THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

MAY 3, 2016 and AUGUST 21, 2017

IN THE

Nebraska Court of Appeals

NEBRASKA APPELLATE REPORTS

VOLUME XXIV

PEGGY POLACEK
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No. A-16-061: **In re Interest of Jacinda B. & Drake B**. Reversed and remanded for further proceedings. Bishop, Inbody, and Riedmann, Judges.

†No. A-16-067: **Schroeder v. Schroeder**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

No. A-16-070: **Jacob v. Department of Corr. Servs**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

No. A-16-073: **In re Interest of Alexander Z**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-16-080: **Campbell v. Gage**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-085: **Norton v. City of Hickman**. Reversed and remanded for further proceedings. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-16-095: **Kroese v. Sanders**. Affirmed as modified. Pirtle and Inbody, Judges, and McCormack, Retired Justice.

No. A-16-100: **State v. Taylor**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-16-101: **State v. Scott**. Affirmed. Inbody, Riedmann, and Bishop, Judges.

†No. A-16-121: **Bilderback-Vess v. Vess**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

No. A-16-123: **In re Interest of Taleya G**. Reversed and remanded with directions. Inbody and Pirtle, Judges, and McCormack, Retired Justice.

†No. A-16-126: **Latenser v. Omaha Zoning Board of Appeals**. Affirmed. Riedmann, Inbody, and Arterburn, Judges.

†No. A-16-129: **Edmunds v. Stevens**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-16-132: **State v. Scaife**. Affirmed. Inbody, Pirtle, and Bishop, Judges.

†No. A-16-134: **State v. McClease**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-16-135: **Haffke v. Hill Custom Homes**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

†No. A-16-147: **State v. Pauly**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-16-152: **Sabin v. Village of Trenton**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-16-158: **Hlavac v. Butler Cty. Health Ctr**. Affirmed. McCormack, Retired Justice, and Inbody and Pirtle, Judges.

†No. A-16-160: **Frink v. Lincoln Electric System**. Affirmed. Inbody and Pirtle, Judges, and McCormack, Retired Justice.

No. A-16-172: **Robert W. on behalf of Addison W. v. Ella G**. Reversed and vacated. Inbody, Riedmann, and Bishop, Judges.

†No. A-16-173: **State v. Carey**. Affirmed. Bishop, Inbody, and Pirtle, Judges.

†No. A-16-176: **State v. Campbell**. Affirmed. Pirtle and Inbody, Judges, and McCormack, Retired Justice.

†Nos. A-16-177 through A-16-181: **In re Interest of Jaina W. et al**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-16-183: **State v. Ritchey**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-184: **Corretjer v. Principal Life Ins. Co**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-16-187: **In re Interest of Jaymon M**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

†No. A-16-189: **In re Interest of Angeleah M. & Ava M**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

No. A-16-191: **State v. Reed**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

No. A-16-200: **In re Interest of Samantha S**. Affirmed. Riedmann, Inbody, and Bishop, Judges.

†No. A-16-208: **Andrew v. Village of Nemaha**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

No. A-16-211: **Central Platte NRD v. Smith**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-16-214: **State v. Hollingsworth**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

No. A-16-215: **In re Guardianship of Jerry B**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

†No. A-16-224: **State v. Garibo**. Affirmed. McCormack, Retired Justice, and Inbody and Pirtle, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-16-235: **State v. Turco**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

No. A-16-238: **In re Interest of Jacina M**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-16-243: **In re Interest of Jameson S. et al**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-16-247: **Schmidbauer v. Ray**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-16-248: **Lewis v. Lewis**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-16-249: **Aschoff v. State**. Affirmed. Moore, Chief Judge, and Inbody, Judge. Bishop, Judge, participating on briefs.

†No. A-16-250: **Arndt v. Arndt**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-16-251: **State v. Wabashaw**. Affirmed. Bishop, Inbody, and Arterburn, Judges.

†No. A-16-254: **In re Interest of Isaiah S. & Noah F**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

†No. A-16-255: **State v. Rivera**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge. Bishop, Judge, dissenting.

†No. A-16-256: **Lowitz v. Colson**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-16-257: **State v. Otte**. Affirmed. Inbody and Pirtle, Judges, and McCormack, Retired Justice.

†No. A-16-272: **Domina Law Group v. Kountze**. Affirmed. Riedmann, Inbody, and Arterburn, Judges.

No. A-16-275: **In re Interest of Aaliyah G. et al**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-16-277: **Boehm v. D3SIGNCUBE, LLC**. Vacated and dismissed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-281: **Armitage v. Armitage**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

†No. A-16-282: **Ehrke v. Mamot**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

†No. A-16-287: **Gray v. Nebraska Dept. of Corr. Servs**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-16-289: **State v. Milton**. Affirmed. Riedmann and Bishop, Judges, and McCormack, Retired Justice.

†No. A-16-291: **State v. Chambers**. Affirmed. Pirtle and Inbody, Judges, and McCormack, Retired Justice.

No. A-16-293: **State v. Hostetter**. Affirmed. Inbody and Pirtle, Judges, and McCormack, Retired Justice.

No. A-16-298: **In re Interest of Markel B**. Affirmed. Inbody, Riedmann, and Bishop, Judges.

No. A-16-299: **Mumin v. Moss**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-16-300: **State v. Copple**. Affirmed. Pirtle and Inbody, Judges, and McCormack, Retired Justice.

No. A-16-301: **State v. Ugarte**. Affirmed. Moore, Chief Judge, and Pirtle and Riedmann, Judges.

No. A-16-303: **Stelmaszek v. Omaha World Herald Co**. Affirmed. Inbody, Riedmann, and Arterburn, Judges.

†No. A-16-305: **State v. Weathers**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-16-310: **In re Interest of Sophia B. et al**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

No. A-16-316: **State v. Nielson**. Affirmed. Inbody, Pirtle, and Bishop, Judges.

†No. A-16-320: **In re Interest of William M**. Affirmed. Pirtle and Inbody, Judges, and McCormack, Retired Justice.

No. A-16-322: **In re Interest of Brianna L**. Reversed, order vacated, and cause remanded for further proceedings. Inbody, Riedmann, and Bishop, Judges.

†No. A-16-324: **Bermudez v. Salazar**. Affirmed. Inbody, Riedmann, and Arterburn, Judges.

†No. A-16-327: **Mumin v. Frakes**. First appeal (filed March 28, 2016) held under submission. Order entered April 5, 2016, denying IFP on appeal (second appeal) affirmed. Bishop, Riedmann, and Arterburn, Judges.

No. A-16-330: **Andrade v. Andrade**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and McCormack, Retired Justice.

†No. A-16-334: **State on behalf of Jayden G. v. Justin B**. Affirmed. Inbody and Pirtle, Judges, and McCormack, Retired Justice.

No. A-16-350: **McAllister v. Lancaster Cty. Bd. of Equal**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-16-351: **In re Interest of Becka P**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-16-352: **In re Interest of Thomas P**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-16-353: **In re Interest of Robert P**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-354: **State v. Parnell**. Affirmed. McCormack, Retired Justice, and Inbody and Pirtle, Judges.

†No. A-16-364: **State v. Nunez**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-16-371: **In re Interest of Sandra I**. Affirmed. Pirtle and Inbody, Judges, and McCormack, Retired Justice.

†No. A-16-375: **State v. Jeffres**. Affirmed. Bishop, Inbody, and Riedmann, Judges.

†Nos. A-16-387, A-16-388: **State v. Hawks**. Affirmed. Inbody and Pirtle, Judges, and McCormack, Retired Justice.

†No. A-16-393: **Scott v. Drivers Mgmt**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-16-397: **Robertson v. U Save Foods**. Affirmed. Bishop and Pirtle, Judges. Riedmann, Judge, participating on briefs.

†No. A-16-398: **Mace v. Mace**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-16-399: **In re Interest of Orion M**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

†No. A-16-400: **In re Interest of Darrion T**. Affirmed in part, and in part reversed and remanded with directions. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-16-401: **Midland Properties v. Yah**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-404: **Bernadt v. Bernadt**. Affirmed. McCormack, Retired Justice, and Inbody and Pirtle, Judges.

No. A-16-412: **State v. Holloway**. Affirmed. Inbody, Pirtle, and Bishop, Judges.

†No. A-16-414: **In re Interest of Akira W. et al**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-16-422: **State v. Bazaldua**. Affirmed. Bishop and Inbody, Judges, and McCormack, Retired Justice.

No. A-16-428: **In re Interest of Damerio C. et al**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

†No. A-16-430: **Zellner v. Latham**. Affirmed as modified. Moore, Chief Judge, and Inbody and Pirtle, Judges.

No. A-16-433: **State v. Cervantes**. Affirmed. McCormack, Retired Justice, and Moore, Chief Judge, and Pirtle, Judge.

No. A-16-440: **State v. Markham**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-442: **Vesper v. Francis**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-451: **Wisner v. Vandelay Investments**. Reversed and remanded for further proceedings. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-16-453: **Araujo v. Araujo**. Affirmed as modified. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-16-458: **State v. Mead**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-16-459: **Panhandle Collections v. Jacobson**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

†No. A-16-460: **Computer Support Servs. v. Vaccination Servs**. Affirmed. Arterburn, Inbody, and Riedmann, Judges.

No. A-16-466: **In re Interest of Simon T**. Affirmed. Pirtle and Inbody, Judges, and McCormack, Retired Justice.

†No. A-16-468: **State v. Rosas**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-16-475: **State v. Schmidt**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-16-476: **State v. Stevenson**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-16-477: **Kiser v. Grinnell**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

†No. A-16-485: **In re Interest of D.R. & M.R**. Reversed and remanded with directions. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-16-490: **State v. Ebberson**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-495: **In re Interest of Jaxyn S**. Affirmed. McCormack, Retired Justice, and Inbody and Pirtle, Judges.

No. A-16-497: **State v. Camacho**. Affirmed. Pirtle and Inbody, Judges, and McCormack, Retired Justice.

†No. A-16-505: **State v. Heldt**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

†No. A-16-507: **In re Interest of Gabriella N. et al**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

No. A-16-517: **State v. Pope**. Affirmed. Inbody, Riedmann, and Bishop, Judges.

No. A-16-518: **Sims v. Sims**. Affirmed. Arterburn, Inbody, and Riedmann, Judges.

†No. A-16-521: **State v. Loyd**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-16-527: **State v. Derreza**. Affirmed. Inbody, Pirtle, and Riedmann, Judges.

No. A-16-528: **State v. Herrin**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

CASES DISPOSED OF BY MEMORANDUM OPINION

†No. A-16-529: **Allen v. Boone Brothers Roofing**. Affirmed. Riedmann and Bishop, Judges, and McCormack, Retired Justice.

No. A-16-531: **In re Interest of Yue-Bo W. & Xin-Bo W**. Affirmed. Inbody, Riedmann, and Arterburn, Judges.

†No. A-16-540: **In re Interest of Paul J. et al**. Affirmed. McCormack, Retired Justice, and Inbody and Pirtle, Judges.

†No. A-16-543: **State v. Sensenbach**. Affirmed. McCormack, Retired Justice, and Riedmann and Bishop, Judges.

†No. A-16-544: **Stutzman v. Stutzman**. Affirmed. Inbody and Pirtle, Judges, and McCormack, Retired Justice.

†No. A-16-545: **State v. Boye**. Affirmed. Bishop, Riedmann, and Arterburn, Judges.

No. A-16-550: **State v. Mendez-Osorio**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-553: **In re Interest of Hindryk B**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-16-555: **State v. Wilson**. Affirmed. Bishop, Inbody, and Pirtle, Judges.

†No. A-16-561: **State v. Remijio**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

†No. A-16-564: **State v. Brungardt**. Affirmed in part, and in part vacated and remanded with directions. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-566: **State v. Brungardt**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-16-568: **State v. Hinz**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-575: **In re Interest of C.A**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-16-576: **Castonguay v. Stieren**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-16-584: **State v. Kennedy**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-585: **Witthuhn v. Witthuhn**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

No. A-16-592: **State v. Blankenship**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-16-596: **In re Interest of Destiny S**. Affirmed. Riedmann and Bishop, Judges, and McCormack, Retired Justice.

†No. A-16-600: **State v. Salinas**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-16-601: **State v. Kincaid**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-611: **State v. Martinez-Fernandez**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and McCormack, Retired Justice.

†No. A-16-612: **State v. Blazek**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-16-620: **Ganzel v. Ganzel**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-16-625: **Alire v. Harris Davis Rebar**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

No. A-16-626: **Duden v. Duden**. Affirmed. Riedmann, Inbody, and Arterburn, Judges.

No. A-16-631: **State v. Bowman**. Affirmed. Moore, Chief Judge, and Inbody and Pirtle, Judges.

†No. A-16-644: **State v. Goff**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-649: **State v. Genchi-Garcia**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-16-651: **In re Guardianship & Conservatorship of Mueller**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-16-655: **In re Interest of Angel R**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-16-656: **In re Interest of Zelyel H**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-16-657: **In re Interest of Tyreca R**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-659: **Antillon v. Cabrera**. Affirmed. Riedmann, Bishop, and Arterburn, Judges.

†No. A-16-662: **State v. Delgado**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-16-666: **State v. Johnson**. Affirmed. Riedmann, Inbody, and Bishop, Judges.

†No. A-16-669: **State v. Porter**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

†No. A-16-670: **State v. Madison**. Affirmed. Bishop, Inbody, and Pirtle, Judges.

No. A-16-671: **State v. Hollins**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-16-672: **Darnall v. Parrish Project**. Affirmed. Arterburn, Inbody, and Riedmann, Judges.

†No. A-16-674: **Plains Radiology Servs. v. Good Samaritan Hosp**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-16-675: **State v. Hamed**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-16-677: **In re Interest of Ke'Shaun T**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-16-679: **State v. Barnett**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

No. A-16-697: **State v. Thornburg**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-16-723: **In re Interest of Adelaide M**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-16-737: **In re Interest of Shaylie T**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

No. A-16-753: **State v. Worley**. Affirmed. Riedmann, Inbody, and Arterburn, Judges.

No. A-16-759: **In re Interest of Phoenix W. et al**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

No. A-16-762: **Warde v. McGill Restoration**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-16-770: **State v. Croft**. Affirmed. Inbody and Arterburn, Judges. Moore, Chief Judge, participating on briefs.

No. A-16-772: **State v. Williams**. Affirmed. Inbody, Pirtle, and Riedmann, Judges.

No. A-16-783: **Wilkinson v. Wilkinson**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-787: **In re Interest of Hassan L**. Affirmed in part, and in part reversed and remanded for further proceedings. Bishop, Pirtle, and Arterburn, Judges.

No. A-16-788: **State v. Thompson**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-16-801: **Tewes v. Tewes**. Affirmed. Inbody, Riedmann, and Arterburn, Judges.

†No. A-16-802: **Giandinoto v. Giandinoto**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

No. A-16-805: **Dueland v. Dueland**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

†No. A-16-808: **State v. Reinig**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

Nos. A-16-813, A-16-814: **In re Interest of Jayden J. & Stevie J**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

Nos. A-16-815 through A-16-817: **In re Interest of Stephanie G. et al**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-16-818: **Thomas v. Fisher**. Affirmed. Inbody, Riedmann, and Arterburn, Judges.

No. A-16-819: **State on behalf of Vaida I. v. Marc I**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

No. A-16-822: **Manarin v. Scott**. Affirmed. Arterburn, Inbody, and Riedmann, Judges.

†No. A-16-824: **State v. Harris**. Affirmed. Inbody, Riedmann, and Arterburn, Judges.

No. A-16-825: **State v. Rios**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-16-835: **Lindsay S. v. Robinson**. Reversed and remanded with directions to vacate. Bishop, Pirtle, and Arterburn, Judges.

†No. A-16-841: **In re Interest of J.C**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

No. A-16-870: **Jensen v. BNSF Railway Co**. Order vacated, and cause remanded with directions. Pirtle, Inbody, and Riedmann, Judges.

†No. A-16-876: **Cervantes v. Darnell**. Affirmed. Arterburn, Inbody, and Riedmann, Judges.

No. A-16-880: **State v. Hisey**. Reversed and remanded for further proceedings. Riedmann, Judge (1-judge).

No. A-16-882: **State v. Hobdell**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

No. A-16-891: **Cavalry SPV I v. Henry**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-16-902: **In re Interest of Athraa A. & Fatima A**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

†No. A-16-903: **In re Interest of Trip B**. Affirmed. Inbody, Riedmann, and Arterburn, Judges.

†No. A-16-905: **Carey v. Hand**. Affirmed in part, and in part reversed and remanded with directions. Arterburn, Inbody, and Riedmann, Judges.

No. A-16-916: **Powell v. Johnson**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-919: **Schmidt v. Parkert**. Affirmed. Arterburn, Inbody, and Riedmann, Judges.

No. A-16-924: **Salvador v. Medina**. Reversed and remanded with directions. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-16-937: **Finke v. Employer Solutions Staffing**. Affirmed. Moore, Chief Judge, and Bishop, Judge. Inbody, Judge, participating on briefs.

No. A-16-943: **In re Interest of Brieanna H**. Affirmed in part, and in part reversed. Bishop, Pirtle, and Arterburn, Judges.

†No. A-16-944: **State v. Barr**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-16-949: **Assad v. Sidney Regional Med. Ctr**. Judgment vacated, and cause remanded with directions. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-962: **State v. Dubray**. Affirmed. Moore, Chief Judge, and Inbody and Arterburn, Judges.

†No. A-16-972: **Kirkelie v. Henry**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-16-986: **Mumin v. Correct Care Solutions**. Affirmed. Riedmann, Inbody, and Arterburn, Judges.

No. A-16-1020: **State v. Vontz**. Affirmed. Riedmann, Bishop, and Arterburn, Judges.

No. A-16-1028: **In re Interest of Eric C. & Derrick C**. Affirmed. Riedmann, Inbody, and Arterburn, Judges.

No. A-16-1038: **In re Interest of Elizabeth N. et al**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-16-1045: **Krenk v. Franks**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-1058: **Matschullat v. Matschullat**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-16-1069: **Jurgenson v. International Paper Co**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

†No. A-16-1072: **Kolar v. Tester**. Affirmed in part, and in part reversed and remanded with directions. Riedmann, Inbody, and Arterburn, Judges.

†No. A-16-1074: **In re Interest of Zy'Air T. et al**. Affirmed. Arterburn, Inbody, and Riedmann, Judges.

†Nos. A-16-1077, A-16-1078: **In re Interest of Annika H. & Praxton H**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-16-1101: **In re Interest of Hannah C. & Rayna C**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-16-1111: **In re Interest of Camrren Y**. Affirmed. Inbody, Riedmann, and Arterburn, Judges.

No. A-16-1112: **In re Interest of Nathaniel C. & Cason B**. Affirmed. Arterburn, Inbody, and Riedmann, Judges.

†No. A-16-1122: **In re Interest of Louis C**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-16-1143: **State v. Johnson**. Affirmed. Riedmann, Inbody, and Arterburn, Judges.

No. A-16-1150: **In re Interest of Tiana B**. Affirmed. Riedmann, Inbody, and Arterburn, Judges.

†No. A-16-1154: **State v. Mora**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-1156: **State v. Harder**. Affirmed in part, and in part vacated and remanded with directions. Inbody, Riedmann, and Arterburn, Judges.

†No. A-16-1167: **State v. Palomo**. Affirmed as modified. Bishop, Pirtle, and Arterburn, Judges.

No. A-16-1204: **In re Interest of Kobe H**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

No. A-16-1220: **In re Interest of Johnathan D**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

No. A-16-1234: **In re Interest of Tyson J. et al**. Affirmed. Riedmann, Inbody, and Arterburn, Judges.

Nos. A-17-001, A-17-002: **In re Interest of Vanessa H. & Breanna H**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

†No. A-17-024: **State v. Jennings**. Sentences vacated, and cause remanded for resentencing. Arterburn, Inbody, and Riedmann, Judges.

†No. A-17-056: **State v. Tafoya**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-17-090: **State v. Peery**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-17-194: **In re Interest of Emilio R**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-17-258: **State v. Johnson**. Reversed. Pirtle, Judge (1-judge).

No. A-17-261: **In re Interest of Gavin K**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

†No. A-17-271: **State v. Webb**. Affirmed. Riedmann, Inbody, and Arterburn, Judges.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-14-404: **Pallett v. Smith Camp**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-15-433, A-15-1228: **Cole v. Morello**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012). See, also, *Caton v. State*, 291 Neb. 939, 869 N.W.2d 911 (2015).

No. A-15-665: **State v. Frazier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014); *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015); *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).

No. A-15-899: **Anthony v. Cattle Nat. Bank & Trust Co**. Affirmed. See § 2-107(A)(1).

No. A-15-903: **Moreno v. Baldwin Filters**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-15-906: **State v. Timmerman**. Affirmed. See § 2-107(A)(1).

No. A-15-933: **State v. Rave**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012).

No. A-15-1073: **Yah v. Morgan**. Appeal dismissed. See *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999).

No. A-15-1076: **State v. McDermott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-15-1079: **State v. White**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-1088: **In re Interest of Ezequiel V**. Affirmed. See § 2-107(A)(1).

No. A-15-1091: **State v. Klatt**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-1097: **State v. Edmonds**. Appellee's suggestion of remand granted. Reversed and remanded for a new trial.

No. A-15-1108: **Dondlinger v. Nickerson Township**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-1142: **Junker v. Junker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-1160: **State v. Fletcher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005).

No. A-15-1164: **State v. Joseph**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-1187: **State v. Ford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-1201: **In re Interest of Di'Nah D. & Ladon M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-1207: **Rhodes v. Meyer**. Affirmed. See, § 2-107(A)(1); *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

No. A-15-1213: **Meyer v. Rhodes**. Summarily reversed and domestic abuse protection order vacated. See, § 2-107(A)(3); *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014).

No. A-15-1215: **Otte Fish Family Harvesting v. Stanko**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-1230: **In re Interest of Sophia P. et al**. Appeal dismissed as moot. See *In re Interest of Nathaniel M.*, 289 Neb. 430, 855 N.W.2d 580 (2014).

No. A-15-1237: **Castonguay v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

No. A-15-1240: **State v. Hauser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-1241: **State v. Bangura**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-1245: **State v. Wilson**. Affirmed. See § 2-107(A)(1).

No. A-16-001: **Rietz v. Gichema**. Motion of appellant to dismiss appeal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-16-008: **Balvin v. Balvin**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-010: **State v. Millner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

CASES DISPOSED OF WITHOUT OPINION

No. A-16-013: **In re Interest of Jaquezz G. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-016: **State v. Motton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-020: **State v. Medina**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

Nos. A-16-021 through A-16-023: **State v. Allen**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-027: **State v. Foster**. Motion of appellee for summary affirmance granted as to excessive sentence claim. See *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-028: **State v. Goodwin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

Nos. A-16-034 through A-16-037: **State v. Shaffer**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-043: **State v. Barralaga-Quintanilla**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-046: **State v. Villalpando**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013); *State v. Cannady*, 192 Neb. 404, 222 N.W.2d 110 (1974).

No. A-16-049: **Burns v. Burns**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-055: **State v. Bregg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-056: **State v. Meyers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-057: **In re Interest of Sergio R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-062: **Shifflet v. Shifflet**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-16-063, A-16-064, A-16-066: **State v. Fils**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-067: **Schroeder v. Schroeder**. No appellant's brief having been filed, appeal dismissed.

No. A-16-067: **Schroeder v. Schroeder**. Appellant's motion for rehearing and appellee's objection considered; order dismissing appeal vacated, and appeal reinstated.

No. A-16-068: **State v. Templeman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-078: **State v. Sutter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-079: **State v. Petracek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-087: **State v. McDonald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-088: **Blazek v. Blazek**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-089: **Thomas v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Foster v. Foster*, 266 Neb. 32, 662 N.W.2d 191 (2003).

No. A-16-102: **O'Dell v. BNSF Railway Co**. Affirmed. See, § 2-107(A)(1); *In re Interest of Sloane O.*, 291 Neb. 892, 870 N.W.2d 110 (2015).

No. A-16-106: **State v. Boomgaarn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-110: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Trice*, 292 Neb. 482, 874 N.W.2d 286 (2016).

No. A-16-111: **In re Guardianship & Conservatorship of James F**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-16-117: **State v. Vogt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-120: **State v. Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-128: **State v. Mladenik**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-136: **State v. Marquart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-137: **State v. Wuor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015); *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013).

No. A-16-138: **Father Flanagan's Boys' Home v. Owens**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-139: **State v. Bering**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-140: **Harper v. Department of Corrections**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-141: **State v. Marquez-Orellana**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

Nos. A-16-142, A-16-143: **State v. Wolff**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-144: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014).

No. A-16-153: **State v. Tiedeman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-153: **State v. Tiedeman**. Motion of appellant to reinstate appeal sustained; appeal reinstated.

No. A-16-153: **State v. Tiedeman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013); *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

No. A-16-154: **Patterson v. Houston**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

Nos. A-16-165, A-16-168, A-16-169: **State v. Holliman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-167: **State v. Damper**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-170: **State v. Damper**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-171: **Millard Gutter Co. v. Hansen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-197: **In re Interest of Treton A**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-198: **State v. Liech**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015). See, also, *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

No. A-16-205: **State v. Martin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-210: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-213: **State v. Sundquist**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-223: **State v. Ventura-Gonzalez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-225: **State v. Bauer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-229: **State v. Wagner**. Stipulation allowed; appeal dismissed.

No. A-16-232: **State v. Sheppard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-233: **State v. Sellers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-234: **State v. Kolbet**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-242: **In re Interest of Kylie D. & Macy D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-244: **In re Interest of Kamarra H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-245: **State v. Castillo-Zamora**. Appeal dismissed.

No. A-16-258: **State v. Purdy**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-259: **State v. Sullivan**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-16-261, A-16-262: **State v. Hespen**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-263: **State v. Stanko**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-265: **In re Interest of Anamarie S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-268: **State v. Branch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-270: **Rosberg v. Rosberg**. Appeal dismissed. See, § 2-107(A)(2); *Furstenfeld v. Pepin*, 23 Neb. App. 673, 875 N.W.2d 468 (2016).

No. A-16-271: **Rosberg v. Riesberg**. Appeal dismissed.

No. A-16-284: **State v. Shepherd**. Stipulation allowed; appeal dismissed.

No. A-16-285: **Hernandez v. Box Butte County**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 13-905 et seq. (Reissue 2012); *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *Mace-Main v. City of Omaha*, 17 Neb. App. 857, 773 N.W.2d 152 (2009).

No. A-16-288: **State v. Gray**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-290: **State v. Pickel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-296: **State on behalf of Haley M. v. Justin K**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-306: **State v. Hatcher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W2.d 267 (2012).

No. A-16-308: **State v. Pendley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-311: **Clouse v. Karimi-Asl**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-315: **Young v. Dantzler**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-317: **State v. Phillips**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-318: **State v. Boye**. Stipulation allowed; appeal dismissed.

No. A-16-319: **Clouse v. Karimi-Asl**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-321: **In re Interest of Jayshawn V**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-16-326: **State v. Hernandez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-328: **Bethel v. York Cold Storage**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912(1) and 25-2301.02(1) (Reissue 2008).

Nos. A-16-331, A-16-344, A-16-345: **State v. Jefferson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-332: **State v. Prince**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

Nos. A-16-336, A-16-337: **State v. Parker**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Garza*, 295 Neb. 434, 888 N.W.2d 526 (2016).

No. A-16-339: **Mumin v. Downing**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-16-340: **State v. Carlson**. Stipulation allowed; appeal dismissed.

No. A-16-341: **First State Bank v. A & G Precision Parts**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

Nos. A-16-342, A-16-343: **State v. Novotny**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Wilkinson*, 293 Neb. 876, 881 N.W.2d 850 (2016).

No. A-16-348: **Tyler v. Wachtler**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-349: **State v. Gomez**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-356: **In re Interest of Lydia R. et al**. Affirmed. See § 2-107(A)(1). See, also, *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 861 N.W.2d 398 (2015).

No. A-16-357: **State on behalf of Derick K. v. Antwon T**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-359: **Speer v. P & L Finance Co**. Motion of appellant for summary dismissal granted. See § 2-107(B)(1). See, also, *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

No. A-16-360: **State v. Hartmann**. Appellee's suggestion of remand sustained.

No. A-16-361: **State v. Mason**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-363: **State v. Dean**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-365: **State v. Marquez-Orellana**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

Nos. A-16-366, A-16-367: **State v. Moten**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-369: **State v. Hallauer**. Affirmed. See § 2-107(A)(1). See, also, Neb. Rev. Stat. § 29-1817 (Reissue 2008).

No. A-16-370: **Lofay v. Reynolds**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-372: **In re Interest of Dylan R. & Jema R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-374: **Koch v. City of Sargent**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1901 (Reissue 2008).

No. A-16-378: **State v. Romero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

No. A-16-380: **Barnes v. Barnes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-382: **State v. Marshall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-384: **State v. Ortiz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-385: **State v. Swift**. Appeal dismissed. See, § 2-107(A)(2); *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996). See, also, Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-16-389: **State v. Dodge**. Stipulation allowed; appeal dismissed.

No. A-16-390: **Rosberg v. Rosberg**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008). See, also, *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

No. A-16-391: **Rosberg v. Rosberg**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-392: **Rosberg v. Sand**. Appeal dismissed. See, § 2-107(A)(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994).

No. A-16-394: **Koch v. Clark**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-16-395: **State v. Dominguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-396: **Rosberg v. Johnson**. Appeal dismissed. See, § 2-107(A)(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994).

No. A-16-402: **State v. Jefferson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-403: **State v. White**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-405: **Turner v. Barfield**. Reversed and remanded with directions. See Neb. Rev. Stat. § 25-2301.02 (Reissue 2008). See, also, *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

No. A-16-406: **State v. Betts**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-16-407: **State v. Kucera-Fitzgerald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-410: **State v. Alford**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-411: **Onuachi v. Harry S. Peterson Co**. Motions of appellees for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-16-416: **State v. Cavin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-420: **State v. Krisor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-423: **State v. Kelley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-424: **State v. Peters**. Appeal dismissed. See Neb. Rev. Stat. §§ 25-1912(1) and 25-2301.02 (Reissue 2008).

No. A-16-427: **State v. Oliver**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-429: **Gardner v. Rensch**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-432: **Thomas v. Thomas**. Appeal dismissed. See, § 2-107(A)(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

No. A-16-434: **In re Interest of Connor F**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-435: **State v. Mejia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-436: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-438: **State v. Spearing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015); *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

No. A-16-439: **State v. Rolling**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

No. A-16-443: **Village of Mead v. Gonzales**. Motion of appellee for summary dismissal sustained; appeal dismissed as untimely. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-444: **State v. Ramirez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-448: **Santos v. Cruickshank**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *O'Neal v. State*, 290 Neb. 943, 863 N.W.2d 162 (2015).

No. A-16-449: **State v. Maldonado**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-450: **Holroyd v. City of Grand Island**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 29-818 (Cum. Supp. 2014); *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

No. A-16-452: **Investors for Infrastructure v. Washington Cty**. Appeal dismissed. See, § 2-107(A)(2); *Last Pass Aviation v. Western Co-op Co.*, 296 Neb. 165, 892 N.W.2d 108 (2017).

No. A-16-454: **In re Conservatorship of Workman**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-455: **State on behalf of Chandler M. v. Tonia M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-457: **State v. Reide**. Stipulation allowed; appeal dismissed.

No. A-16-461: **Lust v. Vandelay Investments**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-16-462: **Hillsborough Pointe v. Skutchan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-463: **Bate v. Daggett**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-464: **State v. Artis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-464: **State v. Artis**. Appellee's motion for rehearing sustained. Appeal reinstated.

No. A-16-469: **State v. Newman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008).

No. A-16-470: **State v. Newman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008).

No. A-16-472: **State v. Black**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-473: **State v. Delaney**. Appeal dismissed for lack of jurisdiction as filed out of time. See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-474: **State v. Delaney**. Appeal dismissed for lack of jurisdiction as filed out of time. See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-478: **Gray v. Taylor**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-479: **State v. Rosas**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-481: **Clark v. Ladwig**. Appeal dismissed. See, § 2-107(A)(2); *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006). See, also, *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

Nos. A-16-483, A-16-484, A-16-487: **State v. Mitthun**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-488: **State v. Eigsti**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015). See, also, Neb. Rev. Stat. § 29-2302 (Reissue 2008); *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994); *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982).

No. A-16-489: **State v. Campbell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-492: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-494: **State v. Bourg**. Stipulation allowed; appeal dismissed.

No. A-16-498: **Johnson v. Nebraska Supreme Court**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Caton v. State*, 291 Neb. 939, 869 N.W.2d 911 (2015); *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

No. A-16-499: **State v. Brooks**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-500: **State v. Holloway**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

Nos. A-16-502 through A-16-504: **State v. Vajgrt**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-508: **Carey v. Carey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-509: **Swift v. State**. Affirmed. See § 2-107(A)(1).

No. A-16-510: **State v. Valentine**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-512: **Brooks v. Mike's 66 Towing**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-513: **In re Interest of Daya P**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-514: **Randall v. Randall**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-16-516: **State v. Schmielau**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Aguallo*, 294 Neb. 177, 881 N.W.2d 918 (2016); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-519: **Williams v. Combat Veterans Motorcycle Assn**. Affirmed. See § 2-107(A)(1).

No. A-16-520: **In re Interest of Shelby H**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-522: **Tyler v. City of Omaha**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-16-523, A-16-524: **State v. Burns**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014). See, also, *State v. Huggins*, 291 Neb. 443, 866 N.W.2d 80 (2015).

No. A-16-525: **State v. Rhoden**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-532: **State v. Coldwell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-16-539: **In re Interest of Jayshawn V**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-541: **State v. Saenz**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *State v. Mamer*, 289 Neb. 92, 853 N.W.2d 517 (2014); *State v. Smith*, 288 Neb. 797, 851 N.W.2d 665 (2014); *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013).

No. A-16-542: **State v. Ohnemus**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016).

No. A-16-546: **Kumar v. Mercaris, Inc**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-549: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-551: **McGauley v. Washington County**. Appeal dismissed. See, § 2-107(A)(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-16-552: **State v. Woolery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015); *State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

No. A-16-556: **Holloway v. Lancaster County**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-16-557: **Tamarin Lodging v. Pirvu**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005). See, also, *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 680 N.W.2d 906 (2016).

No. A-16-559: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-562: **State v. Diequez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-565: **Nowak v. Tarar**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-567: **State v. Lear**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-570: **State v. Ranslem**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-571: **State on behalf of Malachi W. v. Ruben B**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-572: **Fraction v. Owen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Stekr v. Beecham*, 291 Neb. 883, 869 N.W.2d 347 (2015).

No. A-16-573: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-577: **State v. Voyles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-578: **Rosberg v. Skorupa**. Motions of appellees for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-579: **Rosberg v. Rosberg**. Affirmed.

No. A-16-580: **Rosberg v. Rosberg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-581: **Rosberg v. Vaughan**. Motion of appellee for summary affirmance considered; judgment affirmed. See § 2-107(B)(2).

No. A-16-582: **Eacker v. All Star Inflatables**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-16-586: **State v. Ramsey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

CASES DISPOSED OF WITHOUT OPINION

No. A-16-588: **Gemechu v. Sama**. Motion of appellant pro se to dismiss appeal sustained; appeal dismissed.

No. A-16-591: **State v. Brijlall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-594: **State v. Arias**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-595: **State v. Alford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-598: **State v. Kays**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-16-599: **Gray v. Lancaster County**. Motions of appellees for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-602: **State v. Graham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-603: **Hanan v. Walter Meier Mfg**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-16-607: **State v. Akins**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-610: **Hambleton v. Russell**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1301 (Reissue 2008); *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004).

No. A-16-613: **State on behalf of Dylan M. v. Richard M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-615: **State v. Walker**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008).

No. A-16-616: **State v. Warren**. Stipulation allowed; appeal dismissed.

No. A-16-617: **Rosberg v. Rosberg**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-624: **Applied Risk Servs. v. Williams Farms**. Affirmed. See § 2-107(A)(1).

No. A-16-632: **Salem Grain Co. v. City of Falls City**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-16-636: **Folts v. Castlebridge Homes**. Stipulation allowed; appeal dismissed.

CASES DISPOSED OF WITHOUT OPINION

No. A-16-637: **State v. Swift**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1301(3) (Reissue 2008); *State v. Meints*, 291 Neb. 869, 869 N.W.2d 343 (2015).

No. A-16-639: **Donald v. Walmart**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-640: **State v. Starr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Timmerman*, 12 Neb. App. 934, 687 N.W.2d 24 (2004).

No. A-16-642: **Hutchcraft v. Hutchcraft**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016); *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992).

No. A-16-645: **State v. Shweki**. Stipulation allowed; appeal dismissed.

No. A-16-650: **State v. Campsey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-658: **State v. Perkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-661: **State v. Wright**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-16-663: **State v. Valenzuela-Ochoa**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-665: **State v. Alford**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-667: **Storm v. Bennett**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-668: **State v. Shelby**. Motion of appellee for summary dismissal granted in part as to May 19, 2016, order. Appeal of June 22, 2016, order affirmed.

No. A-16-673: **State v. Mitchell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*; 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-680: **Widtfeldt v. Tax Equal. & Rev. Comm**. By order of the court, appeal dismissed for failure to file briefs.

CASES DISPOSED OF WITHOUT OPINION

No. A-16-681: **State v. Tang**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-685: **State v. Robledo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016); *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

No. A-16-686: **Owens v. Owens**. Appeal dismissed. See § 2-107(A)(2). See, also, *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-16-687: **Buffkins v. Westerfield Auto Driveaway**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-16-688: **Fraternal Order of Police v. City of Grand Island**. Stipulation allowed; appeal dismissed.

No. A-16-691: **State v. Lieser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2204.02(2) (Supp. 2015).

No. A-16-692: **Thanawalla v. Thanawalla**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-693: **Hibler v. Hibler**. Affirmed. See § 2-107(A)(1).

No. A-16-695: **State v. Epperson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-696: **Helmick v. Muhannad**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-16-699 through A-16-701: **State v. Gardner**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

Nos. A-16-702, A-16-703: **State v. Valenzuela**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-704: **State v. McCormick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-706: **State v. Wells**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-707: **State v. Castonguay**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

Nos. A-16-709, A-16-710: **State v. Moore**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-712: **Gray v. Ricketts**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-16-713: **Wolking v. Uhing**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-16-714: **State v. Pickinpaugh**. Stipulation allowed; appeal dismissed.

No. A-16-716: **Ray Anderson, Inc. v. Buck's, Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-718: **Turner v. State**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-719: **State v. McDougald**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-16-720: **Fraction v. Rookstool**. Affirmed. See § 2-107(A)(1).

No. A-16-721: **State v. Anderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-722: **McElroy v. Davita Dialysis Clinics Corp**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-16-724: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-725: **State v. Preister**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

No. A-16-726: **State v. Peak**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

No. A-16-728: **State v. Blair**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

CASES DISPOSED OF WITHOUT OPINION

No. A-16-729: **Wesley v. Haynes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-730: **State v. Roberts**. Stipulation allowed; appeal dismissed.

No. A-16-731: **State v. Peters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-733: **State v. Payne**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. §§ 29-2262 and 29-2266.02 (Reissue 2016); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-735: **State v. Fisher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-736: **State v. Boroviak**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-743: **Nash v. Bellevue Pub. Sch. Dist**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-744: **State v. Swenson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015).

No. A-16-748: **Rosberg v. Rosberg**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-749: **State v. Segundo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-751: **Christner v. Brott**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

Nos. A-16-755 through A-16-757: **State v. Salts**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

No. A-16-758: **State v. Fleming**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-16-764: **Spiker v. Guardian Tax Partners**. Stipulation allowed; appeal dismissed.

No. A-16-765: **Doyon v. Spanyers**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-767: **Onuachi v. Alliance Group**. Motions of appellees for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-16-771: **State v. Parrott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-773: **State v. Eng**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-776: **Lombardo v. Sedlacek**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008). See, also, *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

No. A-16-779: **State v. Walker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-781: **State v. Schultz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-16-782: **State v. Bohlke**. Stipulation allowed; appeal dismissed.

No. A-16-784: **State on behalf of Jaden K. v. Troy H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-786: **State v. Doebelin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-789: **Gardner v. International Paper Destr. & Recycl**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

No. A-16-790: **In re Interest of Holden H**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-791: **State v. Gaona**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-792: **Mudd v. Brooks**. Appeal dismissed. See, § 2-107(A)(2); *Mann v. Rich*, 18 Neb. App. 849, 794 N.W.2d 183 (2011).

No. A-16-794: **State v. McDougald**. Appeal dismissed. See, § 2-107(A)(2); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-16-795: **State v. Arce**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-796: **State v. Jenkins**. Appellee's suggestion of remand sustained.

No. A-16-797: **In re Estate of Warner**. Motion of appellant to dismiss appeal sustained; appeal dismissed. See § 2-108.

No. A-16-799: **Hull v. C & S Roofing**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-800: **State v. Vandorien**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-809: **State v. O'Daniel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-820: **State v. Hough**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-821: **Valentine v. Gerber**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

No. A-16-823: **Jones v. State**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-826: **Woodcock v. Navarrete-James**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-827: **State v. Eggenberg**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-16-828: **Solano v. Solano**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-829: **State v. Olona**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-831: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-832: **State v. Louthan**. Appellee's suggestion of remand sustained. Sentence vacated and cause remanded for further proceedings. See, *State v. Sidzyik*, 292 Neb. 263, 871 N.W.2d 803 (2015); *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

No. A-16-833: **Tyler v. Sheriff of Douglas County**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-834: **Tyler v. City of Omaha**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-837: **Valentine v. Gerber**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

No. A-16-838: **State v. Klingelhoefer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Benavides*, 294 Neb. 902, 884 N.W.2d 923 (2016).

No. A-16-839: **Mumin v. Frakes**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-16-842: **Olson v. Schindler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-843: **Olson v. Duncan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-850: **Miller v. Miller**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-853: **State v. Ross**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982).

No. A-16-857: **Martinez v. CMR Constr. & Roofing**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013).

No. A-16-858: **State v. Wiley**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-859: **State v. Wiley**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-860: **State v. Langford**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-862: **Rosberg v. Rosberg**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-866: **State v. Harden**. By order of the court, appeal dismissed.

No. A-16-871: **Anthony v. Valmont Industries**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-872: **Tyler v. Fareway Foods**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-16-877: **State on behalf of Naveah W. v. Lontinus W**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-16-878, A-16-879: **State v. Franks**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013). See, also, *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-883: **State v. Dawn**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-884: **State v. James**. Stipulation allowed; appeal dismissed.

Nos. A-16-885, A-16-886: **State v. Goodwin**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-889: **Zapata v. Kitzing**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-892: **State v. Washington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-895: **In re Guardianship of Jaime G**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-895: **In re Guardianship of Jaime G**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-16-900: **Owens v. Owens**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-16-904: **Fraction v. James**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-908: **State v. Hutchison**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-909: **State v. Hutchison**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-911: **State v. Eagle Elk**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-913: **Kraus v. Kraus**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-914: **Wolter v. Fortuna**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-917: **Olson v. Koch**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-16-918: **State v. Bichlmeier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-16-920: **Lust v. Vandelay Investments**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004).

No. A-16-921: **State v. Swift**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-922: **State v. Tyler**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-926: **State v. Thoan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-927: **Tyler v. Fareway Foods**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2016); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-16-928: **State v. Farnham**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 29-825 (Reissue 2016); *State v. Hood*, 23 Neb. App. 208, 869 N.W.2d 383 (2015).

No. A-16-935: **State v. Coleman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Benavides*, 294 Neb. 902, 884 N.W.2d 923 (2016); *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

No. A-16-939: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-940: **Messinger v. B & R Stores**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912 (Reissue 2016).

No. A-16-942: **Castonguay v. Castonguay**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-945: **State v. Godden**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-950: **In re Interest of Ethan P**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-952: **State v. Freyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Garza*, 295 Neb. 434, 888 N.W.2d 526 (2016).

No. A-16-955: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-956: **State v. Barrow**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-16-957: **State v. Kodad**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-960: **Seier v. Niewohner Bros**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1079 (Reissue 2016); *Koch v. Aupperle*, 277 Neb. 560, 763 N.W.2d 415 (2009).

No. A-16-961: **Hill v. Douglas County**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-963: **Mumin v. Frakes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-966: **ComeSitStay v. Department of Labor**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-16-969: **State v. Buckley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-970: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

Nos. A-16-971, A-16-977: **State v. Newman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Reissue 2016).

No. A-16-973: **In re Interest of J.W**. Appeal dismissed. See, § 2-107(A)(2); *Scott v. Hall*, 241 Neb. 420, 488 N.W.2d 549 (1992). See, also, Neb. Rev. Stat. §§ 25-1912 and 25-1931 (Reissue 2016).

No. A-16-974: **Reo Asset Mgmt. Co. v. Mehner Family Trust**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-16-975: **Chavez v. Chavez-Painter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-976: **Owens v. Owens**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-980: **State v. Gamon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-984: **State v. McMillion**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-16-988: **Moseman v. Moseman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-990: **State v. Colbert**. Motion of appellee for summary affirmance granted. See *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

No. A-16-991: **State on behalf of Adam K. v. Nicholas B**. Motion of appellant to dismiss appeal allowed; appeal dismissed; each party to pay own costs.

No. A-16-992: **Colwell v. Mullen**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-993: **City of Long Pine v. Voss**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-994: **State v. Ennis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-996: **Allawi v. Staffing Concepts**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-999: **Foundation One Bank v. Svoboda**. Motion of appellant to dismiss appeal considered; appeal dismissed.

Nos. A-16-1000, A-16-1002: **State v. Voogt**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-1006: **State v. Drapal**. Stipulation allowed; appeal dismissed.

No. A-16-1007: **Owens v. Owens**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1011: **Schuemann v. City of Omaha**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-1012: **State v. Hadi**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-1013: **State v. Regner**. Stipulation allowed; appeal dismissed.

No. A-16-1014: **State v. Hofler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-1016: **Muhammad v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

No. A-16-1018: **Leslie v. City of Sidney**. Reversed and remanded with directions.

No. A-16-1019: **State v. Franklin**. Stipulation allowed; appeal dismissed.

No. A-16-1023: **Haas-Reasland v. Paramount Commercial Real Estate Servs**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-16-1024: **State v. Lee**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860; 880 N.W.2d 630 (2016).

No. A-16-1026: **In re Interest of Jayshawn V**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-1030: **Dawson v. Zachry Constr. Corp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-16-1033, A-16-1034: **State v. Johnson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-16-1036: **State v. Lawson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-1039: **Cook v. Cook**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-16-1040: **In re Interest of Tiana B**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1041: **J. R. Norberg Farms v. Kimball Cty. Bd. of Equal**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-16-1048: **State v. Purdie**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 29-2926(2)(f) (Reissue 2016).

No. A-16-1051: **Lindsay Internat. Sales & Servs. v. Wegener**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1052: **State v. Valentine**. Stipulation allowed; appeal dismissed.

Nos. A-16-1053, A-16-1055: **State v. Wood**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-1054: **State v. Cruzen**. Stipulation allowed; appeal dismissed.

No. A-16-1060: **State v. Smith**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-1062: **Goodwin v. Bailey**. Appeal dismissed. See, § 2-107(A)(2); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015). See, also, *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-16-1066: **State v. Daye**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 683 N.W.2d 442 (2015).

No. A-16-1067: **State v. Quintana**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-16-1068: **State v. Hasbrouck**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-1070: **Fraction v. James**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-16-1071: **State v. Alford**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1076: **State v. Johnston**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1079: **State v. Friedrichsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-1080: **State v. Widtfeldt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

No. A-16-1081: **State v. Widtfeldt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

No. A-16-1083: **Clark v. Tenneco, Inc**. Stipulation allowed; appeal dismissed.

No. A-16-1084: **Castonguay v. Retelsdorf**. Summarily affirmed. See § 2-107(A)(1).

No. A-16-1085: **State v. Holm**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-16-1090: **State v. Reising**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1329 and 25-1912(3) (Reissue 2016).

Nos. A-16-1092 through A-16-1094: **State v. Harris**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

Nos. A-16-1096 through A-16-1099: **State v. Pecka**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-1100: **In re Interest of Soul H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-1102: **State v. Ruegge**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-1103: **Rietz v. Gichema**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1105: **Pflug v. Pflug**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-1106: **State v. Cortez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-1107: **Cisar v. Cisar**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-1110: **Stock Realty & Auction Co. v. Kush**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *BryanLGH v. Nebraska Dept. of Health & Human Servs.*, 276 Neb. 596, 755 N.W.2d 807 (2008).

No. A-16-1113: **State v. Sieben**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-1113: **State v. Sieben**. Appeal reinstated.

No. A-16-1113: **State v. Sieben**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-1118: **State v. Warren**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-1119: **Lenser v. Sixtos**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-1126: **Dixon v. Department of Corrections**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-16-1128: **State v. Almusa**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-1134: **In re Guardianship of Shelby T**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-1136: **Hayes v. University of Nebraska-Lincoln**. Stipulation allowed; appeal dismissed.

No. A-16-1140: **Gardner v. Rensch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-1141: **State v. Brooks**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-1144: **State v. Munhall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-1145: **State v. Rice**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4)(a) (Reissue 2016); *State v. Wetherell*, 289 Neb. 312, 855 N.W.2d 359 (2014); *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

No. A-16-1147: **State v. Gant**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-16-1149: **State v. Wesson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

Nos. A-16-1151 through A-16-1153: **State v. Larsen**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017).

Nos. A-16-1155, A-17-015: **State v. Sheldon**. Appeals dismissed. See § 2-107(A)(2).

No. A-16-1157: **State v. Pokorny**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-1160: **State v. Shackleford**. Stipulation allowed; appeal dismissed.

No. A-16-1161: **State v. Borkowski**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-1166: **Dole v. Dole**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1169: **State v. Calderon-Ornelas**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-16-1173: **Albrecht v. Albrecht**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1175: **State v. Trevino**. Appeal dismissed for lack of jurisdiction. See Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-16-1176: **State v. Shirley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-1177: **Rosberg v. Riesberg**. Appeal dismissed. See, § 2-107(A)(2); *Friedman v. Friedman*, 20 Neb. App. 135, 819 N.W.2d 732 (2012).

Nos. A-16-1178, A-16-1179: **State v. Peterson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-1180: **State v. Benson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-16-1181: **Hellbusch v. Nebraska Pub. Power Dist**. Stipulation allowed; appeal dismissed with prejudice.

No. 16-1186: **Cloeter v. Bryan LGH Med. Ctr**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-1188: **Tyler v. Kim**. Appeal dismissed. See, § 2-107(A)(2); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-16-1189: **State v. Vasa**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-16-1190: **Smith v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (2014).

No. A-16-1191: **State v. Three Thousand Six Hundred Ninety One Dollars**. Appeal dismissed. See, § 2-107(A)(2); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-16-1194: **State v. Bratt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-1197: **State v. Wesner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-1199: **State v. Alford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-16-1202: **Tyler v. Takata Corp**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-1203: **In re Interest of Saira T. et al**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1206: **In re Interest of Emily N. & Sydney N**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-16-1209: **Prokop v. Ritnour**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1210: **Payne v. Fowler**. Appeal dismissed.

No. A-16-1211: **State v. Gardner**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-1212: **In re Interest of Alissa S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-1214: **Vesper v. Francis**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-16-1216, A-16-1217: **State v. Guel**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-16-1219: **State v. Peterson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912(1) and 25-2301.01 (Reissue 2016).

No. A-16-1221: **In re Interest of Jaxon R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-1222: **State v. Squires**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-16-1223: **Trackwell v. Eagle United Methodist Church**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-16-1224: **State v. Hensley**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-1225: **State v. Hensley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-16-1229: **State on behalf of Kyce K. v. Le'Sean T**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-1229: **State on behalf of Kyce K. v. Le'Sean T**. Appellant's motion for rehearing granted. Appeal reinstated.

No. A-16-1232: **State v. Irving**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-1235: **State v. Lewis**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-010: **Nicholson v. LeBron**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-012: **State v. Serrell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-013: **State v. Alcala**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Castaneda*, 295 Neb. 547, 889 N.W.2d 87 (2017).

No. A-17-014: **State v. King**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-016: **Christopher O. on behalf of Tayton O. v. Phabrice G**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-017: **State v. Wal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-023: **State v. Gardner**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-025: **In re Trust of Schulz v. American Intern. Spec. Ins. Co**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-028: **State v. Murray**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-029: **Davlin v. Cruickshank**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-17-032: **McElroy v. Davita Dialysis Clinics Corp**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

Nos. A-17-033, A-17-034: **State v. Walters**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-17-041: **Shelby v. Lipovsky**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-17-042: **State v. Bonaparte**. Stipulation allowed; appeal dismissed.

No. A-17-047: **State v. Plante**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-059: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014); *State v. Davis*, 23 Neb. App. 536, 875 N.W.2d 450 (2016).

No. A-17-062: **House v. House**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-063: **State v. Castonguay**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-065: **Johnson v. A. Schotsman & ZN**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-066: **State v. Brooks**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-068: **State v. Sands**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-071: **State v. Pummel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017).

No. A-17-072: **State v. Thornton**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-075: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-076: **Kochanowicz v. Kochanowicz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-078: **State v. Bryson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-081: **State v. Yanez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-082: **Valentine v. Gerber**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-083: **State v. Cooper**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-087: **Robinson v. Robinson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-088: **Veron v. Gibbon Packing**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-17-091: **State v. Richardson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-093: **In re Interest of Christopher A**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-094: **State on behalf of Michael A. v. Samar A**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-2301.02 and 25-1912(1) (Reissue 2016).

No. A-17-095: **State v. Schaeffer**. Stipulation allowed; appeal dismissed.

No. A-17-096: **State v. Struss**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-099: **Telford v. Smith County, Texas**. Motion of appellees for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 7-101 (Reissue 2012); *Zapata v. McHugh*, 296 Neb. 216, 893 N.W.2d 720 (2017).

No. A-17-103: **Meridian Holdings v. Bowden**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-104: **State v. Drewes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-106: **Linden v. Turnbull**. Stipulation to remand granted; remanded for further proceedings.

No. A-17-109: **State v. Razey**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-112: **In re Interest of Anthony C**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-113: **Hornbacher v. EH Holdings**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-17-114: **State v. Ramirez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017).

No. A-17-137: **Reising v. Department of Corrections**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-138: **Gray v. AAA Ins. Co**. Appeal dismissed. See, § 2-107(A)(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-17-140: **State v. Montagne**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-141: **Hall v. Lan-ken Rental**. Appeal dismissed. See, § 2-107(A)(2); *Jesse B. v. Tylee H.*, 293 Neb. 973, 883 N.W.2d 1 (2016).

No. A-17-143: **Balvin v. Department of Corr. Servs**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1315(1) Reissue 2016).

No. A-17-148: **State v. Munderloh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

No. A-17-149: **State v. Benson**. Stipulation allowed; appeal dismissed.

No. A-17-152: **State v. Gray**. Appeal dismissed. See, § 2-107(A)(2); *Busboom v. Gregory*, 179 Neb. 254, 137 N.W.2d 825 (1965). See, also, *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-17-155: **State v. Jones**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-156: **State v. Jones**. Appellee's suggestion of remand granted.

No. A-17-157: **Gerber v. P & L Finance Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-158: **State v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-17-159: **Ellis v. Estate of Davis**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2016).

No. A-17-160: **In re Interest of K.M**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). See, also, *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

No. A-17-163: **First Westroads Bank v. Slattery**. Appeal dismissed. See, § 2-107(A)(2); *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

No. A-17-164: **State v. Allee**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-17-166: **In re Guardianship of Ellyeaunnah D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-167: **In re Guardianship of Emmersynne D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-168: **Jetz Serv. Co. v. One-Property Mgmt**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-169: **Devney v. Vincentini**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-172: **Fitzgerald v. Cruickshank**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-17-174: **Mumin v. State**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-175: **State v. Bishop**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-176: **State v. Galindo**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-179: **Bush v. State**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, § 2-109(D).

No. A-17-180: **State v. Valeriano**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-183: **State v. Three Thousand Six Hundred Ninety One Dollars**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-186: **In re Interest of Shelby H**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-188: **In re Estate of Olson**. Motion of appellants to dismiss appeal sustained; appeal dismissed.

No. A-17-189: **In re Estate of Olson**. Motion of appellants to dismiss appeal sustained; appeal dismissed.

No. A-17-198: **State v. Valasek**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-201: **Moore v. Johnson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-209: **Harvey v. Harvey**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-214: **Grant v. Grant**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-215: **State v. Hansher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-220: **State v. Gardner**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-221: **In re Adoption of Ellyeaunnah D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-222: **In re Adoption of Emmersynne D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-223: **State v. Nyuon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-224: **State v. Carlisle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-232: **State v. Duncan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-233: **State v. Johnson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-234: **Mehner Family Trust v. U.S. Bank**. Appeal dismissed.

No. A-17-236: **Smith v. Shred-It**. Stipulation allowed; appeal dismissed.

No. A-17-238: **State v. Servodio**. Stipulation allowed; appeal dismissed.

No. A-17-244: **State v. Raefleng**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-245: **State v. Rogers**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-248: **State v. Gardner**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-249: **State v. Durand**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-250: **State v. Krasser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017).

No. A-17-253: **State v. Alvarado**. Appeal dismissed. See, §§ 2-107(A)(2) and 2-101(B)(4); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-17-255: **State v. Colby**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-262: **In re Estate of Kelly**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-265: **Midstates Bank v. Plaza Real Estate Solutions**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-17-268: **Winkler v. Angel**. Appeal dismissed. See, § 2-107(A)(2); *Furstenfeld v. Pepin*, 287 Neb. 12, 840 N.W.2d 862 (2013).

No. A-17-274: **State v. Blacketer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*. 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-285: **State v. Hollingsworth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-286: **State v. Olsen**. Stipulation allowed; appeal dismissed.

No. A-17-290: **Bixby v. Critel**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-292: **State v. Marks**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-17-294: **State v. Luna**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-298: **State v. Villasenor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-17-300: **State v. Gaines**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014).

No. A-17-301: **State v. Smith**. Appeal dismissed. See, § 2-107(A)(2); *State v. Billups*, 10 Neb. App. 424, 632 N.W.2d 375 (2001). See, also, Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-302: **In re Guardianship of Vina B**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-303: **State v. Moore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-305: **State v. Charles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-17-306: **State v. Antony**. Appeal dismissed. See, § 2-107(A)(2); *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006).

No. A-17-321: **Goodwin v. Mid-K**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-323: **State v. Keyes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-334: **Espinosa v. Meda**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-335: **State v. Merrell**. Stipulation allowed; appeal dismissed.

No. A-17-343: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-345: **State v. Clark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-352: **State v. Rutt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

Nos. A-17-354, A-17-355: **State v. Nuss**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015). See, also, *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017); *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

No. A-17-358: **State v. Shere**. Appeal dismissed for lack of jurisdiction.

No. A-17-364: **In re Estate of Rieke**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-368: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

Nos. A-17-371, A-17-383: **State v. Mason**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-374: **State v. Bango**. Appeal dismissed. See, § 2-107(A)(2); *State v. Bluett*, 295 Neb. 369, 889 N.W.2d 83 (2016).

No. A-17-375: **Chuol v. Frakes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-381: **Cuenca v. Physicians Clinic**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2016). See, also, *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-17-382: **State v. Bello**. Stipulation allowed; appeal dismissed.

No. A-17-388: **Redding v. Duckwall Alco Stores**. Appeal dismissed. See, § 2-107(A)(2); *West Gate Bank v. American Nat. Bank*, 250 Neb. 506, 550 N.W.2d 318 (1996).

No. A-17-388: **Redding v. Duckwall Alco Stores**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-17-390: **State ex rel. Midwest Land Co. v. Battiatto**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-392: **State v. Reddish**. Stipulation allowed; appeal dismissed.

No. A-17-393: **State v. Reddish**. Stipulation allowed; appeal dismissed.

No. A-17-397: **State v. Karpov**. Stipulation allowed; appeal dismissed.

No. A-17-399: **Campbell v. Hansen**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-17-400: **In re Interest of Jace D. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-402: **Goodwin v. Goodwin**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-408: **Donald v. Westroads Mall**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-17-413: **Rosberg v. Vaughan**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-17-419: **State v. Valerio**. Stipulation allowed; appeal dismissed.

No. A-17-437: **Christ v. Markham**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-438: **State v. Kamprath**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-449: **State v. Recca**. Appeal dismissed. See, §§ 2-107(A)(2) and 2-101(B)(4). See, also, *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-17-463: **State v. McNeil**. Appeal dismissed. See, § 2-107(A)(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-17-473: **State v. White**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Castaneda*, 295 Neb. 547, 889 N.W.2d 87 (2017).

No. A-17-474: **State v. Nelson**. Appeal dismissed.

No. A-17-475: **State v. Nelson**. Appeal dismissed.

No. A-17-476: **State v. Nelson**. Appeal dismissed.

No. A-17-483: **Travelers Indemnity Co. v. Gonzalez Constr**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-484: **Goodwin v. Goodwin**. Appeal dismissed. See, § 2-107(A)(2); *Furstenfeld v. Pepin*, 23 Neb. App. 673, 875 N.W.2d 468 (2016).

No. A-17-489: **In re Interest of Daniel K**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-490: **State v. Cobb**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-491: **Castonguay v. Trapp**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-17-492: **Haefs v. Matneys Colonial Manor**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-17-502: **Watson v. Rousseau**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-508: **State v. Freeman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-17-512: **In re Estate of Kelly**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-515: **State v. Hytche**. Stipulation allowed; appeal dismissed.

No. A-17-519: **Akins v. Woundedshield**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-523: **Jackson v. Henry**. Appeal dismissed. See, §§ 2-107(A)(2) and 2-101(B)(4); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-17-524: **State v. Tyler**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-17-541: **Goodwin v. Goodwin**. Appeal dismissed. See, § 2-107(A)(2); *Furstenfeld v. Pepin*, 23 Neb. App. 673, 875 N.W.2d 468 (2016).

No. A-17-542: **Bruna v. Department of Corrections**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-17-544: **Goodwin v. Goodwin**. Appeal dismissed. See, § 2-107(A)(2); *Furstenfeld v. Pepin*, 23 Neb. App. 673, 875 N.W.2d 468 (2016).

No. A-17-553: **In re Interest of Daniel K**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-559: **Valentine v. Gerber**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-561: **State v. Bowers**. Stipulation allowed; appeal dismissed.

No. A-17-564: **Rivera v. Rivera**. Stipulation allowed; appeal dismissed.

No. A-17-569: **In re Estate of Filsinger**. Appeal dismissed. See § 2-107(A)(2). See, also, *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-17-572: **Geidner v. T.O. Haas Tire Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-575: **Taylor v. Tradesmen Internat**. Appeal dismissed. See, § 2-107(A)(2); *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015).

No. A-17-589: **State v. Reuling**. Stipulation allowed; appeal dismissed.

No. A-17-590: **E.D. v. Bellevue Pub. Sch. Dist**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-591: **Nolan v. Chadron Community Hospital**. Stipulation allowed; appeal dismissed.

No. A-17-594: **Nebraska Prop. & Liability Ins. v. Lyman-Richey Corp**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-597: **Domina Law Group v. Colwell**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-17-598: **State v. Nuss**. Appeal dismissed. See, §§ 2-107(A)(2) and 2-101(B)(4); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-17-599: **State v. Nuss**. Appeal dismissed. See, §§ 2-107(A)(2) and 2-101(B)(4); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-17-601: **In re Estate of Taylor**. Stipulation allowed; appeal dismissed.

No. A-17-608: **Valentine v. Gerber**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-611: **In re Name Change of Rida**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(2) (Reissue 2016).

No. A-17-613: **State v. Svoboda**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-614: **State v. Svoboda**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-616: **Gonzales v. Department of Corr. Servs**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-630: **State v. Sayers**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-17-632: **State v. Boeckman**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-633: **State v. Boeckman**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-639: **Standley v. Sprague**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-641: **Olson v. Koch**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-648: **Stanko v. Stanko Family, Inc**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-17-685: **In re Interest of Gach A**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-700: **State v. Gray**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-705: **State v. White**. Stipulation allowed; appeal dismissed.

No. A-17-709: **Boyle v. Thornton Moving & Storage**. Appeal dismissed. See Neb. Rev. Stat. §§ 25-1912(1) (Reissue 2016) and 48-170 (Cum. Supp. 2016).

No. A-17-711: **State v. Nash**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-719: **State v. Howard**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-13-887: **State v. McSwine**, 24 Neb. App. 453 (2017). Petition of appellant for further review denied on March 23, 2017.

No. A-14-583: **State v. Davis**, 23 Neb. App. 536 (2016). Petition of appellant for further review denied on June 29, 2016.

No. A-14-750: **State v. Meints**. Petition of appellant for further review denied on July 13, 2016.

No. A-14-905: **SBC v. Cutler**, 23 Neb. App. 939 (2016). Petition of appellee for further review denied on June 15, 2016.

No. A-14-1166: **State v. McMillion**, 23 Neb. App. 687 (2016). Petition of appellant for further review denied on May 12, 2016.

No. A-15-016: **Payne v. Nebraska Dept. of Corr. Servs.**, 24 Neb. App. 1 (2016). Petition of appellant for further review denied on June 2, 2016.

No. S-15-035: **Marshall v. Marshall**, 24 Neb. App. 254 (2016). Petition of appellee for further review sustained on November 9, 2016.

No. A-15-051: **Shriner v. Friedman Law Offices**, 23 Neb. App. 869 (2016). Petition of appellees for further review denied on September 29, 2016.

No. A-15-054: **State v. Tyson**, 23 Neb. App. 640 (2016). Petition of appellant for further review denied on May 18, 2016.

No. A-15-097: **State v. Cruz**, 23 Neb. App. 814 (2016). Petition of appellant for further review denied on August 8, 2016.

No. S-15-104: **In re Estate of Evertson**, 23 Neb. App. 734 (2016). Petition of appellant for further review sustained on June 2, 2016.

No. A-15-138: **Hillyer v. Midwest Gastrointestinal Assocs.**, 24 Neb. App. 75 (2016). Petition of appellant for further review denied on August 24, 2016.

No. A-15-146: **Rasmussen v. Nelson**. Petition of appellant for further review denied on May 18, 2016.

No. A-15-195: **Hays v. Hays**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-201: **State v. Robertson**. Petition of appellant for further review denied on July 18, 2016.

No. A-15-201: **State v. Robertson**. Petition of appellant pro se for further review denied on July 18, 2016.

No. A-15-222: **Cohrs v. Bruns**. Petition of appellant for further review denied on May 4, 2016.

No. A-15-230: **State v. Moss**. Petition of appellant for further review denied on August 16, 2016.

No. A-15-269: **Vandelay Investments v. Brennan**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-275: **K & H Hideaway v. Cheloha**, 24 Neb. App. 297 (2016). Petition of appellant for further review denied on November 16, 2016.

No. A-15-317: **State v. Washington**. Petition of appellant for further review denied on April 19, 2017.

No. A-15-318: **Stehlik v. Rakosnik**, 24 Neb. App. 34 (2016). Petition of appellants for further review denied on August 2, 2016.

No. S-15-322: **Douglas County v. Archie**. Petition of appellee for further review sustained on September 21, 2016.

No. A-15-335: **Sharp v. Nared**. Petition of appellant for further review denied on September 7, 2016.

No. A-15-336: **Derby v. Martinez**, 24 Neb. App. 17 (2016). Petition of appellee for further review denied on June 14, 2016. See § 2-102(F)(1).

No. A-15-337: **State v. Smith**. Petition of appellant for further review denied on July 19, 2016.

No. A-15-347: **State v. Jenkins**. Petition of appellant for further review denied on June 15, 2016.

No. A-15-388: **State v. Purdie**. Petition of appellant for further review denied on May 4, 2016.

No. A-15-394: **Stonerook v. Green**. Petition of appellant for further review denied on August 8, 2016.

No. A-15-399: **Wilson-Demel v. Demel**. Petition of appellant for further review denied on July 6, 2016, as untimely. See § 2-102(F)(1).

No. A-15-402: **State v. Watson**. Petition of appellant for further review denied on June 8, 2016.

No. S-15-404: **State v. Olbricht**, 23 Neb. App. 607 (2016). Petition of appellee for further review sustained on May 12, 2016.

No. A-15-413: **State v. Gallegos-Palafox**. Petition of appellant for further review denied on June 8, 2016.

No. A-15-426: **Spady v. Spady**. Petition of appellant for further review denied on September 1, 2016.

No. A-15-429: **Deinert v. John**. Petition of appellant for further review denied on June 22, 2016.

Nos. A-15-433, A-15-1228: **Cole v. Morello**. Petitions of appellant for further review denied on September 7, 2016.

PETITIONS FOR FURTHER REVIEW

No. A-15-448: **State v. Haley**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-459: **Miller v. Farmers & Merchants Bank**. Petition of appellants for further review denied on August 5, 2016.

No. A-15-462: **State v. Alspaugh**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-470: **In re Interest of Giavanna G.**, 23 Neb. App. 853 (2016). Petition of appellee for further review denied on June 2, 2016.

No. A-15-480: **State v. Pineda**. Petition of appellant pro se for further review denied on August 5, 2016, for lack of jurisdiction.

No. A-15-483: **State v. Yanga**. Petition of appellant for further review denied on August 16, 2016.

No. A-15-492: **State v. Gifford**. Petition of appellant for further review denied on June 22, 2016.

No. A-15-496: **Telles v. Excel Corp**. Petition of appellee for further review denied on June 22, 2016.

No. A-15-504: **State v. Papazian**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-505: **State v. Laflin**, 23 Neb. App. 839 (2016). Petition of appellant for further review denied on May 2, 2016.

No. A-15-518: **In re Estate of Barger**. Petition of appellant for further review denied on July 26, 2016.

No. A-15-527: **State v. Alford**, 24 Neb. App. 213 (2016). Petition of appellant for further review denied on September 14, 2016.

No. A-15-548: **State v. Hall**. Petition of appellant for further review denied on July 29, 2016, as untimely. See § 2-102(F)(1).

No. A-15-553: **In re Interest of A.H**. Petition of appellant for further review denied on May 4, 2016.

No. A-15-560: **Fellers v. Fellers**. Petition of appellant for further review denied on January 17, 2017.

No. A-15-572: **State v. Burhan**. Petition of appellant for further review denied on November 3, 2016.

No. A-15-575: **In re Estate of Liebig**. Petition of appellant for further review denied on July 19, 2016.

No. A-15-587: **In re Interest of Phaylin D. & Phebie D**. Petition of appellee Keith C. for further review denied on May 12, 2016.

No. S-15-610: **Putnam v. Scherbring**. Petition of appellees for further review sustained on March 13, 2017.

No. A-15-613: **State v. Assad**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-646: **Heimes v. Cedar County**. Petition of appellant for further review denied on August 19, 2016.

No. A-15-650: **Heimes v. Arens**. Petition of appellant for further review denied on August 19, 2016.

No. A-15-651: **Ulferts v. Prokop**. Petition of appellant for further review denied on March 29, 2017.

No. A-15-653: **Dahlgren v. Dahlgren**. Petition of appellee for further review denied on June 29, 2016.

No. S-15-658: **In re Interest of Alec S.**, 23 Neb. App. 792 (2016). Petition of appellant for further review sustained on May 12, 2016.

No. A-15-665: **State v. Frazier**. Petition of appellant for further review denied on July 19, 2016.

No. A-15-666: **State v. Goodwin**. Petition of appellant for further review denied on August 2, 2016.

No. A-15-673: **State v. Potter**. Petition of appellant for further review denied on June 29, 2016.

No. A-15-698: **State on behalf of Gaige R. v. James M**. Petition of appellee for further review denied on September 12, 2016, as premature. See § 2-102(F)(1).

No. A-15-698: **State on behalf of Gaige R. v. James M**. Petition of appellee for further review denied on November 23, 2016.

No. A-15-704: **State v. Palma-Solano**. Petition of appellant for further review denied on August 5, 2016, for failure to comply with § 2-102(F)(1).

No. A-15-730: **In re Estate of Warner**. Petition of appellant for further review denied on February 14, 2017.

No. A-15-754: **State v. Schmidt**. Petition of appellant for further review denied on August 8, 2016.

No. A-15-755: **Steiner v. Steiner**. Petition of appellant for further review denied on June 15, 2016.

No. A-15-775: **Ponec v. Guy Strevey & Assocs**. Petition of appellant for further review denied on March 23, 2017.

No. A-15-777: **Jones v. McDonald Farms**, 24 Neb. App. 649 (2017). Petition of appellant for further review denied on June 26, 2017.

No. A-15-790: **State v. Newcomer**, 23 Neb. App. 761 (2016). Petition of appellant for further review denied on May 12, 2016.

No. A-15-792: **State v. Obley**. Petition of appellant for further review denied on April 12, 2017.

No. A-15-799: **Puls v. Knoblauch**. Petition of appellant for further review denied on October 12, 2016.

No. A-15-811: **In re Trust Created by Haberman**, 24 Neb. App. 359 (2016). Petition of appellant for further review denied on January 4, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-15-825: **In re Trust of Giventer**. Petition of appellant for further review denied on February 6, 2017, as premature. See § 2-102(F)(1).

No. A-15-825: **In re Trust of Giventer**. Petition of appellant for further review denied on April 19, 2017.

No. A-15-833: **Floerchinger v. Floerchinger**, 24 Neb. App. 120 (2016). Petition of appellant for further review denied on August 24, 2016.

No. A-15-834: **State v. Eagle Elk**. Petition of appellant for further review denied on December 13, 2016.

No. A-15-840: **State v. Wynne**, 24 Neb. App. 377 (2016). Petition of appellant for further review denied on January 10, 2017.

No. A-15-842: **State v. Brown**. Petition of appellant for further review denied on May 4, 2016.

No. A-15-845: **Maradiaga v. Specialty Finishing**, 24 Neb. App. 199 (2016). Petition of appellant for further review denied on October 14, 2016.

No. A-15-852: **State v. Brunswick**. Petition of appellant for further review denied on June 8, 2016.

No. A-15-890: **Hanson v. McCawley**. Petition of appellant for further review denied on February 3, 2017.

No. S-15-897: **State v. Huff**, 24 Neb. App. 551 (2017). Petition of appellant for further review sustained on May 2, 2017.

No. A-15-899: **Anthony v. Cattle Nat. Bank & Trust Co**. Petition of appellant for further review denied on June 20, 2017.

Nos. A-15-900, A-16-003: **Cattle Nat. Bank & Trust Co. v. Anthony**. Petitions of appellant for further review denied on June 20, 2017.

No. A-15-916: **In re Interest of Moctavin D. et al**. Petition of appellant for further review denied on July 19, 2016.

No. A-15-917: **State v. Merrill**. Petition of appellant for further review denied on February 6, 2017, for failure to comply with § 2-102(F)(1).

No. A-15-919: **State v. Sazama**. Petition of appellant for further review denied on October 19, 2016.

No. A-15-935: **State v. Kirchhoff**. Petition of appellant for further review denied on September 1, 2016.

No. A-15-946: **In re Interest of Elijah P. et al.**, 24 Neb. App. 521 (2017). Petition of appellee for further review denied on June 6, 2017.

No. A-15-947: **State v. Romero**. Petition of appellant for further review denied on August 12, 2016.

PETITIONS FOR FURTHER REVIEW

No. A-15-949: **Ewert v. Arabi**. Petition of appellant for further review denied on August 29, 2016, as untimely. See § 2-102(F)(1).

No. A-15-961: **Kelly H. v. Luke M**. Petition of appellant for further review denied on August 12, 2016.

No. A-15-962: **Kelly H. on behalf of Dominique M. v. Luke M**. Petition of appellant for further review denied on August 12, 2016.

No. A-15-964: **Kelly H. on behalf of Dominique M. v. Ashley H**. Petition of appellant for further review denied on August 12, 2016.

No. A-15-970: **State v. Lightspirit**. Petition of appellant for further review denied on January 9, 2017.

No. A-15-977: **In re Estate of Ackerman**, 24 Neb. App. 588 (2017). Petition of appellant for further review denied on May 30, 2017.

No. A-15-980: **VanEiser, LLC v. Nebraska Bank of Commerce**. Petition of appellant for further review denied on June 13, 2017.

No. A-15-985: **State v. Ostrum**. Petition of appellant for further review denied on July 26, 2016.

No. A-15-988: **WBE Company v. State**. Petition of appellant for further review denied on March 8, 2017.

No. A-15-994: **State v. Johnson**. Petition of appellant for further review denied on April 4, 2017.

No. A-15-1003: **State v. Crowl**. Petition of appellant for further review denied on September 1, 2016.

No. A-15-1007: **Bouzis v. Bouzis**. Petition of appellee for further review denied on April 18, 2017.

No. A-15-1024: **Perea v. Gomez**. Petition of appellant for further review denied on May 10, 2017.

No. A-15-1034: **CACH, LLC v. deNourie**. Petition of appellant for further review denied on April 6, 2017.

No. A-15-1037: **Jacob v. Cotton**. Petition of appellant for further review denied on April 6, 2017.

No. A-15-1039: **State v. Cook**. Petition of appellant for further review denied on July 10, 2017.

Nos. A-15-1042, A-15-1043: **In re Interest of Hunter P. et al**. Petitions of appellant for further review denied on August 18, 2016.

No. A-15-1048: **In re Interest of Ravin L**. Petition of appellant for further review denied on September 8, 2016.

No. A-15-1055: **Anderson v. Anderson**. Petition of appellant for further review denied on May 18, 2016.

No. A-15-1067: **SFI LTD. Partnership 53 v. Ray Anderson, Inc**. Petition of appellant for further review denied on May 11, 2017.

No. A-15-1076: **State v. McDermott**. Petition of appellant for further review denied on August 30, 2016.

No. A-15-1081: **In re Interest of Kelsey A**. Petition of appellant for further review denied on June 22, 2016.

No. A-15-1082: **In re Interest of Kailee A**. Petition of appellant for further review denied on June 22, 2016.

No. A-15-1083: **In re Interest of Klayton C**. Petition of appellant for further review denied on June 22, 2016.

No. A-15-1086: **State v. Magallanes**. Petition of appellant for further review denied on March 27, 2017, as untimely. See § 2-102(F)(1).

No. A-15-1112: **Parking Mgmt. & Consultants v. City of Omaha**. Petition of appellant for further review denied on July 20, 2017.

No. A-15-1113: **State v. Pigee**. Petition of appellant for further review denied on April 10, 2017.

No. A-15-1117: **State v. Heiser**. Petition of appellant for further review denied on June 2, 2016.

No. A-15-1118: **Mitchell v. Mansfield**. Petition of appellant for further review denied on January 4, 2017, as premature.

No. A-15-1118: **Mitchell v. Mansfield**. Petition of appellant for further review denied on April 10, 2017.

No. A-15-1136: **In re Interest of Tresdon N**. Petition of appellant pro se for further review denied on July 26, 2016.

No. A-15-1143: **Hovey v. Hovey**. Petition of appellee for further review denied on July 12, 2017.

No. A-15-1149: **Ryan Family L.L.C. v. Ryan**. Petition of appellee Stacy Ryan for further review denied on July 19, 2016.

No. A-15-1154: **State v. Chavez**. Petition of appellant for further review denied on January 17, 2017.

No. A-15-1158: **In re Interest of Alyssa D. et al**. Petition of appellant for further review denied on October 19, 2016.

No. A-15-1161: **State v. McCrickert**, 24 Neb. App. 496 (2017). Petition of appellant for further review denied on March 23, 2017.

No. A-15-1165: **State v. Dubas**. Petition of appellant for further review denied on December 22, 2016.

Nos. A-15-1170 through A-15-1172: **In re Interest of Cristalyla C. et al**. Petitions of appellant for further review denied on November 1, 2016.

Nos. A-15-1180, A-15-1221: **State v. Engstrom**. Petitions of appellant for further review denied on April 10, 2017.

No. A-15-1184: **Ammon v. Nagengast**, 24 Neb. App. 632 (2017). Petition of appellant for further review denied on June 5, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-15-1185: **State v. Yanga**. Petition of appellant for further review denied on July 13, 2016.

No. A-15-1186: **State v. Cannon**. Petition of appellant for further review denied on January 18, 2017.

No. A-15-1195: **State v. Green**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-1199: **State v. Killingsworth**. Petition of appellant for further review denied on June 2, 2016.

No. A-15-1200: **In re Interest of Willie G. et al**. Petition of appellant for further review denied on January 9, 2017.

No. A-15-1233: **State v. Edwards**. Petition of appellant pro se for further review denied on March 10, 2017.

No. A-15-1236: **In re Interest of Hannah R**. Petition of appellant for further review denied on September 20, 2016.

No. A-15-1237: **Castonguay v. Frakes**. Petition of appellant for further review denied on August 2, 2016.

No. A-15-1242: **In re Interest of Landyn M**. Petition of appellant for further review denied on August 2, 2016.

No. A-15-1243: **In re Interest of Kaidyn M**. Petition of appellant for further review denied on August 2, 2016.

No. A-16-012: **In re Conservatorship & Guardianship of Lindhurst**. Petition of appellant for further review denied on April 6, 2017.

No. A-16-030: **In re Interest of Julia D**. Petition of appellant for further review denied on November 14, 2016.

No. A-16-033: **Kountze v. Domina Law Group**. Petition of appellant for further review denied on August 4, 2017.

No. A-16-044: **State v. Smith**. Petition of appellant pro se for further review denied on November 22, 2016.

No. A-16-068: **State v. Templeman**. Petition of appellant for further review denied on July 19, 2016.

No. A-16-070: **Jacob v. Department of Corr. Servs**. Petition of appellant for further review denied on February 21, 2017.

No. A-16-073: **In re Interest of Alexander Z**. Petition of appellant for further review denied on January 10, 2017.

No. A-16-080: **Campbell v. Gage**. Petition of appellant for further review denied on February 10, 2017.

No. A-16-087: **State v. McDonald**. Petition of appellant for further review denied on June 15, 2016.

No. A-16-101: **State v. Scott**. Petition of appellant for further review denied on November 8, 2016.

No. S-16-115: **State v. Schiesser**, 24 Neb. App. 407 (2016). Petition of appellant for further review sustained on February 15, 2017.

No. A-16-121: **Bilderback-Vess v. Vess**. Petition of appellant for further review denied on June 29, 2017.

No. A-16-126: **Latenser v. Omaha Zoning Board of Appeals**. Petition of appellant for further review denied on August 4, 2017.

No. S-16-127: **Komar v. State**, 24 Neb. App. 692 (2017). Petition of appellant for further review sustained on August 4, 2017.

No. A-16-134: **State v. McClease**. Petition of appellant for further review denied on October 12, 2016.

No. A-16-149: **Santos v. Madsen**. Petition of appellant for further review denied on May 31, 2016.

No. A-16-150: **Boyer v. Boyer**, 24 Neb. App. 434 (2017). Petition of appellant for further review denied on March 7, 2017.

No. A-16-159: **Moser v. Lancaster Cty. Bd. of Equal**. Petition of appellants for further review denied on May 13, 2016.

No. A-16-162: **State v. Castonguay**. Petition of appellant for further review denied on May 4, 2016.

Nos. A-16-165, A-16-168, A-16-169: **State v. Holliman**. Petitions of appellant for further review denied on July 26, 2016.

Nos. A-16-177 through A-16-181: **In re Interest of Jaina W. et al**. Petitions of appellant for further review denied on November 28, 2016.

No. A-16-187: **In re Interest of Jaymon M**. Petition of appellant for further review denied on October 12, 2016.

No. A-16-188: **Rivera v. Schreiber Foods**. Petition of appellant for further review denied on April 25, 2016.

No. A-16-189: **In re Interest of Angeleah M. & Ava M**. Petition of appellant for further review denied on December 9, 2016.

No. A-16-197: **In re Interest of Treton A**. Petition of appellant for further review denied on August 18, 2016.

No. A-16-205: **State v. Martin**. Petition of appellant for further review denied on June 22, 2016.

No. A-16-211: **Central Platte NRD v. Smith**. Petition of appellant for further review denied on May 8, 2017.

No. A-16-213: **State v. Sundquist**. Petition of appellant for further review denied on September 22, 2016.

No. A-16-224: **State v. Garibo**. Petition of appellant for further review denied on January 4, 2017, for failure to file brief in support. See § 2-102(F)(1).

PETITIONS FOR FURTHER REVIEW

No. A-16-224: **State v. Garibo**. Petition of appellant pro se for further review denied on January 4, 2017, as untimely. See § 2-102(F)(1).

No. A-16-245: **State v. Castillo-Zamora**. Petition of appellant for further review denied on August 11, 2016, as untimely. See § 2-102(F)(1).

No. A-16-248: **Lewis v. Lewis**. Petition of appellant for further review denied on June 20, 2017.

No. A-16-249: **Aschoff v. State**. Petition of appellants for further review denied on July 10, 2017.

No. A-16-250: **Arndt v. Arndt**. Petition of appellant for further review denied on July 31, 2017.

No. A-16-251: **State v. Wabashaw**. Petition of appellant for further review denied on June 2, 2017.

No. A-16-254: **In re Interest of Isaiah S. & Noah F**. Petition of appellant for further review denied on February 3, 2017.

No. S-16-255: **State v. Rivera**. Petition of appellant for further review sustained on May 8, 2017.

No. S-16-267: **Hintz v. Farmers Co-op Assn.**, 24 Neb. App. 561 (2017). Petition of appellee for further review sustained on April 19, 2017.

No. A-16-268: **State v. Branch**. Petition of appellant for further review denied on January 6, 2017.

No. A-16-270: **Rosberg v. Rosberg**. Petition of appellant for further review denied on August 11, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-271: **Rosberg v. Riesberg**. Petition of appellant for further review denied on September 1, 2016.

No. A-16-272: **Domina Law Group v. Kountze**. Petition of appellant for further review denied on August 4, 2017.

No. A-16-275: **In re Interest of Aaliyah G. et al**. Petition of appellant for further review denied on January 4, 2017.

No. A-16-282: **Ehrke v. Mamot**. Petition of appellant for further review denied on June 7, 2017.

No. A-16-287: **Gray v. Nebraska Dept. of Corr. Servs**. Petition of appellant for further review denied on May 16, 2017.

No. A-16-289: **State v. Milton**. Petition of appellant for further review denied on May 2, 2017.

No. A-16-290: **State v. Pickel**. Petition of appellant for further review denied on August 30, 2016.

No. A-16-291: **State v. Chambers**. Petition of appellant for further review denied on January 4, 2017.

No. A-16-293: **State v. Hostetter**. Petition of appellant for further review denied on December 21, 2016.

No. A-16-294: **State v. Rice**. Petition of appellant for further review denied on June 8, 2016.

No. A-16-298: **In re Interest of Markel B**. Petition of appellant for further review denied on December 16, 2016.

No. A-16-305: **State v. Weathers**. Petition of appellant for further review denied on February 14, 2017, as untimely. See § 2-102(F)(1).

No. A-16-316: **State v. Nielson**. Petition of appellant for further review denied on November 1, 2016.

No. A-16-320: **In re Interest of William M**. Petition of appellee for further review denied on February 22, 2017.

No. A-16-322: **In re Interest of Brianna L**. Petition of appellee Darryl L. for further review denied on February 3, 2017.

No. S-16-327: **Mumin v. Frakes**. Petition of appellant for further review sustained on May 10, 2017.

No. A-16-348: **Tyler v. Wachtler**. Petition of appellant for further review denied on December 7, 2016.

No. A-16-354: **State v. Parnell**. Petition of appellant pro se for further review denied on February 14, 2017.

No. A-16-363: **State v. Dean**. Petition of appellant for further review denied on January 10, 2017.

No. A-16-368: **State on behalf of Natalya B. & Nikiah A. v. Bishop A.**, 24 Neb. App. 477 (2017). Petition of appellant for further review denied on March 29, 2017.

No. A-16-374: **Koch v. City of Sargent**. Petition of appellant for further review denied on July 13, 2016.

No. A-16-385: **State v. Swift**. Petition of appellant for further review denied on July 19, 2016.

Nos. A-16-387, A-16-388: **State v. Hawks**. Petitions of appellant for further review denied on March 7, 2017.

No. A-16-390: **Rosberg v. Rosberg**. Petition of appellant for further review denied on August 5, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-391: **Rosberg v. Rosberg**. Petition of appellant for further review denied on August 5, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-392: **Rosberg v. Sand**. Petition of appellant for further review denied on August 5, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-394: **Koch v. Clark**. Petition of appellant for further review denied on August 12, 2016.

PETITIONS FOR FURTHER REVIEW

No. A-16-396: **Rosberg v. Johnson**. Petition of appellant for further review denied on August 5, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-411: **Onuachi v. Harry S. Peterson Co**. Petition of appellant for further review denied on May 30, 2017.

No. A-16-428: **In re Interest of Damerio C. et al**. Petition of appellant for further review denied on April 7, 2017.

No. A-16-430: **Zellner v. Latham**. Petition of appellant for further review denied on April 4, 2017.

No. A-16-439: **State v. Rolling**. Petition of appellant for further review denied on January 18, 2017.

No. A-16-443: **Village of Mead v. Gonzales**. Petition of appellants for further review denied on August 18, 2016.

No. A-16-448: **Santos v. Cruickshank**. Petition of appellant pro se for further review denied on November 3, 2016.

No. A-16-458: **State v. Mead**. Petition of appellant for further review denied on March 8, 2017.

No. A-16-459: **Panhandle Collections v. Jacobson**. Petition of appellant for further review denied on June 26, 2017.

No. A-16-464: **State v. Artis**. Petition of appellant for further review denied on October 13, 2016, as prematurely filed.

No. A-16-468: **State v. Rosas**. Petition of appellant pro se for further review denied on May 16, 2017.

No. A-16-472: **State v. Black**. Petition of appellant for further review denied on February 15, 2017.

No. A-16-475: **State v. Schmidt**. Petition of appellant for further review denied on May 10, 2017.

No. A-16-477: **Kiser v. Grinnell**. Petition of appellant for further review denied on April 10, 2017.

No. A-16-481: **Clark v. Ladwig**. Petition of appellants for further review denied on October 5, 2016.

No. A-16-488: **State v. Eigsti**. Petition of appellant for further review denied on October 18, 2016.

No. A-16-505: **State v. Heldt**. Petition of appellant for further review denied on June 6, 2017.

No. A-16-517: **State v. Pope**. Petition of appellant for further review denied on February 22, 2017.

No. A-16-528: **State v. Herrin**. Petition of appellant for further review denied on June 5, 2017.

No. A-16-531: **In re Interest of Yue-Bo W. & Xin-Bo W**. Petition of appellant for further review denied on July 20, 2017.

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No. A-16-531: **In re Interest of Yue-Bo W. & Xin-Bo W**. Petition of appellee for further review denied on July 20, 2017.

No. A-16-540: **In re Interest of Paul J. et al**. Petition of appellant for further review denied on March 6, 2017. See § 2-102(F)(1).

No. S-16-550: **State v. Mendez-Osorio**. Petition of appellant for further review sustained on March 16, 2017.

No. A-16-552: **State v. Woolery**. Petition of appellant for further review denied on January 26, 2017.

No. A-16-553: **In re Interest of Hindryk B**. Petition of appellant for further review denied on March 29, 2017.

No. A-16-556: **Holloway v. Lancaster County**. Petition of appellant pro se for further review denied on August 11, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-562: **State v. Diequez**. Petition of appellant for further review denied on November 22, 2016.

No. A-16-576: **Castonguay v. Stieren**. Petition of appellant for further review denied on August 7, 2017.

No. A-16-578: **Rosberg v. Skorupa**. Petition of appellant for further review denied on April 26, 2017.

No. A-16-581: **Rosberg v. Vaughan**. Petition of appellant for further review denied on April 26, 2017.

No. A-16-584: **State v. Kennedy**. Petition of appellant for further review denied on April 10, 2017.

No. A-16-592: **State v. Blankenship**. Petition of appellant for further review denied on March 3, 2017.

No. A-16-601: **State v. Kincaid**. Petition of appellant for further review denied on June 14, 2017.

No. A-16-631: **State v. Bowman**. Petition of appellant for further review denied on June 26, 2017.

No. A-16-662: **State v. Delgado**. Petition of appellant for further review denied on July 20, 2017.

No. A-16-669: **State v. Porter**. Petition of appellant for further review denied on May 2, 2017.

No. A-16-671: **State v. Hollins**. Petition of appellant for further review denied on July 20, 2017.

No. A-16-684: **In re Interest of K.W.**, 24 Neb. App. 619 (2017). Petition of appellant for further review denied on June 26, 2017.

No. A-16-691: **State v. Lieser**. Petition of appellant for further review denied on January 6, 2017.

No. A-16-692: **Thanawalla v. Thanawalla**. Petition of appellant for further review denied on April 19, 2017.

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No. A-16-707: **State v. Castonguay**. Petition of appellant for further review denied on November 21, 2016.

No. A-16-720: **Fraction v. Rookstool**. Petition of appellant for further review denied on May 17, 2017.

No. A-16-735: **State v. Fisher**. Petition of appellant for further review denied on January 11, 2017.

No. A-16-744: **State v. Swenson**. Petition of appellant for further review denied on February 22, 2017.

No. A-16-749: **State v. Segundo**. Petition of appellant for further review denied on April 10, 2017.

No. A-16-759: **In re Interest of Phoenix W. et al**. Petition of appellant for further review denied on July 6, 2017.

No. A-16-767: **Onuachi v. Alliance Group**. Petition of appellant for further review denied on March 16, 2017.

No. A-16-776: **Lombardo v. Sedlacek**. Petition of appellant for further review denied on March 10, 2017.

No. A-16-781: **State v. Schultz**. Petition of appellant for further review denied on April 10, 2017.

No. A-16-802: **Giandinoto v. Giandinoto**. Petition of appellant for further review denied on June 5, 2017.

No. A-16-808: **State v. Reinig**. Petition of appellant for further review denied on May 10, 2017.

No. A-16-825: **State v. Rios**. Petition of appellant for further review denied on August 4, 2017.

No. A-16-834: **Tyler v. City of Omaha**. Petition of appellant for further review denied on January 4, 2017. See § 2-102(F)(1).

No. A-16-837: **Valentine v. Gerber**. Petition of appellant for further review denied on November 28, 2016.

No. A-16-838: **State v. Klingelhoefer**. Petition of appellant for further review denied on March 10, 2017.

No. A-16-853: **State v. Ross**. Petition of appellant for further review denied on June 28, 2017.

No. A-16-882: **State v. Hobdell**. Petition of appellant for further review denied on July 6, 2017.

No. A-16-917: **Olson v. Koch**. Petition of appellant for further review denied on March 10, 2017.

No. A-16-922: **State v. Tyler**. Petition of appellant for further review denied on December 12, 2016, as untimely. See § 2-102(F)(1).

No. A-16-937: **Finke v. Employer Solutions Staffing**. Petition of appellant for further review denied on July 19, 2017.

No. A-16-945: **State v. Godden**. Petition of appellant for further review denied on February 3, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-16-947: **In re Interest of Austin G.**, 24 Neb. App. 773 (2017). Petition of appellant for further review denied on August 7, 2017.

No. A-16-949: **Assad v. Sidney Regional Med. Ctr**. Petition of appellant for further review denied on July 12, 2017.

No. A-16-957: **State v. Kodad**. Petition of appellant for further review denied on May 2, 2017.

No. A-16-960: **Seier v. Niewohner Bros**. Petition of appellant for further review denied on April 6, 2017.

Nos. A-16-971, A-16-977: **State v. Newman**. Petitions of appellant for further review denied on May 8, 2017.

No. A-16-1045: **Krenk v. Franks**. Petition of appellant for further review denied on August 2, 2017.

Nos. A-16-1053, A-16-1055: **State v. Wood**. Petitions of appellant for further review denied on March 7, 2017.

No. A-16-1084: **Castonguay v. Retelsdorf**. Petition of appellant for further review denied on May 16, 2017.

No. A-16-1090: **State v. Reising**. Petition of appellant for further review denied on April 21, 2017.

No. A-16-1090: **State v. Reising**. Petition of appellant pro se for further review denied on April 21, 2017.

No. A-16-1102: **State v. Ruegge**. Petition of appellant pro se for further review denied on August 7, 2017.

No. A-16-1140: **Gardner v. Rensch**. Petition of appellant for further review denied on June 2, 2017.

No. A-16-1145: **State v. Rice**. Petition of appellant for further review denied on May 17, 2017.

Nos. A-16-1155, A-17-015: **State v. Sheldon**. Petitions of appellant for further review denied on June 6, 2017.

No. A-16-1175: **State v. Trevino**. Petition of appellant for further review denied on April 17, 2017.

No. A-16-1176: **State v. Shirley**. Petition of appellant for further review denied on April 26, 2017.

No. A-16-1177: **Rosberg v. Riesberg**. Petition of appellant for further review denied on March 17, 2017. See § 2-107(A)(2).

No. A-16-1199: **State v. Alford**. Petition of appellant for further review denied on May 30, 2017.

No. A-16-1209: **Prokop v. Ritnour**. Petition of appellant for further review denied on March 27, 2017, as untimely. See § 2-102(F)(1).

No. A-16-1211: **State v. Gardner**. Petition of appellant for further review denied on March 27, 2017, as untimely. See § 2-102(F)(1).

PETITIONS FOR FURTHER REVIEW

Nos. A-16-1216, A-16-1217: **State v. Guel**. Petitions of appellant for further review denied on June 19, 2017.

No. A-17-013: **State v. Alcala**. Petition of appellant pro se for further review denied on June 26, 2017.

No. A-17-014: **State v. King**. Petition of appellant for further review denied on June 28, 2017.

No. A-17-023: **State v. Gardner**. Petition of appellant for further review denied on April 19, 2017.

No. A-17-063: **State v. Castonguay**. Petition of appellant for further review denied on May 16, 2017.

No. A-17-094: **State on behalf of Michael A. v. Samar A**. Petition of appellant for further review denied on March 7, 2017, for lack of jurisdiction. See, §§ 2-102(F)(1) and 2-101; Neb. Rev. Stat. § 25-2301.02 (Reissue 2016).

No. A-17-137: **Reising v. Department of Corrections**. Petition of appellant for further review denied on August 4, 2017, as untimely filed.

No. A-17-164: **State v. Allee**. Petition of appellant for further review denied on July 26, 2017, as premature.

No. A-17-172: **Fitzgerald v. Cruickshank**. Petition of appellant for further review denied on July 20, 2017.

No. A-17-175: **State v. Bishop**. Petition of appellant for further review denied on June 26, 2017.

No. A-17-209: **Harvey v. Harvey**. Petition of appellant for further review denied on June 19, 2017, as untimely.

No. A-17-209: **Harvey v. Harvey**. Petition of appellant for further review denied on June 30, 2017.

No. A-17-215: **State v. Hansher**. Petition of appellant for further review denied on July 31, 2017.

No. A-17-253: **State v. Alvarado**. Petition of appellant for further review denied on June 6, 2017.

No. A-17-358: **State v. Shere**. Petition of appellant for further review denied on June 20, 2017.

No. A-17-358: **State v. Shere**. Petition of appellant for further review denied on August 2, 2017, for lack of jurisdiction.

No. A-17-399: **Campbell v. Hansen**. Petition of appellant for further review denied on July 26, 2017, as premature.

Christopher M. Payne, appellant, v. Nebraska Department of Correctional Services et al., appellees.

879 N.W.2d 705

Filed May 3, 2016. No. A-15-016.

1. **Right to Counsel.** In civil cases, there is no constitutional or statutory right to appointed counsel.
2. **Constitutional Law: Courts: States.** The question of when federal law should displace state law in state court proceedings under the Supremacy Clause is governed by the reverse-*Erie* doctrine set out in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).
3. **Federal Acts: Courts: States.** State courts hearing federal law claims may generally utilize their own procedural rules so long as they do not infringe upon the substantive federal law at issue.
4. ____: ____: ____. When a state court hears a claim based on federal law, the state's procedural rules may be preempted by federal law if they fail to protect substantive federal rights.
5. **Constitutional Law: Federal Acts: Courts: States.** The Supremacy Clause imposes on state courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected.
6. **Federal Acts: Courts: States.** Where a claim heard in state court is based upon a federal statute and that statute does not dictate procedure, the state court conducts a preemption analysis to determine whether a particular state procedure is preempted by federal law. This preemption analysis considers the federal interest of uniformity in adjudicating federal rights and the countervailing state interest in administering its courts.
7. **Public Officers and Employees: Immunity: Liability.** Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known.

8. ____: ____: ____. Qualified immunity consists of two inquiries: (1) whether the facts that a plaintiff has alleged make out a violation of a constitutional right and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct.
9. ____: ____: ____. The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.
10. ____: ____: ____. Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law.
11. ____: ____: ____. The dispositive inquiry for qualified immunity is whether it would be clear to a reasonable officer in the agent's position that his conduct was unlawful in the situation he confronted.
12. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
13. **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.
14. **Judgments: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
15. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

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

Christopher M. Payne, pro se.

Douglas J. Peterson, Attorney General, and Bijan Koohmaraie for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Riedmann, Judge.

INTRODUCTION

Christopher M. Payne is an inmate housed at the Tecumseh State Correctional Institution (TSCI) in Tecumseh, Nebraska. He filed suit against the Nebraska Department of Correctional Services (the Department) and several of its employees in their individual and official capacities after being prevented from corresponding with a person housed in a secure treatment facility. After pretrial motions and orders disposed of Payne's case against the Department and the State employees in their official capacities, he tried his remaining claims against the State employees in their individual capacities under 42 U.S.C. § 1983 (2012) before a jury. Following Payne's case in chief, the district court for Lancaster County, Nebraska, sustained the defendants' motion for a directed verdict and dismissed the suit. Payne appeals from this order.

After review of the record and the parties' factual and legal arguments, we affirm the judgment of the district court.

BACKGROUND

The TSCI mailroom procedures manual prohibits TSCI's inmates from receiving mail from inmates housed at correctional institutions. On August 3, 2011, Payne received a notice of returned mail stating that a letter mailed from Rodger Robb in Moose Lake, Minnesota, had been returned to the sender. A copy of the envelope was attached to the returned mail notice, showing that the letter had been stamped "Mailed From A Secure Treatment Facility." The returned mail notice stated that the reason for the return was that "[t]he mail [was] from another correctional facility and the writer is not approved to correspond."

Catherine Peters, a mailroom employee at TSCI, testified that she received the letter and believed that it was sent from a correctional institution because of the stamp labeling it from a "Secure Treatment Facility." She then followed the procedure for dealing with mail that is sent from a correctional institution; that is, she checked to see if Payne's

file contained authorization to correspond with the sender, and when it did not, she returned the letter and sent a notice to Payne.

After receiving the notice of returned mail, Payne submitted an "Inmate Interview Request" form with a message for Peters. The message reads: "Several times now Warden Britten has told you people that I am authorized to receive letters from . . . Robb, because he is not in a correctional facility nor an inmate, yet you must be dense because you again rejected his letter. If you can't follow instructions get a new job!" Fred Britten, the warden, replied directly to this message, stating, "Research indicates that . . . Robb's return address is that of a sex offender program. Additionally, see attached envelope which states that it was mailed from a 'secure treatment facility.' You do not have authorization to correspond with this individual."

An administrative assistant to the warden testified that she performed the research on the Moose Lake facility and drafted the warden's response to the initial inmate interview request. She had no specific recollection of what research she conducted, although she was certain that she had researched the facility and stated she may have performed an Internet search. The warden had no specific recollection of hearing her describe her research or doing any research of his own.

On August 12, 2011, Payne submitted an "Informal Grievance Resolution Form" stating that Robb is not an inmate in a correctional facility, but, rather, a patient in a treatment facility, and that correspondence should be allowed. A prison official responded in September, stating, "You do not have authorization to correspond with this individual."

Payne then submitted "Step One" (Step 1) grievance forms on September 20 and 25, 2011, stating that Robb was not an "inmate" nor in a "correctional institution," but that he is a patient in a mental health facility. Assistant warden Michelle Hillman responded to one of these Step 1 grievance forms, and the warden responded to the other. Both concurred with

the informal grievance response, and neither allowed Payne to correspond with Robb.

The assistant warden testified that at the time she completed the grievance response, she believed that the Moose Lake facility was actually a correctional facility, because the word "secure" was used on the envelope to describe it. She testified that a prison file would typically accompany grievances and contain additional information on which she would have based her response. The warden also testified that when the issue was brought to him, he believed that the term "secure treatment facility" referred to a prison. Both the warden and the assistant warden stated that they had no reason to believe that the information provided to them by TSCI staff about the nature of the Moose Lake facility was incorrect.

In October 2011, Payne submitted a "Step Two" (Step 2) grievance. A Step 2 grievance is a central office appeal of the result of a Step 1 grievance. Step 2 grievances are forwarded to the general counsel for the prison in the central office, where staff attorneys independently prepare responses. Payne's Step 2 grievance states that Robb is a patient in a Minnesota mental health facility and argues that civilly committed persons in secure treatment facilities are not inmates or prisoners. The central office response to the Step 2 grievance states:

> You want to receive mail from a friend in Minnesota. You claim he is a patient at the mental health facility in Minnesota. The TSCI staff was informed he is an inmate in a correctional facility. If this is inaccurate, you should provide information to your unit staff showing the nature of the facility.

After receiving the response to his Step 2 grievance, Payne submitted another inmate interview request in October 2011 to the warden stating that Robb is in a mental health facility. Payne attached a copy of the warden's response stating that research had indicated that Robb was in a sex offender program in a secure treatment facility as "proof" that Robb was

not an inmate. The warden responded by stating that the envelope was mailed from a "'secure treatment facility.'"

Testimony indicates that the warden had previously acknowledged that Payne could correspond with mental health patients in the Lincoln Regional Center in Nebraska who were civilly committed and not inmates. The warden stated that although he had visited the Lincoln Regional Center, he had no personal knowledge of the Moose Lake facility or its nature.

Payne filed this suit in April 2012 under 42 U.S.C. § 1983 seeking damages for violations of his First Amendment rights against the State employees in their individual capacities, and additionally seeking equitable relief against them in their official capacities and against the Department.

In January 2013, the Department granted Payne permission to correspond with Robb. In light of this decision, the district court granted summary judgment to the defendants on Payne's claims for equitable relief. The district court denied the remaining defendants' motion for summary judgment as to Payne's First Amendment claims against the employees in their individual capacities.

Payne presented his case in chief to a jury. At the close of Payne's case, the defendants moved for a directed verdict, which the district court granted, reasoning that they were entitled to qualified immunity and that Payne had failed to establish damages. Payne appeals from this determination.

ASSIGNMENTS OF ERROR

Payne assigns that the district court erred in (1) denying Payne's request for appointment of counsel, (2) finding that the defendants are entitled to qualified immunity, (3) sustaining defendants' objection to evidence of prior bad acts, and (4) finding that Payne failed to prove a prima facie case for damages.

STANDARD OF REVIEW

On appeal from an order of a trial court dismissing an action at the close of plaintiff's evidence, this court must determine

whether the cause of action was proved and must accept plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *Russell v. Norton*, 229 Neb. 379, 427 N.W.2d 762 (1988).

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. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). In particular, whether evidence is admissible for any proper purpose under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014), rests within the discretion of the trial court. *Sturzenegger v. Father Flanagan's Boys' Home, supra*.

When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Pettit v. Nebraska Dept. of Corr. Servs.*, 291 Neb. 513, 867 N.W.2d 553 (2015).

ANALYSIS

Appointment of Counsel.

[1] Payne first assigns that the district court erred in denying his request for appointment of counsel. At issue is whether state or federal law controls appointment of counsel in this action. In civil cases, there is no constitutional or statutory right to appointed counsel. *Ward v. Smith*, 721 F.3d 940 (8th Cir. 2013). However, 28 U.S.C. § 1915 (2012), the statute governing federal judicial procedure for proceedings in forma pauperis, allows a federal district court discretion to appoint counsel to any person unable to afford an attorney. Although § 1915 leaves appointment of counsel to the discretion of the trial court, a motion for appointment of counsel under § 1915 requires the court to consider factors including the complexity of the case and the abilities of the litigant requesting counsel. *Childress v. Walker*, 787 F.3d 433 (7th Cir. 2015). Nebraska law, by contrast, allows for appointment of counsel only when a person's physical liberty may be in jeopardy. *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999), *disapproved on other*

grounds, Gibilisco v. Gibilisco, 263 Neb. 27, 637 N.W.2d 898 (2002).

[2] The question of when federal law should displace state law in state court proceedings under the Supremacy Clause is governed by the "reverse-*Erie* doctrine." Kevin M. Clermont, *Reverse*-Erie, 82 Notre Dame L. Rev. 1 (2006). The reverse-*Erie* doctrine refers to the case *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), which dealt with the question of when federal courts should apply state court law. The reverse-*Erie* doctrine, then, deals with when and how broadly state courts hearing federal claims should apply federal law.

[3-5] State courts hearing federal law claims may generally utilize their own procedural rules so long as they do not infringe upon the substantive federal law at issue. See *Johnson v. Fankell*, 520 U.S. 911, 919, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997) (general rule "'"bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them"'"). See, also, *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 622-23, 467 N.W.2d 388, 393 (1991) ("[i]n disposing of a claim controlled by the Federal Employees' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues . . . are determined by the provisions of the act and interpretative decisions of federal courts"). However, procedural rules may be preempted by federal law if they fail to protect substantive federal rights. See *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). The Supremacy Clause imposes on state courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected. *Felder v. Casey, supra*.

[6] Where the federal statute at issue does not dictate procedure, courts conduct a preemption analysis to determine whether a particular state procedure is preempted by federal

law. This preemption analysis considers the federal interest of uniformity in adjudicating federal rights and the countervailing state interest in administering its courts. *Johnson v. Fankell, supra*; Clermont, *supra*.

For example, in *Felder v. Casey, supra*, a plaintiff filed a civil rights suit against a police officer under 42 U.S.C. § 1983 in Wisconsin state courts. The Wisconsin Supreme Court ordered the suit to be dismissed because the plaintiff had not complied with a Wisconsin notice-of-claim statute that requires notice to public officials of an intent to file suit 120 days prior to the suit being filed. *Felder v. Casey, supra*. The U.S. Supreme Court found that the Wisconsin notice-of-claim statute was preempted by federal law in § 1983 claims brought in state court because the notice-of-claim statute impermissibly burdened the plaintiff's substantive federal rights protected by § 1983 and would also cause many cases to have different outcomes depending upon whether the case was filed in federal or state court. *Felder v. Casey, supra.*

In contrast, in *Johnson v. Fankell*, 520 U.S. 911, 717 S. Ct. 1800, 138 L. Ed. 2d 108 (1997), the U.S. Supreme Court upheld a state court's use of its rule prohibiting interlocutory appeals from a denial of qualified immunity in a case brought under 42 U.S.C. § 1983. In *Johnson v. Fankell, supra*, a former employee of an Idaho state liquor store filed suit in state court arguing that her federal civil rights were violated when her employment was terminated. *Id.* The Idaho Liquor Dispensary officials who were named defendants filed a motion for dismissal on the grounds of qualified immunity, which the trial court denied. *Id.* The officials then filed an interlocutory appeal—an appeal of the trial court's qualified immunity denial before the case went to trial. Although federal rules of civil procedure would have allowed the interlocutory appeal, Idaho court rules prohibited this appeal. *Id.* In upholding the state court's use of its own interlocutory appeal rule, the U.S. Supreme Court noted that unlike the notice-of-claim statute at issue in *Felder v. Casey, supra*,

the difference between the state and federal rules on interlocutory appeals would not result in differing outcomes of the final disposition of the case. *Johnson v. Fankell, supra*. In *Felder v. Casey, supra*, a plaintiff who filed in state court and who had not complied with the notice-of-claim statute would have his case dismissed, while the same plaintiff in federal court would not. In contrast, in *Johnson v. Fankell, supra*, a defendant whose meritorious qualified immunity claim was initially denied by the trial court would ultimately be entitled to the same relief on appeal under either the federal or Idaho rule; only the timing of the appeal would change. The U.S. Supreme Court additionally noted that the federal right to an interlocutory appeal does not come from § 1983 itself, but is instead embedded in a separate rule of federal civil procedure that "simply does not apply in a nonfederal forum." *Johnson v. Fankell*, 520 U.S. at 921. The U.S. Supreme Court also stated that it has a "normal presumption against pre-emption" that was "buttressed by the fact that [the decision at issue] rested squarely on a neutral state Rule regarding the administration of the state courts." *Id.*, 520 U.S. at 918. It additionally recognized the strong interest of states in operating their own courts. *Johnson v. Fankell, supra*.

Given these contours of the analysis, we conclude that the Nebraska rule on appointment of counsel is not preempted by the federal procedural rule in § 1915. Like the interlocutory appeal decision at issue in *Johnson v. Fankell*, the district court's denial of appointed counsel "rests squarely on a neutral state Rule regarding the administration of the state courts." 520 U.S. at 918. The State has strong interests in this area of administering the courts, particularly given that appointed counsel results in significant costs to the state court system. Additionally, the Nebraska rule on appointment of counsel does not significantly burden a plaintiff's substantive federal rights under § 1983. Even under the federal rule, there is no statutory or constitutional right to appointed counsel in a civil case. *Ward v. Smith*, 721 F.3d 940 (8th Cir. 2013). Appointment of

counsel is purely discretionary even in the federal system. See *id.* Additionally, like the rule at issue in *Johnson v. Fankell*, the federal rule on appointment of counsel comes not from § 1983 itself but instead from a federal procedural statute that "does not apply in a nonfederal forum." See 520 U.S. at 921.

Finally, Nebraska's rule on appointment of counsel does not implicate the concerns with uniformity of outcome that were present in *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). Although appointment of counsel would certainly assist any pro se litigant, applying the federal rule would not guarantee that counsel would be appointed to the litigant in federal court, much less that the result would differ between federal and state court.

We further note that other states to consider this issue have also determined that their rules on appointment of counsel are applicable in § 1983 actions brought in state court. For example, the Louisiana Court of Appeal, when considering the same question, determined:

> Our exhaustive search of jurisprudence nationwide, however, reveals at least three states, Georgia, New Mexico, and Pennsylvania, have found the statute [(§ 1915's provision on appointment of counsel)] is not applicable to state court actions.
>
> We agree with those courts that this statute is procedural, not substantive, in nature and thus is not applicable to state courts.

Lay v. McElven, 691 So. 2d 311, 313 (La. App. 1997).

Similarly, the Court of Appeals of New Mexico, when addressing the question, determined that the application of state law on the appointment of counsel was not an error, particularly given that appointment of counsel is a privilege and not a right in civil actions. *Archuleta v. Goldman*, 107 N.M. 547, 761 P.2d 425 (N.M. App. 1987).

For these reasons, we hold that the district court did not err in applying the Nebraska rule on appointment of counsel and in denying court-appointed counsel.

Qualified Immunity.

[7-10] Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Qualified immunity consists of two inquiries: (1) whether the facts that a plaintiff has alleged make out a violation of a constitutional right and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct. See *id.* The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Id.* Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law. *Potter v. Board of Regents*, 287 Neb. 732, 844 N.W.2d 741 (2014).

Payne does not argue that the prison procedures prohibiting inmate-to-inmate mail are constitutionally invalid; rather, he alleges that the defendants "knew or should have known" that Robb was not an inmate in a correctional facility and that they "display[ed] reckless and/or callous disregard for and indifference to Payne's rights."

However, all of the evidence in the record demonstrates that the prison officials acted under a consistent and reasonable belief that Robb was an inmate in a correctional institution. The mailroom employee testified that when she returned the letter from Robb, she believed that the stamp labeling it from a "Secure Treatment Facility" indicated that the letter had been sent from a prison. She then followed the procedure for handling mail from an inmate by checking Payne's file for authorization to correspond with the sender and then providing Payne with a returned mail notice and copy of the envelope. Her belief that the letter was sent from a correctional facility because of the stamp labeling it from a "Secure Treatment

Facility" was reasonable under the circumstances. Qualified immunity protects officials from reasonable mistakes of fact. See *Pearson v. Callahan, supra*.

Similarly, the evidence in the record demonstrates that the warden and his assistant warden reasonably relied upon the envelope's stamp and the research of their colleagues over the assertions of Payne as to whether Robb was an inmate when he sent the letter.

The evidence in the record demonstrates that Payne's initial response was hostile in nature and asserted that the warden had given him permission to correspond with Robb, an assertion not supported by evidence in the record. The warden's administrative assistant testified that she conducted research and drafted the suggested response stating that Robb was in a sex offender program in a secure treatment facility and that Payne was not authorized to correspond with him. The assistant warden testified that when she responded to one of Payne's grievances, she relied upon the word "secure" on the envelope and the information in the inmate file that would have accompanied the grievance to believe that Robb was writing from a correctional institution. Even if mistaken, her understanding of the nature of the Moose Lake facility was reasonable given the context.

Similarly, the warden testified that he believed that a secure treatment facility referred to a prison and that he had no actual familiarity with the out-of-state Moose Lake facility. Documentation from Payne's Step 2 grievance further demonstrates that the TSCI staff operated under the belief that Robb was an inmate in a correctional institution. After receiving Payne's grievance and independently researching the issue, the central office recognized Payne's claim that Robb was a patient at the mental health facility in Minnesota, but stated that "[t]he TSCI staff was informed he is an inmate in a correctional facility." The central office response further advised Payne that "[i]f this is inaccurate, you should provide information to your unit staff showing the nature of the facility."

The records in evidence of Payne's inmate interview requests and grievance show that Payne initially asserted that he had been given permission by the warden to contact Robb and then repeatedly asserted that Robb was not an inmate. The only documentary information that Payne submitted on the nature of the Moose Lake facility was the copy of the envelope and copies of the warden's responses that referred to Moose Lake as a "'secure treatment facility.'" Given that the officials believed that the term "secure treatment facility" was synonymous with prison and understood TSCI staff's research to have confirmed their beliefs, it was reasonable for Payne's presentation of the envelope not to settle the issue.

[11] So while Payne's complaint alleges that the defendants "knew or should have known" that Robb was not an inmate in a correctional facility and that they "display[ed] reckless and/or callous disregard for and indifference to Payne's rights," the evidence adduced does not support the allegation. At most, it supports a finding of negligence in their failure to investigate further, which is an insufficient basis upon which to deny qualified immunity. See *Procunier v. Navarette*, 434 U.S. 555, 98 S. Ct. 855, 55 L. Ed. 2d 24 (1978) (upholding grant of summary judgment to defendants on basis of qualified immunity where § 1983 claim for violation of prisoner's First Amendment rights by interference with mail were premised on defendants' negligent acts). Because Payne's evidence at the conclusion of his case in chief failed to establish that it would be clear to a reasonable prison employee in these employees' positions that their conduct was unlawful, it was proper for the district court to direct a verdict on the issue of qualified immunity. See *Wood v. Moss*, 572 U.S. 744, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014) (reiterating that dispositive inquiry for qualified immunity is whether it would be clear to reasonable officer in agent's position that his conduct was unlawful in situation he confronted).

Accordingly, we agree with the trial court that given the uncontroverted facts in the record, the employees acted

according to their reasonable, albeit mistaken, belief that Robb was an inmate and that a secure treatment facility was a prison. Therefore, they are entitled to qualified immunity and the district court did not err in directing a verdict in favor of the defendants.

Evidence of Prior Lawsuits.

Payne next assigns that the district court erred in preventing him from eliciting testimony from the mailroom employee regarding how many lawsuits had been filed against her since she began working at TSCI. Payne asserts that prior lawsuits would be relevant under rule 404 to show knowledge and argues that she had prior knowledge that her actions were violating Payne's constitutional rights. The district court sustained the State's objection to this question on the grounds of relevancy.

[12-14] Rule 404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

Payne did not make an offer of proof regarding this line of questioning, so we can only speculate as to what type of information may have been revealed had Payne been allowed to question the mailroom employee regarding prior litigation. We found above that the employee is entitled to qualified

immunity because her belief that the out-of-state Moose Lake secure treatment facility was a correctional institution was a reasonable belief, and her actions in withholding Robb's mail were reasonable in light of that belief. We find no abuse of discretion in the district court's determination that prior litigation in which she was involved was irrelevant to her knowledge of whether Moose Lake was a correctional facility for purposes of qualified immunity. Accordingly, this assignment of error is without merit.

Damages.

[15] Payne finally assigns that the district court erred in finding that he failed to establish a prima facie case for damages. Because the issue of qualified immunity disposes of this suit, we do not reach this issue. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 868 N.W.2d 67 (2015).

CONCLUSION

After conducting a reverse-*Erie* preemption analysis, we agree with the district court that Nebraska law governs appointment of counsel in § 1983 claims brought in Nebraska state courts. We further find no abuse of discretion in the district court's refusal to receive evidence under rule 404 and agree with the district court's determination that the defendants are entitled to qualified immunity. Because the qualified immunity analysis is dispositive of the case, we do not reach Payne's assignment of error regarding damages. Accordingly, we affirm the order of the district court.

Affirmed.

Weston D. Derby, appellee and cross-appellant, v. Stephanie R. Martinez, appellant and cross-appellee.

879 N.W.2d 58

Filed May 10, 2016. No. A-15-336.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Child Custody.** To prevail on a motion to remove a minor child, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
3. **Child Custody: Visitation.** Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time. However, it is appropriate for a court to give some consideration to the factors described in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), in determining custody based on the children's best interests.
4. **Child Custody.** Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state.
5. ____. Legitimate employment opportunities may constitute a legitimate reason where there is a reasonable expectation of improvement in the career or occupation of the custodial parent, or where the custodial parent's new job includes increased potential for salary advancement.

6. ____. A firm offer of employment in another state with a flexible schedule in close proximity to the custodial parent's extended family constitutes a legitimate reason for relocation.
7. **Child Custody: Visitation.** Under *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), the trial court evaluates three considerations in determining whether removal to another jurisdiction is in the child's best interests: (1) each parent's motives for seeking or opposing the move, (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent, and (3) the impact such a move will have on contact between the child and the noncustodial parent.
8. **Child Custody.** In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child and the parent seeking removal, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the custodial parent, because the best interests of the child are interwoven with the well-being of the custodial parent.
9. **Child Custody: Visitation.** Absent some aggravating circumstances, such as an ulterior motive to frustrate the noncustodial parent's visitation rights, significant career advancement is a legitimate motive in and of itself.
10. **Rules of the Supreme Court: Appeal and Error.** Under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014), a party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant.
11. ____: ____. To comply with Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014), a cross-appeal section 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 facts.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Reversed and remanded with directions.

Jeff T. Courtney, P.C., L.L.O., for appellant.

Carol Pinard Cronin for appellee.

Irwin, Pirtle, and Riedmann, Judges.

Pirtle, Judge.

INTRODUCTION

Stephanie R. Martinez (Stephanie) appeals from an order of the district court for Douglas County finding that Weston D. Derby is the biological father of Harrison Jude Derby and awarding Stephanie custody of Harrison but denying her request to remove him from Nebraska to Texas. Based on the reasons that follow, we reverse, and remand with directions.

BACKGROUND

Stephanie and Weston started dating in 2011, but were never married. Stephanie gave birth to Harrison in July 2013. The parties' relationship ended in January 2014. On April 3, 2014, Weston filed an amended complaint to establish paternity, custody, parenting time, and related issues. Weston sought sole custody of Harrison or, in the alternative, joint physical custody. Stephanie filed an amended answer and amended countercomplaint in which she sought sole custody of Harrison and permission to "leave the jurisdiction with" Harrison.

Trial was held in March 2015. Weston testified that he is self-employed as a stonemason, which involves building and restoring items such as outdoor fireplaces, patios, building entrances, pillars, and chimneys. He testified that he does not have a set work schedule and works as much as he can.

Weston testified that he was raised in Omaha, Nebraska. His mother lives in Omaha, as well as two of his siblings and their children. Weston has another son, who was 7 years old at the time of trial. He testified that he has parenting time with his older son on a regular basis and has a good relationship with that son's mother. There was also evidence that Weston's older son and Harrison get along well with each other.

Weston testified that he was present for Harrison's birth and that although the parties kept separate residences, he has helped out with Harrison since his birth. He testified that in January 2014, Stephanie cut off his contact with Harrison, which led him to file his amended complaint. After a temporary order was entered giving him set parenting time, he had regular contact with Harrison. He testified that after the temporary order was entered, he and Stephanie were getting along with each other. He would bring food over to her house, purchase clothing and diapers for Harrison, and help Stephanie out around her house. Between April and November 2014, he did various repair and improvement work on her house. He also did work on Stephanie's parents' house.

At the time of trial, Weston was living in a two-bedroom, two-bathroom house owned by a friend. Weston had been fixing up and renovating the home in lieu of rent. Weston planned to eventually buy the home.

Weston testified that in November 2014, Stephanie's father told him that he and his wife, Stephanie's mother, were thinking about buying a dog kennel business in Colorado and wanted Stephanie and Harrison to move with them. Weston told him that he did not want Harrison to move. The matter was brought up a short time later, and Weston again indicated he would not agree to Harrison's moving out of state. Stephanie subsequently cut off Weston's contact with Harrison. She also obtained an ex parte harassment protection order against Weston on November 25 which was subsequently ordered to remain in effect for 1 year and, thus, was still in effect at the time of trial. At the end of December 2014, Stephanie began allowing Weston his court-ordered parenting time again, which continued up to the time of trial. Weston testified that sometime between December 2014 and March 2015, he learned that Stephanie's parents planned to move to Weatherford, Texas, and that Stephanie wanted to move with them and take Harrison with her.

Stephanie's father testified that he had worked for an electric utility company for over 24 years and was going to retire in April 2015. He testified that he wanted to own a dog kennel business and had located one in Weatherford that he intended to purchase. Weatherford is located about 40 miles west of Fort Worth, Texas, and has a population of 25,000. The distance between Omaha and Weatherford is 664 miles, which is about a 10-hour drive.

Stephanie's father explained that the business he intended to buy was not only a boarding business, but also a grooming and breeding business, with a residence located on the property. At the time of trial, he had signed contracts to purchase the business and the residence on the same property for $450,000, but the contracts were contingent on Harrison's being able to move to Weatherford. He testified that he wants the dog kennel business to be a family business run by himself, Stephanie's mother, Stephanie, and her brother. He testified Stephanie would be the office manager for the business. He planned to pay her a salary of $40,000 per year, provide retirement benefits, and make health insurance available. He testified that Stephanie and Harrison would initially live in the home located on the property with him and Stephanie's mother. The home had three bedrooms and two bathrooms. He planned to eventually build a separate home on the property for Stephanie and Harrison.

Stephanie's father admitted that neither he nor Stephanie's mother has any experience operating a kennel and that his wife has no experience running any type of business. He has some experience with dogs, in that he has owned and raised a specific breed of dog for 18 years. He also testified that Stephanie does not have any experience operating a business, or any office experience.

Stephanie testified that she lived in a house in La Vista, Nebraska, that she purchased on her own. She testified that she had a state cosmetology license and was working full time cutting hair, making $10 per hour plus tips. She was also

working every other Friday at a restaurant/bar, making $5 per hour plus tips. Her W-2 wage and tax statement from 2014 showed that her gross earnings for the year were $30,222.19. She stated that she does not have a retirement plan with her current employer and that health insurance is available through that employer but she cannot afford it.

She explained that the reason she did not let Weston see Harrison in January 2014 was because Weston was using steroids and she was concerned about Harrison's being around him. Weston admitted that he used steroids in the past, but has not used any since January 2014.

Stephanie testified that she wants to move to Weatherford to better her life for herself and Harrison. She testified that she is not asking to move with Harrison to Weatherford to prevent Harrison from spending time with Weston.

Stephanie testified that in April 2014, she began keeping track of the times Weston exercised his parenting time. Under the temporary order, he had parenting time every other weekend and every Wednesday evening. She testified that between April 2014 and March 9, 2015, he had been late for parenting time at least 9 times and either was a "no-show" or did not keep Harrison overnight about 32 times. She further explained that since January 2015, he had regularly exercised his parenting time as set forth in the temporary order, with the exception of being late at times.

On March 31, 2015, the court entered a decree of paternity finding that Weston was the biological father of Harrison and awarding Stephanie sole legal and sole physical custody of Harrison, subject to Weston's rights of reasonable parenting time. The court denied Stephanie's request to remove Harrison from Nebraska to Texas, finding that she did not prove a legitimate reason to move.

ASSIGNMENT OF ERROR

Stephanie assigns that the trial court erred in finding that she did not prove she had a legitimate reason to relocate to Texas

and asserts that had the court found she had a legitimate reason to relocate, the evidence supported a finding that the removal to Texas would be in Harrison's best interests.

STANDARD OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Citta v. Facka*, 19 Neb. App. 736, 812 N.W.2d 917 (2012).

ANALYSIS

Removal.

[2,3] Stephanie assigns that the trial court erred in finding that she did not prove she had a legitimate reason to relocate to Texas. The court's "legitimate reason" finding comes from *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), which provides that to prevail on a motion to remove a minor child, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Id.* However, in *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009), we held that Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time. However, we noted that in a case where the children's coguardians filed a motion to remove the children to Texas, we had stated, "'[I]f the instant case is determined by the children's best interests, then we can conceive of no good reason why *Farnsworth*

. . . would not be properly included in the analytical framework to determine the children's best interests.'" *Coleman v. Kahler*, 17 Neb. App. at 529, 766 N.W.2d at 150, quoting *In re Interest of Eric O. & Shane O.*, 9 Neb. App. 676, 617 N.W.2d 824 (2000), *disapproved on other grounds, In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011). Accordingly, we stated in *Coleman* that we would give some consideration to the *Farnsworth* factors in determining custody based on the children's best interests.

We recently affirmed our holding in *Coleman* that it is appropriate to give some consideration to the *Farnsworth* factors in a case involving an initial custody determination in a paternity action. In *Shandera v. Schultz*, 23 Neb. App. 521, 876 N.W.2d 667 (2016), the mother and father had one child together, and a few months after the child was born, the mother moved to Texas with the child. The father filed a petition to establish paternity and custody. The trial court gave some consideration to the factors set forth in *Farnsworth* in determining the child's best interests and awarded the father custody. On appeal, the mother argued that the trial court erred in doing a complete *Farnsworth* analysis in a case involving an initial custody determination in a paternity action. We concluded that the trial court did not do a complete *Farnsworth* analysis, but, rather, only gave some consideration to the *Farnsworth* factors in determining what was in the child's best interests, which was appropriate based on *Coleman*.

The present case, like *Shandera* and *Coleman*, is an initial custody determination in a paternity action where one parent wants to move out of state with the parties' child. Based on *Shandera* and *Coleman*, it was proper for the trial court to give some consideration to the *Farnsworth* factors, which the trial court did when it addressed whether Stephanie had a legitimate reason to leave the state. However, the court stopped its analysis there because it concluded Stephanie did not have a legitimate reason for removal. We disagree, and find this decision by the trial court to be an abuse of discretion. We

determine, based on our de novo review of the record before us, that Stephanie had a legitimate reason for removal and that when other *Farnsworth* factors are considered in determining what is in Harrison's best interests, Stephanie should have been allowed to move.

[4-6] In regard to a legitimate reason for removal, Stephanie wants to move to Texas with Harrison because her parents are moving and buying a business. Her father wants her to be the office manager of the business and plans to pay her $40,000 per year, which is much more than she was making at her jobs in Nebraska. She will also have retirement benefits and medical insurance. Her father also testified that he plans to have Stephanie and her brother inherit the business. This court has repeatedly held that legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state. *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2013). We have also stated that such legitimate employment opportunities may constitute a legitimate reason where there is a reasonable expectation of improvement in the career or occupation of the custodial parent, or where the custodial parent's new job includes increased potential for salary advancement. *Id.* We have further held that a firm offer of employment in another state with a flexible schedule in close proximity to the custodial parent's extended family constitutes a legitimate reason for relocation. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

The job in Texas provides a reasonable expectation of improvement in Stephanie's career and includes an increased salary and other benefits. We conclude that Stephanie had a legitimate reason to remove Harrison to Texas. Having so concluded, we will give some consideration to the best interests factors described in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), in determining whether Stephanie should be allowed to move to Texas with Harrison.

[7] Under *Farnsworth*, the trial court evaluates three considerations in determining whether removal to another

jurisdiction is in the child's best interests: (1) each parent's motives for seeking or opposing the move, (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent, and (3) the impact such a move will have on contact between the child and the noncustodial parent. See *Bird v. Bird*, 22 Neb. App. 334, 853 N.W.2d 16 (2014).

[8] In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child and the parent seeking removal, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the custodial parent, because the best interests of the child are interwoven with the well-being of the custodial parent. See *Farnsworth v. Farnsworth, supra*.

Stephanie testified that she wants to move to Texas because of a job opportunity and to be close to her family. She stated that the move was not to prevent Weston from spending time with Harrison. Weston testified that he opposes the move because he wants to parent Harrison and does not want to miss any time with him while he is growing up. Weston also believes that Stephanie's mother, whom he does not get along with, will be Harrison's primary caregiver if Stephanie moves to Texas.

In regard to Harrison's quality of life, we note that both parties are good parents who love and properly care for Harrison.

Both are capable of meeting his emotional, physical, and developmental needs. Stephanie's income will be enhanced by the move, and the job at the dog kennel business will give her an opportunity she likely would not have in Nebraska. Harrison has extended family from both parents in Nebraska, but because Stephanie's parents are moving too, he will have extended family in Nebraska and Texas.

The evidence seems to indicate that allowing the move would not antagonize hostilities between Stephanie and Weston. Prior to the entry of the protection order (which has now expired), the parties were getting along and communicating well. It will be important for Stephanie's mother not to interfere with the relationship between Weston and Harrison. The record is clear that Weston and Stephanie's mother do not get along and that Weston believes she is too involved with Harrison.

The dissent posits that while Stephanie's new position may have improved both her income and her benefits, "it was in an area in which [she] had no education or training." Thus, the dissent concludes, "her ability to carry out the duties of an office manager is speculative."

[9] On the other hand, Stephanie would be working for a family business where any needed training would be readily available and certainly a generous learning curve would be provided by the owners, her parents. As noted in *Farnsworth v. Farnsworth*, 257 Neb. 242, 253, 597 N.W.2d 592, 600 (1999): "Absent some aggravating circumstance, such as an ulterior motive to frustrate the noncustodial parent's visitation rights, *significant career enrichment is a legitimate motive in and of itself*." (Emphasis supplied.)

Based on our de novo review of the record before us, we determine that it would be in Harrison's best interests to allow Stephanie to move with him from Nebraska to Texas. Thus, we conclude that the trial court erred in denying Stephanie's request to remove Harrison from Nebraska.

Cross-Appeal.

The cover of Weston's brief indicates a cross-appeal, and he alleges that the trial court erred in considering the harassment protection order to deny his request for custody.

[10,11] Under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014), a party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant. *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015). Thus, the cross-appeal section 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 facts. *Id.* Other than setting forth an assigned error, there is no cross-appeal set forth in a separate division of the brief as required by our court rules. Therefore, we do not consider the merits of Weston's purported cross-appeal.

CONCLUSION

We conclude that the trial court abused its discretion in denying Stephanie's request to remove Harrison from Nebraska to Texas. Accordingly, we reverse the district court's finding denying Stephanie's request to remove Harrison to Texas and remand the matter to the district court to establish parenting time for Weston that takes into account the distance between the parties.

Reversed and remanded with directions.

Riedmann, Judge, dissenting.

I respectfully disagree with the conclusion of the majority that the district court abused its discretion in determining that Stephanie did not have a legitimate reason for removing Harrison from Nebraska. Based on the evidence, the district court concluded that the success of the kennel business and the expectation that Stephanie's career would improve were too speculative to constitute a legitimate reason for removal. Without analysis, the majority simply concludes that because Stephanie's father plans to employ Stephanie in his new venture and because her parents are moving to Texas, her reason

for removal was legitimate and the district court's failure to conclude otherwise was an abuse of discretion.

Based upon my de novo review of the record, and particularly those facts set forth below, I find no abuse of discretion in the trial court's determination that the evidence was too speculative to constitute a legitimate reason for removal and I would affirm the district court's decision.

STANDARD OF REVIEW

As stated in the dissent in *Schrag v. Spear*, 22 Neb. App. 139, 175, 849 N.W.2d 551, 577 (2014), *reversed on other grounds* 290 Neb. 98, 858 N.W.2d 865 (2015), the standard of review should "significantly control[] the outcome in this case." Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id*.

FACTS

In addition to the facts set forth in the majority opinion, the following are relevant to the analysis of whether the trial court abused its discretion in denying removal: Stephanie's father was employed at one of a utility company's nuclear stations at the time of trial. Like Stephanie, he has no college degree or experience operating a dog kennel, nor does Stephanie's mother. He testified it had "been a dream of [his] for 20 years" to own a dog kennel. And although he had signed a purchase agreement for a kennel in Texas, contingent upon Stephanie's being allowed to remove Harrison, the

Martinez family was not moving to Texas unless Harrison could go. In Stephanie's father's words, "No one is leaving without Harrison."

As to the operation of the business, Stephanie's father testified that he wanted the business to initially be family-run, but stated, "[I]f we're successful and can grow this, I will need help down the road at some point, possibly." Despite his optimism in operating this business, he had a contingency plan, testifying that "if things went south, [he] would go get a job in Weatherford."

The location of the kennel was happenstance; the Martinez family does not have any relatives in the area and had originally considered purchasing a kennel in Colorado.

ANALYSIS

I agree with the majority that the district court analyzed this case within the proper framework of our case law, first determining custody and then considering whether Stephanie had a legitimate reason for removing Harrison to Texas. I disagree, however, that when the proper standard of review is utilized, the district court abused its discretion in finding no legitimate reason for removal. To be an abuse of discretion, the decision must be based upon untenable or unreasonable reasons or must be "clearly against justice or conscience, reason, and evidence." *Schrag v. Spear*, 290 Neb. at 104-05, 858 N.W.2d at 873.

In *Schrag*, the Nebraska Supreme Court highlighted the importance of our standard of review in relocation cases:

> We have previously observed that parental relocation cases are "among the most complicated and troubling" cases that courts must resolve. This is so because of the competing and often legitimate interests of the parents in proposing or resisting the move, and because courts ultimately have the difficult task of weighing the best interests of the child at issue "which may or may not be consistent with the personal interests of either or both

> parents." In these cases, courts are required to balance the noncustodial parent's desire to maintain [his or her] current involvement in the child's life with the custodial parent's chance to embark on a new or better life. It is for this reason that such determinations are matters initially entrusted to the discretion of the trial judge, and the trial judge's determination is to be given deference.

290 Neb. at 105, 858 N.W.2d at 873, quoting *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), and citing *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014).

The threshold issue with respect to removal is whether the custodial parent had a legitimate reason for the proposed relocation. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). The Nebraska Supreme Court has held that job-related changes may be legitimate reasons for moving where there is a "'"reasonable expectation of improvement in the career or occupation of the custodial parent"'" and where the custodial parent's new job included increased potential for salary advancement. *Jack v. Clinton*, 259 Neb. 198, 205, 609 N.W.2d 328, 333 (2000), quoting *Farnsworth v. Farnsworth, supra*. Where there are career advancement opportunities, a desire to be in close proximity to extended family may also constitute a legitimate reason for removing a minor child. *Jack v. Clinton, supra*.

While the evidence reveals that Stephanie's father intended to employ her in a more lucrative position with better benefits, it was in an area of employment in which Stephanie had no education or training. In prior cases allowing removal based on career advancement, the job opportunities were in the same or related areas of work in which the custodial parent had past experience, education, or training. See, e.g., *Farnsworth v. Farnsworth, supra*; *Jack v. Clinton, supra*; and *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2013). While most employment positions do not guarantee a definite term of employment, they virtually always require that the employee be qualified for the position. Given Stephanie's lack

of managerial skills, her ability to carry out the duties of an office manager is speculative.

Moreover, the job opportunity arises only if Stephanie is allowed to move Harrison to Texas. Her father's purchase agreement is contingent upon the court's allowing Stephanie to remove Harrison. Her father testified that "[n]o one is leaving without Harrison." This means that if removal is denied, Stephanie's father is not buying the business and there is no job for Stephanie. This presents a different scenario than the cases in which removal was allowed based upon a firm employment offer. Therefore, although a $40,000 job with benefits is better than what Stephanie presently has, given the circumstances of the job offer, it was not an abuse of discretion for the district court to find the employment too speculative to be the basis for a legitimate reason for removal.

Aside from Stephanie's lack of training, experience, or education to fulfill the duties of an office manager, the business at which this position is proposed is a new venture for Stephanie's family. No one in her family has any training, experience, or education in operating a dog kennel. This is not a situation in which a custodial parent is being offered a position at an established company in another state. Even Stephanie's father had a contingency plan to "get a job in Weatherford" if "things went south."

In discussing the legitimacy of a custodial parent's motives for relocating, which is part of the "'threshold question'" of whether the parent has a legitimate reason for moving, the Nebraska Supreme Court, in *Schrag v. Spear*, 290 Neb. 98, 107, 858 N.W.2d 865, 874 (2015), found no abuse of discretion in a trial court's determination that relocation was not necessary in order to establish a new living arrangement and support system. The district court's conclusion was based upon the fact that "both of those factors were entirely dependent upon the continuation of her relationship" with a man whom the custodial parent "had known for approximately 1 year." *Id.* at 107, 858 N.W.2d at 875. Affirming the district court's decision

denying removal, the Supreme Court stated that the record clearly reflected that the custodial parent's living arrangements "offered no assurance of stability or permanency for herself or her child." *Id.* at 109, 858 N.W.2d at 876. In essence, the court determined the relationship was too tenuous to support a legitimate reason.

Likewise, in the present case, Stephanie's proposed move is based upon tenuous circumstances. She is accepting a job for which she has no experience, training, or education, with a company whose management also has no experience, training, or education. These are sufficient facts upon which the district court could properly determine that Stephanie's employment opportunities are too speculative to be the bases for a legitimate reason for removal.

Nor is Stephanie's desire to relocate near extended family a legitimate reason for removal, in light of the facts that the Martinez family was still in Nebraska at the time of trial and that Stephanie's father testified the family would not pursue the business opportunity if removal were denied.

Based upon the above facts, the trial court's decision to deny removal because Stephanie did not have a legitimate reason for removal was neither untenable nor unreasonable; nor was it clearly against justice, conscience, reason, or evidence. I would therefore affirm the district court's decision.

L. Joe Stehlik, Personal Representative of the Estate of Joseph M. Rakosnik, deceased, appellee, v. Michael C. Rakosnik et al., appellants.

881 N.W.2d 1

Filed May 17, 2016. No. A-15-318.

1. **Agency: Principal and Agent.** Nebraska law regarding power of attorney is concerned with the potential for abuse and fraud that exists when a fiduciary has broad powers to control another person's property.
2. **Principal and Agent: Fraud: Gifts: Proof.** A party establishes a prima facie case of fraud by showing that an attorney in fact used the principal's power of attorney to make a gift of the principal's assets to himself or herself or to make a gift to a third party with a close relationship to the attorney in fact.
3. **Principal and Agent: Fraud: Gifts: Proof: Intent.** Once a prima facie case of fraud is established, the burden shifts to the fiduciary to demonstrate that the gift was (1) made pursuant to power expressly granted in the power of attorney document and (2) made pursuant to the clear intent of the donor. The fiduciary also bears the burden of proving the fairness of the transaction.
4. **Principal and Agent: Gifts.** A blanket power to gift is not effective to authorize self-dealing. Where a fiduciary argues that a power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument.
5. ____: ____. Where a power of attorney does not expressly permit gratuitous self-dealing transfers, a principal's oral authorization is not effective to empower the agent to utilize broad powers in the power of attorney instrument to make gifts.
6. **Trusts: Property: Title: Equity: Proof.** A party seeking to establish a constructive trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to

the rules of equity and good conscience, hold and enjoy the property so obtained.

7. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.

Appeal from the District Court for Pawnee County: Daniel E. Bryan, Jr., Judge. Affirmed.

David W. Watermeier and Andrew K. Joyce, of Morrow, Poppe, Watermeier & Lonowski, P.C., for appellants.

Jeffery W. Davis and Jeffrey A. Gaertig, of Smith, Schafer, Davis & Gaertig, L.L.C., for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Riedmann, Judge.

INTRODUCTION

Michael C. Rakosnik, Linda I. Rakosnik, and Susan M. Muell (collectively the Rakosniks) appeal from a summary judgment order of the district court for Pawnee County concerning transfers of real and personal property made to them by their brother, Lewis D. Rakosnik, under a power of attorney he held for their uncle, Joseph M. Rakosnik (Mike). On appeal, the Rakosniks argue that two of the transfers were valid gifts in accordance with their uncle's intentions and the power of attorney he executed. After review of the record, taking facts in the light most favorable to the Rakosniks, we disagree and affirm the judgment of the district court.

BACKGROUND

The evidence offered and received at the summary judgment hearing reveals the following events: Lewis and the Rakosniks were the only nieces and nephews of Mike. In February 2011, Lewis moved to Mike's home at the request of Mike's longtime companion, Evelyn Doeschot (Evelyn), who lived with Mike but could no longer take care of him alone. When Lewis moved in with Mike and Evelyn, Mike was undergoing hospice care and it was uncertain how long he would live.

In March 2011, Lewis obtained a power of attorney that granted him broad powers over his uncle's property. Mike's longtime attorney, L. Joe Stehilk, prepared the power of attorney. The plenary power clause of the power of attorney document gives Lewis "all powers over my estate and affairs which I can or could exercise, including but not limited to the power to make gifts."

Transfers of Mike's Property.

Lewis utilized the power of attorney to make transfers of Mike's money and real property to himself and the Rakosniks. In June 2011, he cashed his uncle's Edward Jones account and transferred some of the proceeds to the Rakosniks and their spouses. In August 2011, Lewis transferred his uncle's farm property to himself and the Rakosniks, reserving a life estate for his uncle. During this time period, Lewis also utilized certain funds from his uncle's checking account for personal use.

Lewis stated that these transfers were a "protective measure" to prevent Stehlik and Evelyn from obtaining Mike's property. As the basis for these fears, Lewis cited a sale of 160 acres of Mike's land to a neighbor in January 2011. After conversations with his uncle, Lewis believed that his uncle had not planned to sell the land but had been influenced by Stehlik. He also found it to be suspicious that Stehlik charged Mike for preparation of a new abstract for the sale when Mike's original abstract was in Mike's safe deposit box. The Rakosniks also argue that the transfers were made in order to avoid probate.

Lewis stated that he learned about an Edward Jones account from a conversation with Evelyn and then utilized his power of attorney to request information about that account from Edward Jones. Lewis discussed the account with Mike and came to the understanding that the money was "to go to [Mike's] kin," that is, Lewis and the Rakosniks. In depositions, the Rakosniks testified that they never discussed their uncle's finances or estate planning with Mike before his death.

However, Linda later submitted an affidavit stating that on August 7, 2011, she sat with Mike at her parents' house and discussed transferring the farm property to her and her siblings to avoid probate.

Lewis consulted an attorney regarding how to avoid probate for his uncle's estate. The attorney prepared a warranty deed transferring the farm property to Lewis and the Rakosniks and reserving a life estate in Mike. Lewis testified in a deposition that he had conversations with Mike prior to transferring the farm property and that in particular, he discussed the deed with Mike to explain it and "make sure . . . it was okay" the day before Lewis signed it.

In August 2011, Evelyn moved out of the farmhouse where Mike lived and Lewis was staying. On January 31, 2012, Lewis was arrested. Mike died on April 27. Following a jury trial, Lewis was convicted of 39 counts of abuse of a vulnerable adult and theft by deception. The victim was Mike.

Mike's Wills.

Beginning in 1988, Mike executed a series of wills leaving the bulk of his estate to Lewis and the Rakosniks. Mike's 2005 will, which was in effect at the time of the transfers at issue in this case, devised Mike's real property to Lewis and the Rakosniks, subject to a life estate in the farmhouse to Evelyn, and with the condition that the land must stay in the family name and not be sold or mortgaged outside the family during the lifetime of Lewis and his siblings.

Lewis testified that he discussed the will with Mike in May 2011 and that Mike told him having the farm stay in the family name was not really important to him.

On March 1, 2012, Mike executed a new will that disinherited Lewis and the Rakosniks. Stehlik testified that on March 1, Mike called him stating that his nieces and nephews were a "bunch of crooks" who had betrayed him. Stehlik stated that this telephone call was prompted by a newspaper article Mike read about the criminal charges against Lewis. Stehlik

understood that Mike was also upset upon learning that Lewis had conveyed a remainder interest in all of Mike's farmland to himself and his siblings. Mike's March 1 will makes no mention of his farmland, unlike his previous wills. The will also makes no mention of Lewis and the Rakosniks. The March 1 will devises a rolltop desk and chair to Evelyn, makes a series of specific devises to other family members and charity, and leaves the residuary of Mike's estate to a charity. It also nominates Stehlik to serve as personal representative of the estate, just as the prior wills did.

After preparing the March 1, 2012, will, Stehlik asked Steve Kraviec, an attorney, to prepare another will for Mike. Stehlik had a poor relationship with the Rakosnik siblings and felt it would be less contentious if the will effective at Mike's death had been prepared by another attorney. Stehlik provided Kraviec with the March 1 will. On March 5, Kraviec met with Mike and prepared an additional will, which Mike signed on March 10. The only difference between the March 1 will and the March 10 will was the insertion of an alternate personal representative in the event Stehlik was unable to serve. Following a will contest, a jury determined that the March 10 will was the valid will of Mike.

In July 2013, Stehlik filed an action alleging breach of fiduciary duty, conversion, and civil conspiracy and seeking to reclaim the farm property and other funds for the estate. The parties filed cross-motions for summary judgment. After a hearing, the district court granted summary judgment in favor of the estate. The court ordered the farm property to be placed in constructive trust and, following a further hearing on damages, ordered Lewis and the Rakosniks to repay money damages to the estate. The Rakosniks appeal from those orders.

ASSIGNMENTS OF ERROR

The Rakosniks assign on appeal, restated and reordered, that the district court erred in (1) determining that no genuine

issue of material fact exists on the issue of whether Lewis had authority to transfer the farm property, (2) determining that no genuine issue of material fact exists as to whether Lewis breached his fiduciary duty by distributing the contents of the Edward Jones account, (3) imposing a constructive trust on the farm property, (4) finding there was no evidence that Mike knew Lewis had transferred the farm property and Edward Jones account, and (5) determining that the appellants were collaterally estopped from litigating breach of fiduciary duty related to the transfers.

STANDARD OF REVIEW

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. *Grammer v. Lucking*, 292 Neb. 475, 873 N.W.2d 387 (2016). When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted. *Zornes v. Zornes*, 292 Neb. 271, 872 N.W.2d 571 (2015). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.* Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute. *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014).

ANALYSIS

Constructive Fraud.

As an initial matter, we note that the events in this case occurred before the effective date of the new provisions of the Nebraska Uniform Power of Attorney Act, which includes new statutory requirements for gifts made via power of attorney.

See Neb. Rev. Stat. §§ 30-4024 & 30-4040 (Cum. Supp. 2014). Undoubtedly, the standard for interpreting gifting powers in future powers of attorney will be impacted by the requirements of this act. Therefore, this case should be understood to reflect analysis under the previously existing law before the enactment of the Nebraska Uniform Power of Attorney Act.

The Rakosniks' first two assignments of error involve whether genuine issues of material fact existed that precluded the district court from finding on summary judgment that Lewis' transfer of farm property and the Edward Jones account proceeds to his siblings breached his fiduciary duties.

[1-3] Nebraska law is concerned with the potential for abuse and fraud that exists when a fiduciary has broad powers to control another person's property. See *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009). Because of this concern, the Nebraska Supreme Court has held that a party establishes a prima facie case of fraud by showing that an attorney in fact used the principal's power of attorney to make a gift of the principal's assets to himself or herself or to make a gift to a third party with a close relationship to the attorney in fact. *Id.* Whether the fiduciary acted in good faith or had actual intent to defraud is immaterial; when these circumstances are shown, the law presumes constructive fraud. *Id.* Once a prima facie case of fraud is established, the burden shifts to the fiduciary to demonstrate that the gift was (1) made pursuant to power expressly granted in the power of attorney document and (2) made pursuant to the clear intent of the donor. The fiduciary also bears the burden of proving the fairness of the transaction. *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007).

The evidence presented at the summary judgment hearing indisputably establishes that Lewis used Mike's power of attorney to make gifts to himself and his siblings, the Rakosniks. This established a prima facie case of fraud. We therefore address whether there is a genuine issue of material fact as to whether the gifts were made pursuant to power expressly

granted in the power of attorney and were made pursuant to Mike's clear intent.

Lewis' Transfer of Farm Property.

We first consider whether the Rakosniks have met their burden to demonstrate that Lewis' transfer of the farm property was authorized by the power of attorney and made pursuant to Mike's clear intent.

Power Granted in Power of Attorney.

[4] The power of attorney granted Lewis "all powers over my estate and affairs which I can or could exercise, including but not limited to the power to make gifts." A blanket power to gift is not effective to authorize self-dealing. Where a fiduciary argues that a power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003). A long line of Nebraska Supreme Court cases have held that "no gift may be made by an attorney in fact to himself or herself unless the power to make *such a gift* is expressly granted in the instrument and there is shown clear intent on the part of the principal to make *such a gift*." *Archbold v. Reifenrath*, 274 Neb. 894, 901, 744 N.W.2d 701, 707 (2008) (emphasis supplied). See, also, *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998); *Mischke v. Mischke*, 247 Neb. 752, 530 N.W.2d 235 (1995).

Further, courts in other jurisdictions have held based upon the same policy concerns that the broad power to gift in a power of attorney is ineffective to empower a fiduciary to make a self-dealing gift without a specific statement that self-dealing is permissible. For example, in *Bienash v. Moller*, 721 N.W.2d 431, 436 (S.D. 2006), the South Dakota Supreme Court upheld summary judgment against fiduciaries who utilized a power of attorney that contained a power to "make gifts" to make changes to the principal's financial instruments

that benefited themselves. Citing *Crosby v. Luehrs, supra*, the South Dakota court held that the power to gift did not authorize self-dealing gifts.

Even if a transaction is not a direct gift, but indirectly promotes the fiduciary's interest, it is still considered self-dealing. See *id*. (finding funds that eventually pass through principal's estate to fiduciary constitute unauthorized self-dealing).

[5] Additionally, where a power of attorney does not expressly permit gratuitous self-dealing transfers, a principal's oral authorization is not effective to empower the agent to utilize broad powers in the power of attorney instrument to make gifts. See, *Cheloha v. Cheloha, supra* (oral authorization to make gifts to agent's wife and child were ineffective because power of attorney did not contain power to make gifts); *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989) (adopting rule that power to make any gift must be expressly granted in power of attorney instrument itself; oral authorization to gift is ineffective).

Mike's power of attorney authorized Lewis to "make gifts." However, the power of attorney did not authorize Lewis to self-deal; therefore, Lewis had no authority to effectuate a self-interested transfer of the farm property. See *Crosby v. Luehrs*, *supra*.

Although the Rakosniks attempt to distinguish Lewis' transfer of farm property to them from his transfer of farm property to himself, it is not possible to divide the transaction in this manner. Lewis transferred all of the farm property via a single warranty deed from Mike to himself and the Rakosniks as tenants in common each enjoying an undivided interest in the property, subject to a life interest in Mike. Lewis effectuated the transaction by affixing a single signature on the warranty deed. The power of attorney, therefore, either did or did not grant him the power to sign that deed and effectuate that transfer; any attempt to partition the farm property transfer into separate transfers to Lewis and to each of his siblings is an inaccurate description of the manner in which Lewis and

the Rakosniks chose to structure the transfer and would at most be legal fiction.

We find that the warranty deed, which transfers an undivided interest in the farm property to Lewis and the Rakosniks equally in a single transaction, involves gratuitous self-dealing that is not authorized by the power of attorney. See *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003) (holding that where fiduciary argues that power of attorney allowed for self-dealing, that power must be specifically authorized in instrument). Although the power of attorney contains the power to gift, the farm property transfer inextricably involves self-dealing, which must be explicitly authorized in a power of attorney. Because the power of attorney did not authorize self-dealing, Lewis did not have the power to sign the warranty deed as prepared. We agree with the trial court's determination that the transfer was void ab initio. Because the defendants cannot show that the power of attorney authorized Lewis to sign the warranty deed transferring property to himself and his siblings, we affirm the district court's grant of summary judgment regarding the farm property transfer without reaching the intent prong of the analysis.

Transfer of Edward Jones Account.

As to the Edward Jones account, our analysis differs. As noted above, Stehlik has established a case for constructive fraud by showing that Lewis had a power of attorney and used that power of attorney to make gifts of Mike's property to his siblings. See *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009). We note that Lewis did not directly take a share of the investment account, but, rather, put "his share" into Mike's account, from which Lewis made unauthorized withdrawals for his own benefit. Because the transfers of the Edward Jones account proceeds are separable from any self-dealing gifts to Lewis himself, we find that the gifting power in the power of attorney is sufficient to authorize these gifts and we turn to the intent prong of the analysis. See *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007).

Given the gifting power in the power of attorney, the propriety of this transfer rests upon whether evidence in the record, when viewed in the light most favorable to the Rakosniks, could support a finding that Mike clearly intended to transfer the Edward Jones account funds to Lewis' siblings before his death.

The Rakosniks argue that the gifting power in the power of attorney, Lewis' conversations with Mike, and the fact that the 2005 will left the Rakosniks the residuary of Mike's estate together create an inference that Mike authorized the transfer. We disagree.

Lewis testified in a deposition that he learned about the Edward Jones account through a conversation with Evelyn and that he then utilized his power of attorney to telephone Edward Jones and learn the specifics of the account. He discussed the account with Mike and gained the understanding that the money was "to go to [Mike's] kin." This testimony does not establish that Mike instructed Lewis to disburse the Edward Jones account immediately rather than waiting for the money to pass via the will after Mike's death.

Additionally, the fact that Lewis and the Rakosniks were the remainder beneficiaries of Mike's 2005 will does not demonstrate Mike's clear intent to give them the contents of his Edward Jones account during his lifetime. A will is evidence only of a person's plan for the disposition of his property upon his death and does not establish donative intent for an inter vivos gift.

Because there is no evidence in the record that Lewis distributed the Edward Jones account pursuant to the clear intention of Mike, the district court did not err in granting summary judgment to Stehlik on this issue.

Constructive Trust.

The Rakosniks next argue that the district court erred in imposing a constructive trust over the farm property because the transfer was valid and not procured by fraud.

[6] A party seeking to establish a constructive trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007).

As discussed above, we disagree with the Rakosniks that the farm transfer was proper. The deed involved self-dealing by Lewis, and the power of attorney does not expressly allow for self-gifting. Accordingly, Lewis cannot rebut Stehlik's prima facie case of constructive fraud. See *id.* Given our above analysis and following a de novo review of the record taking all facts in the light most favorable to the Rakosniks, we hold that the district court did not err in finding that the Rakosniks' title to the farm property was procured by fraud and that they should not equitably be allowed to enjoy the property. Accordingly, this assignment of error is without merit.

Knowledge of Transfers.

[7] The Rakosniks next assign that the district court erred in finding that there was no evidence on the record that Mike knew of the transfers. Mike's *knowledge* of the transfers, however, would not defeat summary judgment. The question on summary judgment is whether there are genuine issues of *material* fact. *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008). A fact is material only if it would affect the outcome of the case. *Id*. The relevant inquiry is not whether Mike knew of the transfers but whether Mike clearly intended for Lewis to make the transfers. *Eggleston v. Kovacich, supra*. We have determined, on de novo review, that Lewis presented no evidence that Mike clearly intended him to transfer the Edward Jones account during Mike's lifetime. And because the farmland transfer involved self-dealing which was not expressly authorized in the power of attorney, Mike's

knowledge of this transfer is also not material. Accordingly, the district court's finding of fact regarding his knowledge of the transfers is not an issue of material fact.

Issue Preclusion.

The Raksoniks finally assign that the district court erred in finding that they were precluded by Lewis' prior criminal convictions from litigating whether Lewis' transfers were breaches of his fiduciary duties. Given our determination above that Lewis' transfers breached his fiduciary duties, we need not reach the issue of whether the Rakosniks' arguments also fail because they are precluded by collateral estoppel. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 868 N.W.2d 67 (2015).

CONCLUSION

We determine that the district court did not err in determining on the merits of the issues that Stehlik was entitled to summary judgment as a matter of law. Accordingly, we affirm the judgment of the district court.

Affirmed.

State of Nebraska on behalf of Carter W., a minor child, appellee, v. Anthony W., defendant and third-party plaintiff, appellee, and Cynthia H., third-party defendant, appellant.

879 N.W.2d 402

Filed May 31, 2016. No. A-15-158.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Visitation: Appeal and Error.** Parenting time determinations are also matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
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. **Child Custody: Appeal and Error.** In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Child Custody.** Courts typically do not award joint legal custody when the parties are unable to communicate effectively.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

Jerry L. Soucie for appellant.

Linsey A. Camplin and Jessica Ledingham, Senior Certified Law Student, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Pirtle, Judge.

INTRODUCTION

Cynthia H. appeals from an order of the district court for Lancaster County determining custody, parenting time, and child support for the minor child, Carter W. Cynthia challenges the court's decision to grant joint legal and physical custody, and she asserts the court failed to follow the local court rules in determining the parties' respective parenting time. For the reasons that follow, we affirm.

BACKGROUND

Cynthia and Anthony W. began a relationship in the summer of 2009 and conceived a child in January 2010. They moved in together in the summer of 2010, and their son, Carter, was born in September. Their romantic relationship ended in September 2011.

Immediately after the parties' separation, Anthony's parenting time with Carter was not specifically scheduled and the time and duration varied. On January 26, 2012, the Lancaster County Attorney filed a complaint to establish support, and Anthony's acknowledgment of paternity was attached. Anthony agreed to the child support calculation proposed by the county attorney. A referee's report was filed stating that Carter resided with Cynthia and that Anthony was able and capable of supporting Carter. The report contained the parties' stipulation to the amount of support to be provided to Cynthia by Anthony. Anthony was not represented by counsel and testified that he was not aware that the referee's report reflected a stipulation that Cynthia had, or should have, sole custody of Carter.

In April 2013, the parties agreed to split their time with Carter on a "week on/week off" basis. Cynthia said she anticipated the schedule would end in September. In August 2013, Anthony filed a complaint for determination of custody and parenting time and sought decisions regarding issues including temporary and permanent custody, parenting time, and child support. In September, Anthony filed a motion for temporary custody and requested temporary legal and physical custody or, in the alternative, joint legal and physical custody of Carter.

A hearing on the motion for temporary custody was scheduled for November 18, 2013, and the parties were to be allowed one-half hour to present evidence. The hearing was continued to December 19. Both parties testified, and the court received multiple exhibits without objection. The exhibits included Anthony's affidavit and proposed child support calculation, Cynthia's proposed parenting plan and child support calculation, and the income statements of both parties.

On December 23, 2013, the district court entered a temporary order granting joint legal and physical custody with an exchange of physical custody occurring on a weekly basis. A hearing on Anthony's complaint for determination of custody and parenting time occurred on November 17, 2014. Cynthia and Anthony both testified.

Anthony testified that he began working at a retail store in Lincoln on September 27, 2014. He works from 8 a.m. to 5 p.m., except for one night per week, when he closes the store, and he receives $50,000 per year for this occupation. He testified that he decided to work there because the schedule allowed him to spend more time with Carter and that it offered an increased salary. He was previously employed by a detention center and a social services organization. He was still considered an on-call employee for both of those employers, but he had not worked any shifts since he began working for the retail store.

Anthony testified that he moved multiple times in the year prior to the hearing. He testified that in December 2013, he moved from a one-bedroom apartment to ensure that Carter would have a room of his own. In 2014, he canceled his lease in anticipation of a move into a home with his girlfriend, but the home was not available right away because of remodeling delays. As a result, he moved into his girlfriend's apartment, and then into the home when it became available in November. He testified that he signed an 18-month lease at that time and has no plans to move. He stated that he plans to remain in a long-term relationship with his girlfriend.

Anthony testified that when he picks up Carter from daycare, they play and cook dinner together, then Carter takes a bath, and they watch TV or read books before bedtime. Anthony testified that the parties have been complying with the week on/week off parenting schedule and that he believed it was "going really great." He testified that he does not believe that continuing with this schedule would be disruptive to Carter or his education in the future.

The parties agreed to exchanges of Carter at daycare, and the few face-to-face exchanges which occurred took place in public or with a third party present. Cynthia testified that she believed Anthony should continue to be actively involved in Carter's life and in decisions which affect it. She said it is "of value that [he] has a very good relationship with his son."

Cynthia testified that she works full time as a program specialist for the State of Nebraska. She began her job as a part-time employee in February 2013 while she finished her master of science degree, and she was hired as a permanent employee in May 2013.

She testified that she was concerned that week on/week off parenting time would cause instability and anxiety. She said it could cause stress which would impact Carter's sleeping patterns, behavior, cognitive functioning, and ability to focus in school.

Cynthia testified that at times she smelled the odor of alcohol on Anthony, when she knew he had been out the night before. She testified that there were times that she did not want Carter to go with Anthony, but her concerns regarding alcohol use did not prevent her from letting Carter leave with him. There was one instance when she did not allow Carter to leave because Anthony arrived late and it was Carter's naptime. These instances were prior to the temporary order of the district court.

Anthony testified that in February 2014, he drove under the influence of alcohol and hit a parked vehicle with his vehicle. Anthony was fined for driving under the influence of alcohol and sentenced to 14 days of house arrest. He has an ignition interlock device in his vehicle and has not had any violations of that device. He testified that he has not had anything to drink since that incident occurred, and at the temporary hearing, he stated that he never picked up Carter while under the influence of drugs or alcohol.

On January 30, 2015, the district court entered an order placing legal and physical custody of Carter jointly with Cynthia and Anthony. The court incorporated the parenting plan proposed by Anthony and ordered Anthony to pay child support in the amount of $60 per month.

The parenting plan provided for parenting time with each parent every other week, with the exchange to occur at 4 p.m. on Friday. Recognizing that cooperation between the parents is in the child's best interests, the plan provided that the parents should not disparage or denigrate the other parent and that they should cooperate "to the fullest extent necessary" to foster and promote a safe, secure, and loving environment for the child. The parents were to cooperate and inform each other about medical, religious, educational, social, and extracurricular matters. The plan provided that the parties should communicate regarding these matters in a "communication notebook" which would be transferred with the child to the other parent at the end of each parenting time period. The

district court also incorporated the mediated agreement of the parties regarding holidays, vacations, and special occasions, as well as the agreement that the primary means of communication between the parties should be through text message. The parties agreed that the text messages would be limited to issues regarding Carter and that there would be only one message conversation initiated per day.

Cynthia timely appealed the order of the district court.

ASSIGNMENTS OF ERROR

Cynthia asserts the district court erred in awarding joint legal and physical custody, and she asserts the court failed to follow the local court rules in determining the parties' respective parenting time.

STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

[2] Parenting time determinations are also matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Aguilar v. Schulte*, 22 Neb. App. 80, 848 N.W.2d 644 (2014).

[3,4] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Schrag v. Spear, supra.* A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.*

[5] In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court

considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

ANALYSIS

The district court found that legal and physical custody of Carter was to be placed jointly with Cynthia and Anthony. The court specifically found that both parties were fit and proper parents to have custody, and it provided a plan for communication between them in the interest of mutual participation and cooperation for the benefit of the child. Part of this plan included the use of a communication notebook in which the parties would document important information so the other parent would be fully informed at the end of each parenting time period.

Cynthia asserts that joint custody should be an option only if the parties can communicate in an open and supportive manner and asserts that the agreement to communicate through one text message conversation per day and a weekly exchange of a communication notebook is evidence that the court erred in determining that joint legal and physical custody was in Carter's best interests. Cynthia argues the joint custody determination was not accompanied by any "attempt to explain why such a cumbersome communications plan made any sense or was in any way, shape, or form in Carter's best interest." Brief for appellant at 32.

[6] The Parenting Act defines "[j]oint legal custody" as "mutual authority and responsibility of the parents for making mutual fundamental decisions regarding the child's welfare, including choices regarding education and health." Neb. Rev. Stat. § 43-2922(11) (Cum. Supp. 2014). We acknowledge that courts typically do not award joint legal custody when the parties are unable to communicate effectively. *State on behalf of Maddox S. v. Matthew E.*, 23 Neb. App. 500, 873 N.W.2d 208 (2016). However, a trial court's decision to award joint legal or physical custody can be made without parental agreement

or consent so long as it is in the child's best interests. *Id.* Neb. Rev. Stat. § 42-364(3) (Cum. Supp. 2014) states:

> Custody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both, (a) when both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) if the court specifically finds, after a hearing in open court, that joint physical custody or joint legal custody, or both, is in the best interests of the minor child regardless of any parental agreement or consent.

Section 42-364 has also been applied to custody disputes in paternity actions. See *State on behalf of Maddox S. v. Matthew E., supra*. See, also, *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981).

The district court specifically found that both parents are fit and proper parents and that cooperation between them is in Carter's best interests. The court chose not to favor one parent over the other with regard to parenting time or legal custody.

In affording such deference to the trial courts, appellate courts have in some instances declined to reverse trial court decisions where joint custody has been awarded or maintained even when the evidence demonstrates a lack of communication or cooperation between parents. For example, in *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015), the Nebraska Supreme Court affirmed a district court's denial of a father's request to modify from joint legal custody to sole legal and physical custody despite an apparent inability of the parties to parent cooperatively with one another. The Supreme Court stated as follows: "Given the record in this case, and given our standard of review and deference to the trial court's determinations with respect to the credibility of the witnesses, we cannot say that the court's denial of the modification of custody was clearly untenable or an abuse of discretion." *Id*. at 87, 871 N.W.2d at 243.

Likewise, in *State on behalf of Maddox S. v. Matthew E., supra*, this court affirmed the district court's modification of the parenting plan in spite of the parents' communication difficulties. The modification specifically divided joint legal custody responsibilities between the parties in a manner that would minimize contact and conflict between them. We gave deference to the district court's attempt to find a workable solution to protect the child's best interests despite the "power struggle" between the parties. *Id.* at 520, 873 N.W.2d at 220.

In this case, the parties have demonstrated the ability to communicate regarding matters affecting Carter between the temporary order in December 2013 and the hearing in November 2014. Anthony testified that the parties have communicated mostly by text and telephone and that he felt it has been working. He testified that he felt they could reasonably discuss and come to a solution on any issues regarding Carter in the future. Cynthia testified that she believed a joint custody arrangement would cause instability and anxiety and that communication with Anthony has followed a pattern of "power and control." She testified that the mediated agreement placed boundaries on the text messages between the parties because they did not engage in healthy communication. The text messages submitted as evidence contained an exchange regarding the parties' prior relationship which would be outside of the boundaries set by the parties. Cynthia testified that the messages were designed to manipulate her emotions. However, there was no showing that the messages were exchanged after the parties agreed in mediation to limit the content of the messages to only information about Carter, and the language used was not violent, vulgar, or abusive. There is little evidence that the parties have not been able to communicate for the benefit of the minor child.

Cynthia asserts that awarding joint physical and legal custody when the parties are unable to communicate represents a "default disposition" by the trial court and is contrary to

established case law that joint custody is not favored by the courts of this state. Brief for appellant at 32. Contrary to her assertions, however, the trial court's order was specifically tailored to the evidence presented and did not represent a default disposition. The district court respected the parties' agreement to place boundaries on their communication, and the order incorporated the partial mediated agreement, including their agreement to initiate only one text message conversation per day. The order attempted to further facilitate healthy communication by ensuring that each party is fully informed about important issues related to Carter through the use of a communication notebook. The notebook allows an exchange of information on a weekly basis, while the option of one daily text message conversation allows for information to be shared on a day-to-day basis as needed. Upon our de novo review of the record, we find the district court did not abuse its discretion in devising a plan for communication which will hopefully minimize conflict between the parties.

Cynthia also asserts that Anthony's "performance during 2014 between the temporary custody award and the final hearing was nothing short of a disaster" and that therefore joint custody is inappropriate. Brief for appellant at 37. The evidence shows that Anthony made mistakes, including driving under the influence of alcohol. However, he has complied with court orders and changed his behavior, avoiding the consumption of alcohol to ensure the same mistakes will not happen again. In addition, the evidence shows that although Anthony changed jobs and moved several times in 2014, these changes were made to provide a stable, more long-term living situation for Carter and allow them to spend more time together.

Appellate courts review custody decisions for an abuse of discretion and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). See, also, *Aguilar v. Schulte*, 22 Neb.

App. 80, 848 N.W.2d 644 (2014). Upon our de novo review, we find the district court did not abuse its discretion in finding joint custody was in Carter's best interests.

Cynthia also asserts the district court erred "when it failed to comply with local rule 3-9 and grant parenting time to [Anthony] as set forth in Third Judicial Local Rule 3-9 Appendix Form 3." Brief for appellant at 38. According to the local rules, Appendix Form 3 is "a standard parenting time schedule which, in the absence of unusual circumstances, the court finds provides reasonable parenting time for the noncustodial parent in cases in which the parties are unable to agree otherwise." Rules of Dist. Ct. of Third Jud. Dist. 3-9(F)(a) (rev. 2013). Having determined the district court did not abuse its discretion in awarding joint custody, we find it would not have been proper to use Appendix Form 3. That form applies when allocating parenting time between custodial and noncustodial parents, and in this situation, the parties hold joint physical and legal custody. The district court's final order incorporated an exhibit which contained the parties' partially mediated agreement. The mediated agreement addressed issues including expenses incurred on behalf of the child, parenting time for holidays, vacations and special occasions, communication between the parties, and how disagreements or modifications would be handled. The mediated agreement was offered at the hearing and received without objection. We find the district court did not err in incorporating a parenting time schedule other than the schedule provided in Appendix Form 3.

CONCLUSION

For the reasons stated above, we affirm the order of the district court granting joint legal and physical custody.

Affirmed.

Lacey M. Kenner, appellant, v. Ryan James Battershaw, appellee.

879 N.W.2d 409

Filed May 31, 2016. No. A-15-776.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
3. **Modification of Decree: Child Custody: Proof.** Before custody of a minor child may be modified based upon a material change in circumstances, it must be shown that the modification is in the best interests of the child.
4. **Child Custody.** Courts determining custody and parenting arrangements must consider (1) the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (2) the desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning; (3) the general health, welfare, and social behavior of the minor child; (4) credible evidence of abuse inflicted on any family or household member; and (5) credible evidence of child abuse or neglect or domestic intimate partner abuse.
5. ____. In addition to statutory "best interests" factors, a court making a child custody determination may consider matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's

character; and the parental capacity to provide physical care and satisfy the educational needs of the child.

6. ____. The desires and wishes of the minor child are not determinative of custody but are just a factor to be considered by the trial court, when the child is of an age of comprehension and bases those desires on sound reasoning.

Appeal from the District Court for Cherry County: Mark D. Kozisek, Judge. Affirmed.

Loralea L. Frank and Bergan E. Schumacher, of Bruner Frank, L.L.C., for appellant.

Michael S. Borders, of Borders Law Office, for appellee.

Moore, Chief Judge, and Inbody and Riedmann, Judges.

Riedmann, Judge.

INTRODUCTION

Lacey M. Kenner appeals from an order of the district court for Cherry County modifying a paternity decree and awarding Ryan James Battershaw custody of the parties' minor child. After a de novo review of the record, we find that the trial court did not abuse its discretion, and accordingly, we affirm its modification order.

BACKGROUND

Kenner and Battershaw have one son, Brayden Battershaw, who is the subject of the custody modification order before us. He was born in December 2006. Although Kenner and Battershaw never married, the three of them lived together for approximately 1½ years after Brayden was born. A decree of paternity was entered in 2010, and a stipulated agreement and modified parenting plan was entered in 2012. The parties have followed the 2012 parenting plan since it was entered; Brayden lives with Kenner a majority of the time, but Battershaw exercises significant parenting time for 1 full week each month and every other weekend during the school year. In the summer, the parties each exercise 6 weeks of parenting time.

At the time of trial, Kenner and Battershaw had each married other people, and Brayden has a warm, bonded relationship with both parents and both stepparents. Kenner also has two younger children with her husband. With Kenner and her husband, Brayden enjoys riding horses, "playing with Legos," going to church, swimming, fencing, haying, playing baseball, and entering rodeos. With Battershaw and his wife, Brayden enjoys playing board games and video games, fishing, hunting, swimming, playing basketball, spending time outdoors, going on road trips, and building cars. Battershaw has also recently coached him in summer soccer and baseball. Brayden was described during testimony as a happy child who makes friends easily and is socially involved. He also has excellent reports from school.

Kenner and Battershaw each have routines when parenting their son. Kenner is a stay-at-home mother and is available to care for him and his half siblings after school and in the summers. Battershaw and his wife both work full time. Battershaw works at a tire store, and his wife works at a law office. After school or during the day in the summertime when Battershaw is working, Brayden can go to the store with his father, go to his stepmother's office, read books in the library across the street from the office, or spend time with other family in Valentine, Nebraska, where Battershaw lives.

At the time the current parenting schedule was agreed to and entered, Battershaw lived in Valentine and Kenner lived on a ranch south of Wood Lake, Nebraska, which is near Valentine. Beginning in August 2014, Kenner's husband had disagreements with his father about the operations of the family ranch and ultimately lost his job working there. Both parties and their spouses searched for a new source of employment for Kenner's husband in the Valentine area; however, they were unable to find employment in that area that met the family's income, housing, and livestock housing needs. Kenner's husband eventually obtained employment in Emmett, Nebraska, which is approximately a 1½-hour drive from the family's

former home. Kenner's husband moved to and began employment in Emmett in January 2015.

Because of the distance of the Kenners' move, Kenner filed a complaint to modify the parties' paternity decree and custody arrangement, seeking full physical and legal custody of Brayden and asking to remove Battershaw's full week each month from the parties' parenting time schedule. Battershaw answered and filed a countercomplaint for modification also seeking custody of Brayden. While awaiting trial on her motion to modify, Kenner rented a home in Wood Lake so that Brayden could finish the school year there and continue the parties' current parenting plan. The family spent weekends in Emmett during the school year. At the end of the school year, Kenner moved to Emmett with her husband, Brayden, and her other children.

Both Kenner and Battershaw testified at trial that they are able to provide for their son's needs in their homes. If Brayden were to live with Battershaw, he would attend school in Valentine. Although Battershaw could continue to provide transportation for him to school in Wood Lake, that school has only four students enrolled, and the Battershaws own a home across the street from the elementary school in Valentine. If Brayden lived with the Kenners, he would live near the ranch outside Emmett and attend school in Atkinson, Nebraska.

During the trial, the court also conducted an in camera interview with Brayden and asked, among other things, whether he had a preference as to custody. We have considered the contents of this sealed interview in our de novo review of the record.

At the close of evidence, the district court took the matter under advisement, noting the difficulty of having to award custody to one parent or the other given what a good job the parents had done raising their son under their prior coparenting plan. In a written order modifying the decree, the district court awarded custody to Battershaw, and Kenner appeals.

ASSIGNMENT OF ERROR

Kenner assigns on appeal that the district court abused its discretion when it granted Battershaw custody of Brayden.

STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.* A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.*

ANALYSIS

Change of Circumstances.

[2] Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Schrag v. Spear, supra*. A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.*

While even an out-of-state move does not automatically constitute a change of circumstances, a significant move may be a change of circumstances warranting modification depending upon other evidence. See *id.* In this case, the parties' agreed parenting plan involved Brayden spending every other weekend and 1 full week per month with Battershaw. See *id.* Kenner's move 100 miles away from Battershaw makes it impractical to impossible for the parties to maintain this schedule, particularly during the school year.

The district court determined that the parties' prior parenting plan constituted a joint physical custody plan and that modification was necessary to accommodate the move. Referencing *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013), the district court found that although the parties' stipulated parenting plan stated that Kenner previously had physical custody of Brayden, in fact the parties' fairly even split of time and share of day-to-day parenting constituted a joint physical custody arrangement. Neither party appeals this determination. The parties asserted, and the district court agreed, that the move at issue in this case makes the custody plan of the prior decree unworkable and constitutes a change in circumstances warranting a custody modification. We agree.

Best Interests.

Kenner argues that the district court abused its discretion in determining that the best interests of Brayden were met by granting custody to Battershaw. We disagree.

[3,4] Before custody may be modified based upon a material change in circumstances, it must be shown that the modification is in the best interests of the child. *Schrag v. Spear, supra*. Courts determining custody and parenting arrangements must consider (1) the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (2) the desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning; (3) the general health, welfare, and social behavior of the minor child; (4) credible evidence of abuse inflicted on any family or household member; and (5) credible evidence of child abuse or neglect or domestic intimate partner abuse. Neb. Rev. Stat. § 43-2923 (Cum. Supp. 2014).

[5] In addition to these statutory "best interests" factors, a court making a child custody determination may consider matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered

by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the parental capacity to provide physical care and satisfy the educational needs of the child. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

In this case, the evidence at trial demonstrates that Brayden has strong connections to each of his parents and stepparents. He enjoys activities with both households. Brayden appears to be in generally good health and thriving in school under the parties' prior coparenting arrangement. The record contains no evidence of abuse by either party, nor any suggestion of parental unfitness.

[6] The district court noted that during the in camera interview, Brayden expressed a preference to live and attend school in Valentine, with his father. Section 43-2923 provides for consideration of the child's wishes if the child is of an age of comprehension and the child's reasoning is sound. Kenner argues that an 8-year-old child is not old enough to express an opinion that may be considered by the court. We disagree. Kenner cites no authority for the proposition that an 8-year-old child may not be "of an age of comprehension" as required by the statute for the court to consider a child's preference. See § 43-2923. The record reveals that the minor child was 8½ years old at the time of trial. In his interview, Brayden expressed an understanding of the complexity of the decision and articulated relevant components of consideration, including routines, scheduling, proximity to activities, and the home and school environments. Of course, the desires and wishes of the minor child are not determinative of custody but are just a factor to be considered by the trial court, when the child is of an age of comprehension and bases those desires on sound reasoning. See *Adams v. Adams*, 13 Neb. App. 276, 691 N.W.2d 541 (2005). However, we see no evidence that

the district court regarded this factor as determinative, as Kenner argues.

The remaining factors to be considered encompass the stability, environment, and relationships to be impacted by either custody choice. *Schrag v. Spear, supra*. In either household, Brayden would experience some change and disruption of the parties' prior schedule, while also enjoying certain kinds of stability. Bradyen has more ties to the Valentine area, where he has previously lived, than to the Emmett area, although he has some acquaintances in both locations. We also note that Brayden has previously spent more time living with his mother and siblings, but has spent significant time being parented day-to-day by both parents. While all testimony suggested that both homes are emotionally nurturing, the home environments have differences. In particular, Brayden has younger half siblings at Kenner's home and no siblings at Battershaw's home. Testimony suggested benefits both to being raised among siblings and to receiving the attention of an only child. In short, the record revealed that either parent could provide for the child emotionally and physically.

Kenner argues that the district court should have given more weight to keeping Brayden in a home with his half siblings. In so arguing, she notes that it is generally sound public policy to keep children together when a marriage is dissolved. *Ziebarth v. Ziebarth*, 238 Neb. 545, 471 N.W.2d 450 (1991). However, this is not a dissolution of marriage case where the custody of all children is being determined as a result of the parties' divorce. Only Brayden's custody is being determined by these proceedings, and a rule requiring him to be kept with his half siblings would mean that a parent having children with a former or subsequent spouse would automatically give that parent preferred status. While a bond with half siblings is certainly an emotional environmental factor that the district court should take into consideration, the focus is on the relationship between the siblings and whether separation will have a detrimental effect on the child. See *Ritter v. Ritter*,

234 Neb. 203, 450 N.W.2d 204 (1990). The district court's order evinces that it considered the relationship between the children and concluded that separation of Brayden from his half siblings would not be detrimental. We disagree with the argument that the district court erred in inadequately considering this factor.

Given the record before us, we cannot find that the district court abused its discretion in awarding custody to Battershaw. An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.* In this case, the district court detailed its thoughtful consideration of the evidence in a difficult case. Following a careful de novo review of the record, we find no abuse of discretion.

CONCLUSION

Following a de novo review of the record, we find no abuse of discretion by the district court and accordingly affirm its order.

Affirmed.

State of Nebraska, appellee, v. Dominick L. Dubray, appellant.

883 N.W.2d 399

Filed June 7, 2016. No. A-15-627.

1. **Search and Seizure: Appeal and Error.** The denial of a motion for return of seized property is reviewed for an abuse of discretion.
2. **Search and Seizure: Property: Presumptions: Proof.** 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.
3. **Property: Presumptions: Proof.** A presumption of ownership is created by exclusive possession of personal property, and evidence must be offered to overcome that presumption.
4. **Search and Seizure: Property: Proof.** One in possession of property has the 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.
5. ____: ____: ____. 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.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Box Butte County: Travis P. O'Gorman, Judge. Reversed and remanded for further proceedings.

Dominick L. Dubray, pro se.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Moore, Chief Judge, and Inbody and Riedmann, Judges.

Moore, Chief Judge.

INTRODUCTION

Dominick L. Dubray appeals from an order of the district court for Box Butte County partially denying his motion for return of seized property. For the reasons set forth below, we reverse the order of the district court and remand the cause for further proceedings.

BACKGROUND

Prior Proceedings

The circumstances of the present appeal arise from Dubray's February 2012 arrest and convictions for the murders of Catalina Chavez and Mike Loutzenhiser in Alliance, Nebraska. See *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). Dubray's motion for rehearing was denied January 29, 2015. Dubray and Chavez were in a relationship and had lived together for 2 to 3 years in Alliance with their child and Chavez' older child from a previous relationship. Chavez' 16-year-old half brother had also been living at the house since June 2011. Loutzenhiser, who lived in Scottsbluff, Nebraska, was Chavez' stepfather and the father of Chavez' 16-year-old half brother. On Friday, February 10, 2012, Loutzenhiser arrived in Alliance for a visit. Dubray murdered Chavez and Loutzenhiser the following morning, February 11, at the residence. During the subsequent murder investigation, police officers collected a number of items from the residence. Dubray's motion for return of seized property, at issue in the current appeal, seeks the return of several of these items.

Current Proceedings

On May 11, 2015, Dubray filed a motion for return of seized property. The motion requested the return of the following items collected during the murder investigation: a "[b]lack and silver colored i-pod"; a "black i-pod with a rubberized cover containing 3 [M]onster [energy drink logos]"; a "black purse with pink playboy bunny logo" containing $219.98 in cash; a "black carhartt coat size 2xL"; a pair of gray size 13 athletic shoes; a wooden jewelry box containing "3 necklaces, 2 nec[k]lace pendants, 1 clasp, 28 rings, 3 watches, 2 bracelets, 2 sets of earrings and 1 penny"; and a jewelry holder "shaped like a cone containing [a] headband, a set of gold colored earrings, a beaded necklace, a bracelet, and 1 beaded earring."

Dubray alleged that the property is being held in violation of Neb. Rev. Stat. § 29-818 (Cum. Supp. 2014) and that this property should be returned to him, as the rightful owner. In his accompanying affidavit in support of his motion, Dubray stated that none of the requested items were introduced or otherwise used as evidence at trial. Additionally, Dubray alleged that the county has failed to provide him with any notice of intent to initiate forfeiture proceedings regarding the seized property, in violation of due process.

On June 24, 2015, a hearing on the motion was held before the district court. Dubray appeared pro se via telephone. No evidence was presented at the hearing by either party; rather, only the unsworn statements and arguments of Dubray and counsel for the State were given. The State conceded that the "Carhartt coat [and] size 13 athletic shoes" belonged to Dubray, stating that the evidence at trial supported his ownership of these items. However, the State objected to the balance of the motion for the reason that Dubray had not shown that he is the actual owner of the property. Counsel for the State expressed a belief that the other items listed in the motion belonged to Chavez, but provided no supporting evidence. Responding to the alleged due process violation, the State

argued that it had insufficient time since the issuance of the mandate on the direct appeal to ascertain ownership of the property. Dubray responded, claiming that more than 20 of the rings contained in the jewelry box are men's rings and stating that any returned property would go to the child of Dubray and Chavez.

Later that day, the court entered an order on Dubray's motion. The court granted the motion with respect to the coat and shoes and ordered these items be returned to Dubray immediately. The court denied the motion with regard to the remaining items for "failure to prove ownership."

Dubray subsequently perfected this appeal.

ASSIGNMENTS OF ERROR

Dubray assigns, restated, that the district court erred in partially denying his motion for return of seized property. Dubray also alleges that the failure to return the property violated his constitutional due process and property ownership rights.

STANDARD OF REVIEW

[1] The denial of a motion for return of seized property is reviewed for an abuse of discretion. *State v. Agee*, 274 Neb. 445, 741 N.W.2d 161 (2007).

ANALYSIS

Denial of Motion for Return of Seized Property

Section 29-818 establishes that "property seized under a search warrant or validly seized without a warrant shall be safely kept by the officer seizing the same . . . and shall be so kept so long as necessary for the purpose of being produced as evidence in any trial." Neb. Rev. Stat. § 29-820 (Cum. Supp. 2014) specifies that, unless otherwise directed by this statute or law of Nebraska, when certain 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," and that all other property "shall be disposed of in such manner as the court in its sound discretion shall direct."

The controlling case in Nebraska relied upon by both parties is *State v. Agee, supra*. In that case, Timothy E. Agee was suspected of being involved in an ongoing scheme to use checks and fraudulent driver's licenses to make purchases at local department stores. A search warrant was executed at Agee's residence and various items were seized. Ultimately, Agee's theft by deception charge was dismissed by the State although Agee was convicted of unlawful possession with intent to deliver marijuana as a result of evidence discovered during the execution of the search warrant.

Agee filed a motion for return of property seized from his home during the execution of the search warrant; specifically, "3 watches, 1 diamond bracelet, 2 cellular telephones, 10 assorted articles of clothing, an unspecified number of photographs, and Agee's wallet and Social Security card." *Id.* at 447, 741 N.W.2d at 164. Agee alleged that the items were not illegal per se and that they had value to him. At the telephone hearing at which Agee appeared pro se, counsel for the State represented that some of the items were stolen property, that some of the items had already been returned to a department store, and that it had no record of other items. Agee indicated he had receipts for some of the items. No evidence was adduced at the hearing by either party. Nevertheless, in reaching its decision, the court noted the statements by counsel concerning items that were stolen, returned, and not in existence. The court overruled Agee's motion except as to his Social Security card and photographs, which were ordered returned.

[2-5] On appeal, the Nebraska Supreme Court recognized that 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. *State v. Agee*, 274 Neb. 445, 741 N.W.2d 161 (2007). In response to the State's primary contention on appeal that Agree presented no evidence supporting his claim to the property, the court found that this argument "misapprehends the burden of proof in such a proceeding." *Id.* at 450, 741 N.W.2d at 166. The court went on to recognize the following propositions:

> 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 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.

Id. at 450-51, 741 N.W.2d at 166-67.

The Supreme Court in *Agee* concluded that the district court erred in relying on the representations made by counsel that the property was stolen instead of demanding evidence relevant to the State's allegations. The Supreme Court therefore found that the district court abused its discretion by substantially denying Agee's motion without requiring the State to submit evidence supporting its continued retention or disposition of the property. *State v. Agee, supra*.

Similar to the State's arguments in *Agee*, the State in the instant case argues that Dubray failed to present evidence supporting his claim to the property. The State relies upon

the language quoted above from *Agee* that the presumption of ownership is created by the *exclusive* possession of the claimed property. The State asserts that because other people resided with Dubray, he was unable to demonstrate that the property seized from his residence was in his exclusive possession, and that therefore, he was not entitled to the presumption of ownership and the burden to show otherwise was not placed on the State. Additionally, the State emphasizes that the nature of the property, particularly the purse, jewelry box, jewelry holder, and corresponding contents, opposes Dubray's claim of ownership. Lastly, the State asserts that as a matter of policy, Dubray should not receive the property of his murder victims. We are not persuaded by the State's arguments.

In Agee's underlying criminal case, in response to his argument that the evidence was insufficient to show that he lived at the residence where the contraband was found, we noted that other people besides Agee resided at the residence and perhaps even occupied the same bedroom as Agee. See *State v. Agee*, No. A-05-1153, 2006 WL 2129117 (Neb. App. Aug. 1, 2006) (not designated for permanent publication). Thus, Agee was arguably not in exclusive possession of the items seized from the residence. Although this argument was apparently not presented to the Supreme Court in Agee's appeal of the denial of his motion for return of property, the court nevertheless applied the presumption of ownership in favor of Agee.

As in *State v. Agee, supra*, we conclude that once the criminal proceedings against Dubray were concluded, Dubray was presumptively entitled to the return of property seized from him. The State did not overcome that presumption by presenting evidence of a cognizable claim or right of possession adverse to Dubray's. The district court erred in substantially denying Dubray's motion without requiring the State to submit such evidence. The district court's order denying Dubray's motion is reversed, and the cause is remanded for further proceedings.

[6] Because we are reversing and remanding for further proceedings, we need not address Dubray's due process argument. See *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

CONCLUSION

Dubray was presumptively entitled to the return of property seized from him, and the State did not present evidence justifying its refusal to do so. The district court's order denying Dubray's motion is reversed, and the cause is remanded for further proceedings.

Reversed and remanded for further proceedings.

Denice Hillyer, appellant, v. Midwest Gastrointestinal Associates, P.C., and Bradley Schroeder, M.D., appellees.

883 N.W.2d 404

Filed June 14, 2016. No. A-15-138.

1. **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.
2. ____: ____: ____. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
3. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries.
4. **Rules of Evidence: Words and Phrases.** Pursuant to Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
5. **Rules of Evidence.** Pursuant to Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
6. ____. Pursuant to Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008), evidence which is not relevant is not admissible.

7. **Evidence: Malpractice: Negligence: Informed Consent.** Evidence of risk-of-procedure or risk-of-surgery discussions with the patient is generally irrelevant and unfairly prejudicial where the plaintiff alleges only negligence, and not lack of informed consent.
8. **Testimony: Appeal and Error.** Error in the admission of irrelevant and inadmissible testimony does not require reversal if the trial court gave a sufficient curative instruction.
9. **Jury Instructions: Presumptions.** It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.

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

Greg Garland, of Greg Garland Law, Tara DeCamp, of DeCamp Law, P.C., L.L.O., and Kathy Pate Knickrehm for appellant.

Brien M. Welch and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

Moore, Chief Judge, and Irwin and Bishop, Judges.

Bishop, Judge.

Denice Hillyer brought a medical malpractice action against Bradley Schroeder, M.D., and his employer, Midwest Gastrointestinal Associates, P.C. (MGI), based on alleged negligence in the course of performing a colonoscopy. The district court for Douglas County entered judgment on the jury's verdict in favor of Dr. Schroeder and MGI.

Hillyer appeals, alleging the trial court erred in allowing evidence of Dr. Schroeder's discussions with Hillyer and other patients regarding risks and complications associated with colonoscopies. We find that under the circumstances of this case, it was error to allow evidence of such discussions by Dr. Schroeder, because the medical malpractice action did not include a claim for lack of informed consent, making such evidence irrelevant as to whether Dr. Schroeder deviated

from the standard of care. However, any error in admitting such evidence does not constitute reversible error given the trial court's curative instruction to the jury. Accordingly, we affirm.

BACKGROUND

On August 17, 2011, Hillyer went to a medical facility in Omaha, Nebraska, for a screening colonoscopy. Dr. Schroeder performed the colonoscopy. During the colonoscopy, Hillyer's colon was perforated. As a result of the perforation, Hillyer required emergency surgery to repair the perforation, was hospitalized for several weeks, and had an ileostomy bag for 5½ months until a subsequent surgery was performed. She had various other injuries, both physical and emotional, and incurred more than $300,000 in medical expenses.

Hillyer initially filed a complaint against Dr. Schroeder and MGI for medical malpractice alleging professional negligence and lack of informed consent. However, in her amended complaint, Hillyer alleged only professional negligence; her claim for lack of informed consent had been withdrawn. Specifically, Hillyer alleged that Dr. Schroeder was negligent because he used excessive force while performing a colonoscopy on her and that such excessive force caused the shaft of the "colonoscope" to perforate her colon.

Hillyer filed a motion in limine asking that the following matters not be mentioned in the jury's presence:

> 15. All medical consent forms, including but not limited to, consent to treat and perform the colonoscopy. . . .
>
> 16. Any discussion that [Hillyer] was aware of the risks and complications of colonoscopies. . . .
>
> 17. Any discussion regarding the practice and/or routine of explaining risks of procedures to patients.

Hillyer sought exclusion of the above matters on the basis of "NRE 402 Relevance, 403 Relevance outweighed." In their amended response to Hillyer's motion in limine, Dr. Schroeder and MGI did not object to paragraph 15. They did however object to paragraphs 16 and 17, arguing:

> This evidence is relevant to establish the facts and circumstances leading to the perforation in this case. The average layperson has undergone a medical procedure and has experienced an informed consent discussion with his/her physician. Accordingly, members of the jury may be led to incorrectly infer that such a conversation did not occur in this matter between Dr. Schroeder and [Hillyer] if Dr. Schroeder is prohibited from discussing that such a conversation did occur prior to the procedure. Additionally, this discussion is relevant to establishing the facts and circumstances of the procedure at issue and Dr. Schroeder's recollection of his interactions with [Hillyer].

During a hearing on the motion in limine, the trial court sustained Hillyer's motion with regard to paragraph 15, citing no objection by Dr. Schroeder or MGI. However, the trial court reserved ruling on paragraphs 16 and 17.

During the jury trial, the only real issues were whether Dr. Schroeder used excessive force during Hillyer's colonoscopy (thereby deviating from the standard of care) and, if so, the extent of Hillyer's damages. Hillyer testified regarding the injuries she sustained, the treatment she underwent, and the damages she incurred as a result of her perforated colon.

Hillyer's expert, Dr. Mark Molos, testified that the standard of care requires a physician performing a colonoscopy to "advance the scope under the appropriate amount of exertion or pressure." Based on his review of the case, Dr. Molos opined that Dr. Schroeder breached the standard of care by applying excessive force and pressure, which resulted in a "shaft loop" perforation of Hillyer's colon. Dr. Molos testified that "[a] shaft loop perforation by definition is caused by excessive pressure and force." He also opined that only excessive force would cause a perforation the size that Hillyer had, which was 6 to 7 centimeters. On cross-examination, Dr. Molos agreed that just because a patient has a medical complication does not mean that the doctor fell below the standard of care, that

complications can and do occur even when the doctor provided excellent care, and that perforations can occur even when the doctor is meeting the standard of care.

Dr. Schroeder's expert, Dr. Alan Thorson, testified that perforations are a known and accepted complication of colonoscopies and that a colon perforation can occur even when the best medical care is provided. Dr. Thorson disagreed with Dr. Molos' testimony that a large perforation like Hillyer's could have occurred only due to excessive force. Dr. Thorson opined that Hillyer's abdominal adhesions were a proximate cause of her perforation. According to Dr. Thorson, adhesions can hold the colon in a more fixed position, and when doing a colonoscopy, the endoscopist "can end up with a pressure against the colon that's enhanced because of the fixation of the adhesions even though [the endoscopist] might be putting very acceptable pressure [sic]"; the endoscopist might not even feel resistance when advancing the scope. Based on his review of the case, Dr. Thorson opined that Dr. Schroeder met the standard of care and did not use excessive force while performing Hillyer's colonoscopy.

Both experts had their credibility challenged. For example, Dr. Molos was questioned regarding his honesty, personal history of being sued for malpractice, and long history of testifying in medical malpractice cases (usually on behalf of plaintiffs). And Dr. Thorson was questioned regarding potential bias in favor of Dr. Schroeder due to patient referrals.

Dr. Schroeder testified regarding the steps he takes before doing colonoscopies: He meets the patients, gets their health histories, does a physical examination, and then begins the consent process. Over Hillyer's repeated objections, Dr. Schroeder was allowed to testify that with every patient, he goes through the list of complications and risks for the procedure, including perforations and the potential need for surgery, the alternatives, and the fact that a patient does not even have to do the examination. Hillyer also objected to Dr. Schroeder's testimony that he goes through the same process every time and

has had patients refuse the procedure after discussion. Dr. Schroeder was further allowed to testify, over objection, that he discussed potential complications and risks, including perforation and the potential need for surgery, with Hillyer prior to her colonoscopy.

Dr. Schroeder testified that he did not encounter resistance while performing Hillyer's colonoscopy and did not use excessive force to advance the colonoscope. He stated he met the standard of care when he performed Hillyer's colonoscopy.

The jury returned a unanimous verdict in favor of Dr. Schroeder and MGI, and the court entered judgment accordingly. Hillyer timely appeals.

ASSIGNMENTS OF ERROR

Hillyer assigns that the trial court abused its discretion and committed prejudicial error in allowing evidence of Dr. Schroeder's discussions with Hillyer and other patients regarding risks and complications associated with colonoscopies.

STANDARD OF REVIEW

[1] 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. *Gallner v. Larson*, 291 Neb. 205, 865 N.W.2d 95 (2015).

[2] In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

ANALYSIS

[3] In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries. *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d

460 (2008). In the instant case, there was no dispute that Hillyer's colon was perforated during a colonoscopy performed by Dr. Schroeder. The only real issues at trial were whether Dr. Schroeder used excessive force during Hillyer's colonoscopy (thereby deviating from the standard of care) and, if so, the extent of Hillyer's damages.

As stated above, prior to trial, Hillyer filed a motion in limine to exclude evidence of any discussions (with Dr. Schroeder) that she was aware of the risks and complications of colonoscopies and any discussion regarding the practice or routine of explaining risks of procedures by Dr. Schroeder with his patients. The reasons cited in Hillyer's motion were "NRE 402 Relevance, 403 Relevance outweighed." At the hearing on the motion, the trial court reserved ruling as to these discussions. In its order on the motion in limine, which was not filed until the day after the jury returned its verdict in the case, the court said it had reserved ruling as to these discussions but "sustained as to the actual consent form and phrases contained in medical records stating 'After receiving informed consent.'"

[4-6] Pursuant to Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), "[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008). Evidence which is not relevant is not admissible. Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008).

During trial, Dr. Schroeder was allowed to testify, over Hillyer's repeated objections, regarding his discussions with Hillyer about the risks and complications of colonoscopies

and regarding his practice or routine of explaining risks of procedures to his patients. These are the "discussion[s]" which were at issue in Hillyer's motion in limine and on which the trial court had reserved making a ruling. As discussed next, we conclude it was error to allow such testimony.

Although this is a case of first impression in Nebraska, cases from other jurisdictions suggest that evidence of informed consent and risk-of-surgery discussions is irrelevant and unfairly prejudicial where a plaintiff alleges only negligence, and not lack of informed consent. By our count, eight states have addressed the issue. Of those eight, one state specifically dealt with risk-of-surgery discussions, rather than consent forms. See *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004). Six states dealt with evidence of both risk-of-surgery discussions and consent forms. See, *Hayes v. Camel*, 283 Conn. 475, 927 A.2d 880 (2007); *Matranga v. Parish Anesthesia of Jefferson*, 170 So. 3d 1077 (La. App. 2015); *Schwartz v. Johnson*, 206 Md. App. 458, 49 A.3d 359 (2012); *Waller v. Aggarwal*, 116 Ohio App. 3d 355, 688 N.E.2d 274 (1996); *Warren v. Imperia*, 252 Or. App. 272, 287 P.3d 1128 (2012); *Brady v. Urbas*, 111 A.3d 1155 (Pa. 2015). And one state dealt solely with evidence of the actual consent forms in a negligence action. See *Baird v. Owczarek*, 93 A.3d 1222 (Del. 2014). All of the aforementioned cases found the evidence inadmissible.

In *Wright v. Kaye, supra*, a patient brought a medical malpractice action against her surgeon, alleging he negligently performed a procedure. The patient filed a motion in limine seeking to exclude any testimony regarding preoperative discussions between her and her surgeon concerning the risks of surgery. The patient argued that because she did not claim the surgeon failed to obtain her informed consent, any testimony concerning discussion of the risks of surgery was not relevant to either negligence or causation and would only confuse the jury. The trial court denied the motion, ruling, "'If you don't show that [the doctor advised the patient concerning any risk prior to surgery], immediately you've implied that maybe this

doctor is negligent to begin with.'" *Id.* at 528, 593 S.E.2d at 317. On appeal, the Virginia Supreme Court determined that under the facts of that case, the trial court's ruling was erroneous. The Virginia Supreme Court stated:

> In resolving this issue, it is a particularly salient fact that [the patient] does not plead or otherwise place in issue any failure on the part of the [surgeon] to obtain her informed consent. Her claim is simply that [the surgeon] was negligent by deviating from the standard of care in performing the medical procedure at issue.
>
> Seen in that context, evidence of information conveyed to [the patient] concerning the risks of surgery in obtaining her consent is neither relevant nor material to the issue of the standard of care. Further, the pre-operative discussion of risk is not probative upon the issue of causation: whether [the surgeon] negligently performed the procedure.
>
> [The patient's] awareness of the general risks of surgery is not a defense available to [the surgeon] against the claim of a deviation from the standard of care. While [this patient] or any other patient may consent to risks, she does not consent to negligence. Knowledge by the trier of fact of informed consent to risk, where lack of informed consent is not an issue, does not help the plaintiff prove negligence. Nor does it help the defendant show he was not negligent. In such a case, the admission of evidence concerning a plaintiff's consent could only serve to confuse the jury because the jury could conclude, contrary to the law and the evidence, that consent to the surgery was tantamount to consent to the injury which resulted from that surgery. In effect, the jury could conclude that consent amounted to a waiver, which is plainly wrong. *See Waller v. Aggarwal,* 116 Ohio App.3d 355, 688 N.E.2d 274, 275-76 (1996).

Wright v. Kaye, 267 Va. 510, 528-29, 593 S.E.2d 307, 317 (2004). Accordingly, the Virginia Supreme Court held that the

trial court erred in failing to grant the motion in limine regarding preoperative discussions concerning the risks of surgery. The court reversed the summary judgment in favor of the surgeon and remanded the cause for further proceedings.

In *Hayes v. Camel*, 283 Conn. 475, 927 A.2d 880 (2007), the patient filed a medical malpractice action against a neurosurgeon and his assistant based on alleged negligence in the course of performing a surgery. The patient filed numerous motions in limine seeking to preclude the admission of documentary or testimonial evidence pertaining to informed consent and preclude any discussion or argument pertaining to his injuries as a "'"risk of the procedure."'" *Id.* at 480, 927 A.2d at 885. The trial court denied the motions. At trial, the court did not permit the words "informed consent" to be used, and it refused to admit the consent forms into evidence. On appeal, the plaintiff claimed that the trial court improperly denied his motions in limine to preclude, and overruled his objections to, the admission of evidence that included (1) the surgeon's testimony that he informed the plaintiff that nerve damage was a risk of the surgery and (2) notes to that effect from the preoperative consultation between the plaintiff and the surgeon. The sole issue on appeal was whether, in a medical malpractice action without a claim of lack of informed consent, the trial court properly admitted testimonial and documentary evidence that the defendant surgeon had informed his patient of the risks of the medical procedure in question. The Connecticut Supreme Court, after citing *Wright v. Kaye, supra*, and *Waller v. Aggarwal*, 116 Ohio App. 3d 355, 688 N.E.2d 274 (1996), said:

> We conclude that the trial court abused its discretion when it admitted evidence of the risks of the [surgery] in the form of their disclosure to the plaintiff. The admission of evidence that [the surgeon] had told the plaintiff of those risks, namely, his testimony and the office notes to that effect, implicates the concerns about jury confusion raised by our sister state courts that have considered

> the issue of the admissibility of informed consent evidence in medical malpractice cases without informed consent claims. See Conn.Code Evid. § 4-3. Put differently, admission of testimony about what the plaintiff specifically had been told raised the potential that the jury might inappropriately consider a side issue that is not part of the case, namely, the adequacy of the consent. . . . [I]t was unduly prejudicial to admit such evidence [of the risks of a surgical procedure] in the context of whether and how they were communicated to the plaintiff. Rather, such evidence is properly admitted, without this risk of confusion and inappropriate prejudice, in the form of, for example, testimony by the defendants or nonparty expert witnesses about the risks of the relevant surgical procedures generally.

Hayes v. Camel, 283 Conn. 475, 487-88, 927 A.2d 880, 889-90 (2007). Accordingly, the Connecticut Supreme Court concluded that the trial court improperly admitted the challenged evidence pertaining to whether the risks of the procedure were communicated to the plaintiff. However, the court found that such error was harmless because

> the trial court's charge to the jury specifically addressed the relationship of surgical risk and negligence, and stated that "simply because a particular injury is considered to be a risk of the procedure does not mean that a physician is relieved of the duty of adhering to the appropriate standard of care and does not mean that because the injury was a risk of the procedure injury did not result from a failure to conform to the standard of care."

Id. at 491-92, 927 A.2d at 892. The Connecticut Supreme Court presumed that the jury followed the instruction, thereby mitigating the prejudice and risks of inappropriate inferences attendant to the improperly admitted evidence.

We note that the approach among other jurisdictions is to find that evidence of informed consent and risk-of-surgery discussions is generally irrelevant where a plaintiff alleges

only negligence; they then state that even if relevant, the evidence is prejudicial. Other jurisdictions have generally not adopted a per se rule of exclusion. As noted by the Pennsylvania Supreme Court in *Brady v. Urbas*, 111 A.3d 1155 (Pa. 2015), sometimes the evidence may be relevant to the question of negligence, if, for example, the standard of care requires that the doctor discuss certain risks with the patient. And in *Viera v. Cohen*, 283 Conn. 412, 927 A.2d 843 (2007), the patient's negligence claim was based in part on the doctor's failure to properly assess her risk factors. On appeal, the doctor claimed that the trial court improperly allowed the patient's expert to testify, over the doctor's relevancy objection, as to the patient's lack of informed consent when there was no informed consent claim in the case. The Connecticut Supreme Court found that even though the patient did not assert a lack of informed consent claim, the testimony was directly relevant to the patient's claim that the doctor failed to recognize that the patient's delivery presented a risk of shoulder dystocia (i.e., when the baby's shoulders become lodged during a vaginal delivery requiring delivery of the child within minutes to avoid risk of neurological injury or death). The court said that if, as the patient's experts had testified, the standard of care would have obligated the doctor to discuss the risks of vaginal delivery with her, the doctor's failure to do so would provide evidence that he had not in fact recognized that those risks were present. The court concluded that the trial court did not abuse its discretion in concluding that the testimony was relevant. Moreover, the trial court in *Viera* expressly instructed the jury that informed consent was not an issue in the case.

[7] We hold, as a matter of first impression, that evidence of risk-of-procedure or risk-of-surgery discussions with the patient is generally irrelevant and unfairly prejudicial where the plaintiff alleges only negligence, and not lack of informed consent. However, we specifically decline to adopt a per se rule of exclusion. Given our holding, which is in accord with

other state courts, we now turn our analysis to the facts of the case before us.

The trial court allowed Dr. Schroeder to testify over objection that prior to performing a colonoscopy, it is his practice to talk to his patient about complications of the procedure and specifically list the risks and complications, including perforation and the potential need for surgery. He testified:

> I give the same consent every single time because you're required — there's basic elements of that requirement that you just have to include every time, risks, benefits, alternatives. And even the fact that they don't have to do the exam and there's other things they can do to get screened for colonoscopy [sic].

At that point, Hillyer's counsel requested a sidebar, during which the following discussion was had:

> [Hillyer's counsel]: Your Honor, we object to this line of questioning for the reasons stated, 402, 403, the motion in limine, and now he's also going — he's also using the word "consent" and going into that and we already have a sustained motion in limine regarding informed consent.
>
> [Defense counsel]: Your Honor, I think I'm following the motion in limine. We've already discussed this. He's not — if the witness was permitted to testify, he would say he actually goes for the statistical rate of perforation. But following the Court's order, he's not going to talk about that. But he has to be able to talk about how he talks to his patients and gets their permission before they undergo a procedure, and he does it every time with all of the colonoscopies. This is part of his normal practice. And I — they certainly went into it with their expert, and I did on cross-examination. It's a known risk of the procedure. So I don't know how I can't elicit that from my client.
>
> THE COURT: I think the issue that we are addressing has to do with him using the word "consent." I think

when we were discussing this in the motion in limine it was going to what the risks are and things of that nature, but we need to avoid any implication that she somehow consented to all of these risks by going through with the procedure. And I think that's in the rulings that have come out in other jurisdictions and other states. So as far as the motion in limine, the portion of the actual medical records that is the signed consent form is out, and that one phrase in the medical ruling it says after I received informed consent.

What I would say at this point on the objection is to try and steer clear of using the word "consent" when he's talking about going through the risks and things of that nature.

. . . .

. . . [W]hat we're trying to avoid here are some of the issues that have come up that we've discussed as far as there being some insinuation to the jury that she somehow assumed the risk of going through this procedure. Getting away from the actual issue of the case which is whether or not there was excessive force. . . .

[Defense counsel]: After he explains this to the patient and they understand it, because he's not — I don't want them to get the implication that he says all this to them and they don't have a choice, that they have to do this. Can he say after I explain this I make sure they understand it?

THE COURT: I don't think there's a problem with saying make sure they understand it. But when you get into saying they had a choice to do it or not to do it, I think we get into the issue that they somehow consented to all of the risks.

[Defense counsel]: Maybe the solution to all of this is maybe an instruction to the jury that you can say the patient — we can formulate one, to say that they

consented to the procedure does not mean that they consented to — that the physician would be below the standard of care in performing the procedure.

[Hillyer's counsel]: It's the word "consent." Move to strike, and ask the jury to disregard — just instruct them to disregard the use of the word "consent" if he's getting really close to the consent form.

After the sidebar, the court struck Dr. Schroeder's statement, "'I give the same consent every single time,'" and instructed the jury to disregard the same.

Direct examination of Dr. Schroeder resumed as follows:

[Defense counsel:] Doctor, since your fellowship and through your practice, do you meet with your patients and explain to them — regardless of what the procedure is, if it's an endoscopy, colonoscopy, ERCP, do you try to sit down with them and have them understand the procedure that you're about to perform?

[Hillyer's counsel]: Objection. 402, 403 again.

THE COURT: Overruled.

[Hillyer's counsel]: Motion in limine.

THE COURT: Overruled.

[Dr. Schroeder:] I don't think that I can proceed with an exam unless the person undergoing the procedure or those responsible for them truly understand what they're getting involved in.

. . . .

[Defense counsel:] And as it relates to a colonoscopy, one of the things that you try to get the patient to understand is that there are potential complications with that procedure. Is that fair?

[Hillyer's counsel]: Objection. 402, 403, motion in limine.

THE COURT: Overruled.

[Dr. Schroeder:] I do try to make sure that the patient understands those complications.

[Defense counsel:] Okay. And as it relates to perforations, do you try to get the patient to understand that that is a potential complication of the procedure?

[Dr. Schroeder:] Very much so.

[Hillyer's counsel]: Objection. 402, 403, motion in limine, and move to strike.

THE COURT: Overruled.

[Defense counsel:] And is a part of that attempt, talk to that patient so that they understand? I think you mentioned earlier to a question that one of the things that you do, you mention to the patient the potential that a perforation may occur and might require surgery; is that fair?

[Hillyer's counsel]: Objection. 402, 403, motion in limine.

THE COURT: Overruled.

At that point, Hillyer's counsel requested another sidebar, during which the following discussion was had:

[Hillyer's counsel]: This needs to stop. We're getting way — we're just spending this time on all of this stuff he tells the patients. Why don't you get to the colonoscopy?

THE COURT: What's the objection?

[Hillyer's counsel]: The objection is 402, 403, relevance, motion in limine. We're getting right to the heart of the thing we've dealt with all the time about this same issue. This is not a case about informed consent. We understand that. Let's move it.

. . . .

THE COURT: This brings up a lot of the arguments that were made at our pretrial motions, one of them being that I understand the informed consent part of it. I understand not getting into some insinuation to the jury that she somehow consented to this procedure; therefore, you just have to deal with whatever happens. The problem that I see at this point is . . . Hillyer's own

> testimony that she doesn't even remember talking to the doctor before the procedure at all. So that brings up some of this issue as far as what even happened during the procedure.
>
> So while I understand we need to get to the heart of the matter, the objection is overruled in that he's just explaining generally that he goes through the risks. He's been told not to mention anything with regard to consent. And I would expect that Counsel is not going to argue in any way that she somehow consented to what happened to her. And . . . I would ask for both sides to submit a jury instruction so I can see the language that you would like the Court to consider with regards to just because she went through with this procedure doesn't mean she somehow consented to this happening to her or that it somehow negates professional responsibility.

After the sidebar concluded, Dr. Schroeder was allowed to testify, over objection, that it is his "custom and practice to repeat the same discussion for every colonoscopy with every patient every time." He was also allowed to testify, over objection, "I ask the patient after my discussions with them if they still wish to proceed with the examination. And, yes, patients have said they didn't want to do the exam at that point, got their clothes on, went home."

Dr. Schroeder also testified about his discussions with Hillyer:

> [Defense counsel:] Would you have had a discussion consistent with what you've already testified to with . . . Hillyer about the colonoscopy and the procedure that you were about to perform and the potential complications and risk are[a]s of the procedure?
>
> [Dr. Schroeder:] Yes.
>
> [Hillyer's counsel]: Objection. 402, 403, motion in limine, move to strike and instruct the jury to disregard.
>
> THE COURT: Objection is overruled. The answer will stand.

> [Dr. Schroeder:] At the completion of this physical examination I then discussed the risks, benefits, options, complications of the examination as well as the sedation.
>
> [Defense counsel:] And would that have included, as you discussed earlier as is your custom and habit the thousands of times that you have done it, concerning a potential for a perforation and the potential need for surgery if that in fact resulted?
>
> [Dr. Schroeder:] Yes.
>
> [Hillyer's counsel]: Objection. 402, 403, motion in limine, move to strike and instruct the jury to disregard.
>
> THE COURT: Objection is overruled. The answer will stand.

We first focus on Dr. Schroeder's testimony as it relates to discussions he had with Hillyer specifically. Dr. Schroeder and MGI argue:

> Evidence that a perforation is a known risk of a colonoscopy and can occur even when a physician is complying with the standard of care is obviously relevant. It is, in fact, necessary in order that the jury not find [Dr. Schroeder and MGI] negligent solely because of the perforation.

Brief for appellees at 19. We agree. However, the problem occurs when evidence of the risks comes in the form of their disclosure to the plaintiff. See *Hayes v. Camel*, 283 Conn. 475, 927 A.2d 880 (2007). When evidence of the risks comes in the form of their disclosure to the patient (i.e., that a patient was informed of the risks), such evidence goes toward the patient's consent to the procedure, not negligence. In cases where consent is not at issue, evidence of what a patient was told raises the potential that the jury might inappropriately consider consent. To avoid confusion and inappropriate prejudice, evidence of the risks of a procedure is instead properly admitted in the form of general testimony by the defendants or nonparty expert witnesses. *Id.* The defendant or nonparty expert witnesses can testify about the risks of the relevant

surgical procedures generally (e.g., that perforations are a risk of colonoscopies), but cannot testify that the patient was informed of such risks prior to the procedure. In this manner, the jury hears evidence that something is a risk of a procedure, and is less likely to wrongly assume that the doctor was negligent just because something bad happened. But the jury will also not hear evidence that the patient was informed of the risk, and thus will not be likely to inappropriately consider consent—that if the patient consented to the procedure, he or she somehow consented to any negligence. And in the present case, experts on both sides did testify that perforations can occur even when a physician is complying with the standard of care; such testimony was proper.

However, testimony given by Dr. Schroeder relating to discussions he had with Hillyer is exactly the kind of testimony that courts in other jurisdictions have found to be irrelevant and unfairly prejudicial, given that Hillyer alleged only negligence, and not lack of informed consent. In the present case, the jury had to determine whether Dr. Schroeder used excessive force during Hillyer's colonoscopy (thereby deviating from the standard of care). Evidence of information conveyed to Hillyer concerning the risks of the procedure, including perforations, had no bearing on the issue of the standard of care. See *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004). "Put simply, what *plaintiff* was told bears no relationship to what *defendant* should have done." *Warren v. Imperia*, 252 Or. App. 272, 280, 287 P.3d 1128, 1132 (2012). Furthermore,

> [e]vidence that plaintiff was told about the risks of surgery raised the possibility that the jury might consider whether plaintiff assumed the risks of the surgery or consented to defendant's negligence. In other words, the evidence had a significant potential to confuse the jury or lead it to decide the case on an improper basis.

Id. at 281, 287 P.3d at 1132-33.

The fact that the trial court did not permit Dr. Schroeder to use the word "consent" is of no import in our final

determination; nor is the fact that the trial court granted Hillyer's motion in limine with regard to the actual consent forms. See *Hayes v. Camel*, 283 Conn. 475, 927 A.2d 880 (2007) (concluding trial court abused its discretion in admitting evidence of risks of surgery in form of their disclosure to plaintiff despite trial court's not permitting words "informed consent" to be used and refusing to admit consent forms into evidence). Nor are we persuaded by the trial court's reasoning that "Hillyer's own testimony that she doesn't even remember talking to [Dr. Schroeder] before the procedure at all . . . brings up some of this issue as far as what even happened during the procedure." Again, what happened before the procedure with regard to discussion of risks has no bearing on whether or not Dr. Schroeder used excessive force during the procedure. Furthermore, Hillyer was not questioned on direct examination about conversations she had with Dr. Schroeder; testimony regarding Hillyer's memory of preprocedure discussions came in during cross-examination and referenced her deposition testimony, which was not received into evidence or otherwise before the jury.

We note that in their brief, Dr. Schroeder and MGI argue that Hillyer's "specific objection" at trial was to the word "consent" and that she now "attempts to expand the objection from 'consent' to the fact that [she] was informed of the risks of surgery." Brief for appellees at 15-16. A complete review of the record shows that Hillyer is not expanding her objection. After Dr. Schroeder testified that he "give[s] the same consent every single time," Hillyer requested a sidebar and objected based on "402, 403, the motion in limine." After further discussion on the matter, she did object to the word "consent." Throughout the remainder of Dr. Schroeder's testimony regarding discussion of risks, Hillyer repeatedly objected, citing "402, 403," and the motion in limine. Hillyer's motion in limine, particularly paragraphs 16 and 17, sought to exclude any discussion that Hillyer was aware of the risks and complications of the colonoscopies and any discussion regarding the practice or

routine of explaining risks of procedures to patients. The reasons cited in Hillyer's motion were "NRE 402 Relevance, 403 Relevance outweighed"; these were the same objections raised by Hillyer at trial. Hillyer has not expanded her objection on appeal.

Dr. Schroeder and MGI further argue that given "the context of this case," brief for appellees at 20, the trial judge was correct in admitting testimony that Hillyer was informed of the risks. They argue that a "theme pressed by [Hillyer] at trial, starting in voir dire, was the mental aspect of her surprise in awaking in the hospital after the colonoscopy" and that Hillyer "questioned [potential jurors] in a fashion to imply to the jury that it was highly unusual for a person not to go home immediately following a colonoscopy," such that Hillyer's knowledge of possible complications should be allowed. *Id.* They also cite to exhibits placed into evidence (i.e., medical records from Hillyer's surgeries following her colonoscopy); those records included statements that Hillyer was informed of the risks of surgery and decided to proceed. Our review of the record reveals no "mental aspect of . . . surprise" on Hillyer's part. See brief for appellees at 20. Hillyer's questioning during voir dire was benign and reveals nothing other than counsel's efforts to learn of potential jurors' experiences with colonoscopies, ferret out possible bias, and acquire a fair jury pool. Finally, nothing in the medical records regarding Hillyer's subsequent surgeries with other doctors placed Dr. Schroeder's discussions with Hillyer regarding the colonoscopy in issue. See *Fiorucci v. Chinn*, 288 Va. 444, 764 S.E.2d 85 (2014) (finding that trial court did not err in excluding from evidence defendant doctor's risk-of-surgery discussions with patient, even though one of expert witnesses referred to discussions with his own patient). In sum, nothing in the record before us persuades us to deviate from the general rule that evidence of risk-of-procedure or risk-of-surgery discussions is irrelevant where a plaintiff alleges only negligence, and not lack of informed consent.

We find that under the facts of this case, any discussion that Dr. Schroeder informed Hillyer of the risks and complications of colonoscopies was neither relevant nor material to the issue of whether Dr. Schroeder used excessive force during Hillyer's colonoscopy, and therefore, the discussions were inadmissible. See §§ 27-401 and 27-402. For the same reasons, we find that evidence of Dr. Schroeder's discussions with his other patients regarding risks and complications associated with colonoscopies was improperly admitted, because such discussions go to the issue of consent, not negligence. In particular, Dr. Schroeder's testimony that some patients, after having risk discussions with him, have decided not to proceed with the examination could lead a jury to improperly conclude that because Hillyer did proceed with the procedure, she somehow consented to negligence or waived a claim of negligence.

[8,9] Having concluded that admission of such evidence was erroneous, we now consider whether its admission requires reversal. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015). The admission of Dr. Schroeder's irrelevant and inadmissible testimony regarding risk-of-procedure discussions was prejudicial as previously discussed; however, under the circumstances of this case, such error does not require reversal, because the trial court gave a sufficient curative instruction. As we noted earlier, in *Hayes v. Camel*, 283 Conn. 475, 491-92, 927 A.2d 880, 892 (2007), although the Connecticut Supreme Court concluded that it was unduly prejudicial to admit evidence of the risks of a surgical procedure in the context of whether and how they were communicated to the plaintiff, the court nevertheless held that "the trial court's charge to the jury specifically addressed the relationship of surgical risk and negligence," by noting that the mere fact a particular injury is a risk of a procedure does not mean it "'did not result from

a failure to conform to the standard of care.'" Similarly here in the case before us, the trial court's instructions to the jury specifically addressed the relationship of the risks of the procedure and negligence; they stated:

> A healthcare provider has the duty to possess and use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other healthcare providers engaged in a similar practice in the same or similar communities.
>
> *The fact that a patient goes through with a procedure having been advised of the risks of such procedure does not change or alter the duty of the health care provider to possess and use the care, skill and knowledge ordinarily possessed and used under like circumstances by other healthcare providers engaged in a similar practice in the same or similar communities.*

(Emphasis supplied.) In *Hayes v. Camel, supra*, the Connecticut Supreme Court presumed the jury followed the instruction, thereby mitigating the prejudice and inappropriate inferences attendant to the improperly admitted evidence. We conclude the same here. See, also, *Simon v. Drake*, 285 Neb. 784, 829 N.W.2d 686 (2013) (certain testimony prejudicial and not harmless; no curative instruction given); *Baker v. Racine-Sattley Co.*, 86 Neb. 227, 233, 125 N.W. 587, 590 (1910) (finding that court's instruction to jury to disregard certain testimony cured any error in case at bar, but recognizing that "in some cases error in the reception of incompetent evidence cannot be cured by an instruction to the jury to disregard it"). It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded. *In re Estate of Clinger, supra*. There is nothing in the record before us to affirmatively show that the jury disregarded the instruction above; further, in the present case, two competing experts testified as to whether Dr. Schroeder used excessive force (thereby deviating from the standard of care),

and it was for the jury to decide which one to believe. Both experts testified that perforations were a risk of the procedure; each differed in his testimony as to whether the perforation which occurred during Hillyer's colonoscopy was caused by excessive force. Although we conclude that the curative instruction in this case sufficiently mitigated the prejudice of the improperly admitted evidence, particularly in light of the other evidence available to the jury to reach its conclusion, we caution that curative instructions may not always overcome the prejudice and reversal may be warranted. See *Baker v. Racine-Sattley Co., supra.*

CONCLUSION

For the foregoing reasons, we find that under the circumstances of this case, it was error to allow evidence of Dr. Schroeder's risk discussions with Hillyer and other patients. However, any error in admitting that evidence does not constitute reversible error given the trial court's curative instruction to the jury. Accordingly, we affirm.

Affirmed.

Marvin Arnold, appellee, v. Harvey Arnold, appellant.

884 N.W.2d 450

Filed June 21, 2016. No. A-15-243.

1. **Easements: Equity.** An adjudication of rights with respect to an easement is an equitable action.
2. **Easements: Real Estate: Conveyances.** An easement by implication from former use arises only where (1) the use giving rise to the easement was in existence at the time of the conveyance subdividing the property, (2) the use has been so long continued and so obvious as to show that it was meant to be permanent, and (3) the easement is necessary for the proper and reasonable enjoyment of the dominant tract.
3. **Easements: Proof.** The degree of necessity required to prove the existence of an implied easement from former use is reasonable necessity.
4. **Easements: Words and Phrases.** Reasonable necessity means that the easement is necessary for the proper and reasonable enjoyment of the dominant tract as it existed when the severance was made.
5. **Easements.** Every easement carries with it by implication the right of doing whatever is reasonably necessary for the full enjoyment of the easement itself, including the right of access to make repairs and enter upon the servient estate for this purpose.
6. ____. An owner of a dominant tract may not inflict any unnecessary injury to the servient tract in making easement repairs.

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

Larry R. Baumann and Angela R. Shute, of Kelley, Scritsmier & Byrne, P.C., for appellant.

Sally A. Rasmussen and Patricia L. Vannoy, of Mattson Ricketts Law Firm, for appellee.

Moore, Chief Judge, and Inbody and Riedmann, Judges.

Riedmann, Judge.

INTRODUCTION

Harvey Arnold appeals from an order of the district court for Frontier County, Nebraska, determining the boundaries of easements across his land for access to and repair of an irrigation well and underground pipeline. Following our de novo review, we find no error in the determinations of the district court and, accordingly, affirm its judgment.

BACKGROUND

Harvey and Marvin Arnold are brothers who own and farm adjacent parcels of land in Section 23, Township 6 North, Range 26 West of the 6th P.M., Frontier County, Nebraska. Harvey owns the southeast quarter of Section 23 and Marvin owns the west half of Section 23. Harvey and Marvin have farmed their respective tracts of land under lease agreements with their father, Dorrance Arnold, since the 1970's, and they received ownership of their parcels from Dorrance after he died in 2005.

An irrigation well that serves Marvin's land lies on Harvey's land 74 feet east of the boundary line that divides the east and west halves of Section 23. From the well, an underground pipe carries water at a slight northwestern angle until it reaches the northwest corner of Harvey's property and there crosses onto Marvin's land. Dorrance drilled the well in 1971, and it has been used exclusively to irrigate crops on the west half of Section 23 since 1978.

In addition to transferring ownership of the farmland to the brothers, Dorrance's will reserved for Marvin's tract an easement against Harvey's land "for the purposes of maintaining and replacing the irrigation well located on [the southeast quarter of Section 23] which provides irrigation water for [the west half of Section 23]."

Harvey and Marvin have a strained relationship, and they do not communicate directly with each other. In 2011, the

brothers constructed a boundary fence between their tracts. Each brother constructed a portion of the fence. In particular, Harvey constructed a fence on the western border of his land and left an opening directly west of the well. Marvin constructed a portion of the fence along the northern boundary and installed two gates at the northwest corner of Harvey's land through which he could access the pipeline and well. Marvin testified that it had been his longstanding practice to access the well by entering Harvey's land at its northwest corner; continuing down the boundary line on Harvey's side of the land, roughly above the route taken by the underground pipe; and then angling from the fence line to the well. Marvin testified that he and Harvey had previously agreed on this route when the land was still owned by Dorrance and that over the years, he had worked to raise the dirt on this path to prevent it from flooding.

In 2012, Marvin found that Harvey had padlocked the gate in the northwest corner of Harvey's land and planted corn over the path Marvin normally used to drive to the well. Until 2012, Harvey had not planted corn in this area. Marvin removed a pin from the hinge of the gate to open it while it was locked and continued driving his usual route. In June 2013, Marvin filed this action seeking an injunction, a declaratory judgment finding that the easement in Dorrance's will included the right to access and maintain the pipeline, and in the alternative, an easement by implication of former use for access to and maintenance of the pipeline.

The parties submitted conflicting evidence at trial as to whether it would be feasible for Marvin to access the well by driving down his side of the fence line and then turning west onto Harvey's property. The parties disputed whether the gap in the fence that Harvey constructed directly west of the well would be appropriate for large equipment. Marvin argued that flooding and topographical features would prevent his fuel truck from taking Harvey's proposed route. Marvin also testified that he is able to check the pipeline for leaks by utilizing

his current route. He also introduced evidence that in order to repair or replace the pipeline, he would need an easement extending to 20 feet on each side of the pipeline in order to accommodate trenching machinery and dirt work. In addition to the testimony and exhibits, the district court inspected the property.

Following trial, the district court made findings of fact and conclusions of law pertaining to both the well easement granted in Dorrance's will and the pipeline easement claimed by Marvin. The district court determined the metes and bounds of Marvin's well to include 120 feet surrounding the well for maintenance and repair. The court's determination of the bounds of the well easement is not at issue on appeal.

The district court next determined that Marvin held an easement by implication from former use for the pipeline, including an easement of 20 feet on each side of the pipeline to maintain, repair, and replace it. The district court ordered that Marvin be allowed access to the pipeline easement and the well via the two gates in the northwest corner of Harvey's property, and the court enjoined Harvey from interfering with access to or utilization of either easement. Harvey appeals from this order, assigning that the district court's determination of the existence and extent of the pipeline easement was in error.

ASSIGNMENTS OF ERROR

Harvey assigns that the district court erred in (1) holding that Marvin was entitled to an easement to maintain, repair, and replace the underground pipe running from the irrigation well and (2) establishing that Marvin's pipeline easement extends 20 feet on each side of the pipe and includes access through the gates installed by Harvey in the northwest corner of Harvey's property.

STANDARD OF REVIEW

[1] An adjudication of rights with respect to an easement is an equitable action. *Homestead Estates Homeowners Assn. v.*

Jones, 278 Neb. 149, 768 N.W.2d 436 (2009). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Hauxwell v. Henning*, 291 Neb. 1, 863 N.W.2d 798 (2015). But when credible evidence is in conflict on material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Homestead Estates Homeowners Assn. v. Jones, supra*.

ANALYSIS

Before analyzing the assigned errors, we first address Marvin's argument that Harvey's failure to assign as error the granting of an injunction prohibiting Harvey from interfering with Marvin's access to or use of the pipeline easement is fatal to his appeal. Marvin contends that because the injunction was not assigned as error, it must stand, even if this court were to find that Harvey should succeed on his assigned errors. Given that the two assigned errors (entitlement to the easement and the extent thereof) are the bases for the injunction, we determine that failure to separately assign as error the granting of the injunction does not preclude us from addressing the issues raised in this appeal.

Easement to Maintain, Repair, and Replace Pipeline.

Harvey first assigns that the district court erred in determining that the west half of Section 23 held an easement by implication of former use against the southeast quarter of Section 23 for the maintenance, repair, and replacement of the underground pipeline. Harvey states that Marvin's proposed access route to the well does not include access to the pipeline because Dorrance's will did not grant an easement in the pipeline. He argues that the pipeline easement and northwest gate access route is not reasonably necessary because the pipeline

has never previously needed repair and alternative methods of access and repair exist. For the reasons below, we disagree with this analysis.

[2-4] An easement by implication from former use arises only where (1) the use giving rise to the easement was in existence at the time of the conveyance subdividing the property, (2) the use has been so long continued and so obvious as to show that it was meant to be permanent, and (3) the easement is necessary for the proper and reasonable enjoyment of the dominant tract. *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000). The degree of necessity required to prove the existence of an implied easement from former use is reasonable necessity. *Id.* Reasonable necessity means that the easement is necessary for the proper and reasonable enjoyment of the dominant tract as it existed when the severance was made. See *id.*

In *O'Connor v. Kaufman, supra*, a home had long been served by a well, pump, and pipeline. In 1975, the land was subdivided such that the well and the home were under different ownership. *Id.* The owners of the parcel containing the well removed the well and pipeline to plant crops. *Id.* In the ensuing litigation, the Nebraska Supreme Court found that the tract containing the home enjoyed an easement by implication of former use for maintenance of the well, pump, and pipeline. *Id.*

The present case is similar to *O'Connor v. Kaufman, supra*. With regard to the first element, use at the time of subdivision, there is no dispute that Marvin was using the underground pipeline to irrigate crops on the west half of Section 23 at the time that he and Harvey received their parcels following Dorrance's death. Because Dorrance owned both parcels at the time he drilled the well in 1971 and until his death, this was the first time that the well was under separate ownership from the west half of Section 23, which it serves. Accordingly, the first element of an easement by implication from former use is met in this case.

Under the second element, we consider whether the use has been so long continued and so obvious as to show that it was meant to be permanent. *O'Connor v. Kaufman, supra*. Here, too, the facts support such a finding. The underground pipe has occupied its current location and carried water from the well since the well was drilled in 1971. This well and pipeline were meant to permanently serve the irrigation of the west half of Section 23, as demonstrated by the pipeline's use carrying water to the west half of Section 23 for over 30 years, and Dorrance's inclusion of an easement for the well in his will. See *O'Connor v. Kaufman, supra* (holding that continuous use of well for over 25 years, up to time when property was divided, demonstrated intent to create permanent easement). Therefore, although Dorrance's will does not mention an easement for the underground pipeline, we find on de novo review that the long, obvious, and continuous use of the pipeline shows that Dorrance intended a permanent easement for maintenance of the pipeline.

[5] Harvey argues that an easement in the pipeline should not include the right to repair or replace the pipeline because it has never been previously repaired. Therefore, Harvey argues that repair of the pipeline is not a use "so long continued and so obvious as to show that it was meant to be permanent." *O'Connor v. Kaufman*, 260 Neb. 219, 227, 616 N.W.2d 301, 308 (2000). We disagree and think the applicable analysis is whether the pipeline has been in continuous use, not whether it has been under continuous repair. We find no case law supporting Harvey's apparent assertion that the holder of an easement by implication of former use for a pipeline may not repair the pipeline unless it has previously been repaired. Instead, the Nebraska Supreme Court has held that every easement carries with it by implication the right of doing whatever is reasonably necessary for the full enjoyment of the easement itself, including the right of access to make repairs and enter upon the servient estate for this purpose. See *Ricenbaw v. Kraus*, 157 Neb. 723, 61 N.W.2d 350 (1953). However, the

right to repair does not always include unconditional access to the surface land disturbed by repairs. See *id.* While we conclude here that the easement by implication of former use for the pipeline includes the right to repair or replace the pipeline, we will discuss in greater detail under our analysis of the second assignment of error whether the district court was correct in determining that Marvin's pipeline easement included the rights to a surface tract extending to 20 feet on each side of the pipeline.

Finally, we consider whether an easement for maintenance, repair, and replacement of the pipeline is reasonably necessary for Marvin's enjoyment of the west half of Section 23. We find that it is. Although the parties submitted conflicting evidence as to whether Marvin could access the well via a different route and whether the pipeline could be rerouted to travel under less of Harvey's property, the Nebraska Supreme Court has previously recognized that the standard of necessity for an easement by implication of prior use is only reasonable necessity and that testimony regarding alternate routes of irrigation water are grounded in a strict necessity standard that is not applicable. See *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996). Other cases have recognized that carrying water to adjacent land is a use reasonably necessary for the enjoyment of that land. See *O'Connor v. Kaufman, supra*. In this case, the facts demonstrate that the pipeline is necessary to carry irrigation water from the well to the west half of Section 23. For these reasons, this assignment of error is without merit.

Extent and Route of Easement.

Harvey next assigns that the district court erred in determining that the pipeline easement included 20 feet of surface land on each side of the pipeline and access through the gates in the northwest corner of Harvey's property. Harvey argues that the access route granted was in error because an alternate route to the well exists. However, Harvey admits that his proposed

alternate route does not include access to the pipeline, and as we determined above, the pipeline and access to the pipeline are reasonably necessary for use and enjoyment of the west half of Section 23. See *O'Connor v. Kaufman, supra*. Furthermore, there was conflicting testimony as to the sufficiency of the alternate route. Although we try factual issues de novo on the record, when credible evidence is in conflict on material issues of fact, we may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Homestead Estates Homeowners Assn. v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009). We also give weight to the fact that the trial court personally viewed the area in question. Accordingly, we determine that it was appropriate to grant an easement through the gates at the northwest corner of Harvey's property.

[6] Harvey next argues, without citation to supporting authority, that if Marvin is allowed access to the pipeline from his property, he should be responsible for any damages to Harvey's property. We recognize that an owner of a dominant tract may not inflict any unnecessary injury to the servient tract in making easement repairs. See *Ricenbaw v. Kraus*, 157 Neb. 723, 61 N.W.2d 350 (1953). In *Ricenbaw v. Kraus*, this meant that the owner of a tile drain was required to restore the surface of the servient tract's land to substantially the same condition as it had been before performance of repair work. However, the facts here are distinguishable, and after de novo review, we determine that these facts support the district court's determination that the easement by implication of former use extends to the surface above the pipeline. Marvin introduced testimony at trial that an easement of 20 feet extending on each side of the pipeline would be necessary to repair the pipeline. Marvin testified that his longtime route of driving above the pipeline allows him to visually inspect for leaks and that he recently found a leak in the pipeline through this method which will require repair. Marvin also testified that he has long accessed the well twice per day via a route

that roughly corresponds to the pipeline's route. Through years of accessing the well along this path, he has built a dirt road that does not flood and is suitable for his fuel truck and other machinery required to routinely service the well. Harvey had not planted corn along this route until 2012, so the established use of this land has been to provide an access road to the easement well. Given the long use of this general access pathway, the fact that it assists Marvin in monitoring and maintaining the pipeline, and the importance of suitable access to the well, we conclude on de novo review that the district court did not err in determining that the pipeline easement extends to the surface above the pipeline, including 20 feet on each side of the pipeline and access via the gate on the northwest corner of Harvey's property.

Harvey finally argues that he should be allowed to determine the location of the easement because he is the grantor of the easement. See *Graves v. Gerber*, 208 Neb. 209, 302 N.W.2d 717 (1981) (failure of grant to definitely locate easement does not give grantee right to use servient estate without limitation; in such case, grantor may designate location, and if he fails to do so, grantee may then make designation which, in either case, must be reasonable). However, while Harvey owns the servient estate, there is no evidence that he is the grantor of the easement, nor that he ever held an ownership interest in the easement well or pipeline that would have allowed him to be the grantor of this easement. For the foregoing reasons, we find this assignment of error to be without merit.

CONCLUSION

Following a de novo review, we find no error in the determinations of the trial court and accordingly affirm its judgment.

Affirmed.

Douglas S. Becker, appellant, v. Tonya M. Walton, appellee.

884 N.W.2d 737

Filed June 21, 2016. No. A-15-367.

1. **Pretrial Procedure: Appeal and Error.** On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard.
2. **Trial: Appeal and Error.** The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion.
3. **Rules of the Supreme Court: Pretrial Procedure: Costs.** A hearing on a motion for expenses pursuant to Neb. Ct. R. Disc. § 6-337(c) is a legal proceeding entirely separate from the underlying proceedings concerning the merits of the case.
4. **Costs: Appeal and Error.** The appellate court reviewing a decision on a motion for expenses is to concern itself solely with the evidence established and produced at that hearing.
5. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** The determination of an appropriate sanction under Neb. Ct. R. Disc. § 6-337(c) rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
6. **Rules of the Supreme Court: Pretrial Procedure: Costs: Proof.** Once the party making a motion for sanctions proves the truth of the matter previously denied and that reasonable expenses were incurred in doing so, the burden then shifts to the nonmoving party to prove, by a preponderance of the evidence, one of the four exceptions enumerated in the discovery rule.
7. **Rules of the Supreme Court: Pretrial Procedure: Proof.** To be applicable, Neb. Ct. R. Disc. § 6-337(c) requires that a party must fail to admit the truth of any matter requested, and the party requesting the admissions must prove the truth of the matter.

8. **Rules of the Supreme Court: Pretrial Procedure.** Sanctions under Neb. Ct. R. Disc. § 6-337 exist not only to punish those whose conduct warrants a sanction but to deter those, whether a litigant or counsel, who might be inclined or tempted to frustrate the discovery process by their ignorance, neglect, indifference, arrogance, or, much worse, sharp practice adversely affecting a fair determination of a litigant's rights or liabilities.
9. ____: ____. Sanctions under Neb. Ct. R. Disc. § 6-337 are designed to prevent a party who has failed to comply with discovery from profiting by such party's misconduct.
10. ____: ____. An appropriate sanction under Neb. Ct. R. Disc. § 6-337 is determined in the factual context of each particular case and is initially left to the sound discretion of the trial court, whose ruling will be upheld in the absence of an abuse of discretion.
11. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
12. ____. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for York County, James C. Stecker, Judge, on appeal thereto from the County Court for York County, Linda S. Caster Senff, Judge. Judgment of District Court affirmed.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., for appellant.

Daniel P. Chesire and Anastasia Wagner, of Lamson, Dugan & Murray, L.L.P., for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Pirtle, Judge.

INTRODUCTION

Douglas S. Becker appeals from an order of the district court for York County which affirmed the York County Court's denial of Becker's motion for an award of fees and expenses

pursuant to Neb. Ct. R. Disc. § 6-337(c). Based on the reasons that follow, we affirm.

BACKGROUND

On December 4, 2013, Becker filed a complaint against Tonya M. Walton for personal injury arising out of an automobile accident that occurred on December 16, 2009. Becker served 20 requests for admission with the complaint. On January 17, 2014, Walton served her initial responses. She admitted requests Nos. 1, 2, and 4; objected to request No. 3 as vague and ambiguous; and denied the remaining 16 requests. In denying the requests for admission, Walton stated that she had not had an opportunity to conduct discovery regarding the matters which were the subject of the requests. Requests Nos. 5 through 9 concerned liability. Request No. 10 concerned medical causation. Requests Nos. 11 through 20 concerned fairness, reasonableness, and the necessity of Becker's medical bills and treatment.

Walton served interrogatories and requests for production on Becker, which Becker answered on January 24, 2014. Becker and Walton were both deposed on February 26. Becker filed supplemental responses to Walton's interrogatories and requests for production on May 22.

On May 23, 2014, Becker filed a motion for partial summary judgment alleging that there were no genuine issues of material fact and that he was entitled to judgment as a matter of law on the issues of liability and medical expenses. The matter was set for hearing on June 19. On June 18, Walton supplemented her responses to the requests for admission and admitted all previously denied requests, with one exception. In regard to request No. 10, Walton admitted that Becker injured his neck but denied the nature and extent of the injury. Walton also denied that Becker suffered a back injury, an injury that Becker himself denied suffering in his deposition.

On June 19, 2014, the county court entered an order finding that Walton had admitted that she was negligent, that her

negligence was a proximate cause of the accident, that the accident was a proximate cause of some damage to Becker, and that the medical expenses of $3,731.50 were fair, reasonable, and necessary. The court stated that Walton did not oppose entry of summary judgment on those issues and that therefore, based on the agreement of the parties, Becker's motion for partial summary judgment was granted. It further stated that "the nature and extent of [Becker's] injury and pain and suffering, if any," would be determinations for the jury at trial.

The remaining contested issues were tried to a jury on August 28, 2014. The jury awarded Becker $21,731.50 plus costs.

On September 4, 2014, Becker filed a motion for an award of fees and expenses pursuant to § 6-337(c) alleging that he incurred attorney fees and expenses "in proving the truth of matters requested under Rule 36" and that his application was submitted within 30 days of "proving the truth of such matters." Becker only sought reimbursement of fees and expenses he incurred up to the time of the motion for partial summary judgment.

On September 26, 2014, the motion for fees was heard by the county court. Subsequently, on October 30, the county court denied Becker's motion, finding that Becker was not required to prove the truth of the matters in the requests for admission because Walton had supplemented her answers prior to the hearing for partial summary judgment, admitting the matters previously denied. The court further found that even if such matters were proved by Becker, the exceptions set out in § 6-337(c)(3) and (4) applied. The county court also overruled Becker's request for fees and expenses incurred in pursuit of his § 6-337(c) motion for fees and expenses.

Becker filed on November 3, 2014, a motion for new trial or to alter or amend judgment. The motion was overruled, and Becker timely appealed to the district court. The district court affirmed the county court's findings and further found that the motion for fees filed in the county court was not timely filed

within 30 days of "proving the matter." The district court also found that because it was affirming the county court's ruling denying the award of fees and expenses under § 6-337(c), Becker was not entitled to attorney fees for pursuing the matter on appeal.

ASSIGNMENTS OF ERROR

Becker assigns that the district court erred in (1) affirming the order of the county court which overruled his motion for award of fees and expenses pursuant to § 6-337(c); (2) affirming the county court's ruling that he did not prove the matters which were the subject of Becker's requests for admission; (3) affirming the county court's ruling that Walton's response to the request for admission No. 10, regarding injuries to Becker's neck and back, justified a denial of Becker's motion for fees; (4) ruling that Becker's motion for fees and expenses was not timely filed; (5) affirming the county court's ruling that Walton met her burden of proof under § 6-337(c)(3); (6) affirming the county court's ruling that Walton met her burden of proof under § 6-337(c)(4); and (7) affirming the county court's ruling which denied him an award of fees and expenses that were associated with the proceedings held on the motion for fees and expenses, and in denying an award of fees incurred on appeal.

STANDARD OF REVIEW

[1,2] On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard. *McCormick v. Allmond*, 18 Neb. App. 56, 773 N.W.2d 409 (2009). The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion. *Id.*

ANALYSIS

Becker assigns that the district court erred in affirming the order of the county court which overruled his motion for award of fees and expenses pursuant to § 6-337(c).

Neb. Ct. R. Disc. § 6-337(c) provides as follows:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he or she may, within 30 days of so proving, apply to the court for an order requiring the other party to pay him or her the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:
>
> (1) The request was held objectionable pursuant to Rule 36(a), or
>
> (2) The admission sought was of no substantial importance, or
>
> (3) The party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
>
> (4) There is other good reason for the failure to admit.

[3-6] A hearing on a motion for expenses pursuant to § 6-337(c) is a legal proceeding entirely separate from the underlying proceedings concerning the merits of the case. See *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003). The appellate court reviewing a decision on a motion for expenses is to concern itself solely with the evidence established and produced at that hearing. *Id.* The determination of an appropriate sanction under § 6-337(c) rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. See *id.* Once the party making a motion for sanctions proves the truth of the matter previously denied and that reasonable expenses were incurred in doing so, the burden then shifts to the nonmoving party to prove, by a preponderance of the evidence, one of the four exceptions enumerated in the discovery rule. *Id.*

[7] Becker first argues that the district court erred in affirming the county court's ruling that he did not prove the matters which were the subject of Becker's requests for admission. To be applicable, § 6-337(c) requires that a party

must fail to admit the truth of any matter requested, and the party requesting the admissions must prove the truth of the matter. Although Walton first denied the majority of Becker's requests for admission on January 17, 2014, she supplemented her responses on June 18 and admitted each of the previously denied requests for admission, with one exception. On June 19, the day set for the partial summary judgment hearing, Walton confessed summary judgment as to liability and medical bills in the amount of $3,731.50. No hearing was held on the motion for partial summary judgment, and no evidence was presented. Based upon a stipulation of the parties, the county court entered an order granting Becker's motion for partial summary judgment. Thus, Walton admitted the truth of the matters requested and Becker did not have to prove the matters which were the subject of the requests for admission.

Becker argues that he is entitled to fees and expenses because he expended time and money to develop proof of the disputed facts and that Walton should not be able to avoid sanctions under § 6-337(c) by admitting previously denied facts on the day before the partial summary judgment hearing. In support of his argument, Becker relies on a Nebraska federal case and several non-Nebraska cases where fees were awarded after a party admitted requests. However, the cases cited by Becker are distinguishable in that they involve matters being admitted at the pretrial hearing, on the eve of trial, or after trial had commenced. See, *Johnson Intern. v. Jackson Nat. Life Ins.*, 812 F. Supp. 966 (D. Neb. 1993), *affirmed in part and in part remanded on other grounds* 19 F.3d 431 (8th Cir. 1994) (court ordered award of fees under Fed. R. Civ. P. 37(c) after responding party admitted requests for admission at pretrial conference after failing to admit requests for over 2 years); *Peralta v. Durham*, 133 S.W.3d 339 (Tex. App. 2004) (court ordered award of fees under Texas rule of discovery, identical to § 6-337(c), after defendant in traffic accident case stipulated to liability immediately before trial); *Campana v. Board of*

Directors of the Massachusetts Housing Finance Agency, 399 Mass. 492, 505 N.E.2d 510 (1987) (court upheld award of attorney fees to plaintiff after defendant failed to admit plaintiff's requests for admission until first day of trial). Unlike the cases referred to by Becker, Walton's supplemental responses admitting the requests for admission were not filed on the eve of trial. Rather, they were filed the day before a hearing on a motion for partial summary judgment and just over 6 months after the complaint was filed.

Becker also relies on *Chemical Engineering v. Essef Industries*, 795 F.2d 1565 (Fed. Cir. 1986), where the court upheld an award of fees and expenses under federal discovery rule 37(c) following the entry of a summary judgment. However, this case is distinguishable because the party in *Chemical Engineering* did not admit the requests for admission prior to the summary judgment hearing, as Walton did in the present case. Rather, the matters were proved at the summary judgment hearing.

Further, while Becker may have expended time and money preparing to prove the requests for admission that Walton initially denied, Walton was entitled to have a chance to evaluate her case. There is no indication that Walton was trying to delay the case or frustrate the discovery process by not admitting the requests until the day before the partial summary judgment hearing. As the county court noted: "This is not a case that languished with inactivity . . . . The defendant is entitled to a fair amount of time to do discovery and to explore possible defenses." The district court agreed, stating that "[i]t is clear from the record that subsequent discovery was necessary and beneficial to the defendant" and that Walton "did not engage in any behavior or actions to slow down the normal trial process."

[8-10] Sanctions under § 6-337 exist not only to punish those whose conduct warrants a sanction but to deter those, whether a litigant or counsel, who might be inclined or tempted to frustrate the discovery process by their ignorance,

neglect, indifference, arrogance, or, much worse, sharp practice adversely affecting a fair determination of a litigant's rights or liabilities. *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). Sanctions under § 6-337 are designed to prevent a party who has failed to comply with discovery from profiting by such party's misconduct. *Norquay v. Union Pacific Railroad, supra*. An appropriate sanction under § 6-337 is determined in the factual context of each particular case and is initially left to the sound discretion of the trial court, whose ruling will be upheld in the absence of an abuse of discretion. See *Norquay v. Union Pacific Railroad, supra*.

The parties promptly engaged in discovery following the filing of the complaint. The requests for admission were served with the complaint, and Walton timely responded to the requests. The parties took depositions, and Walton served interrogatories and requests for production on Becker. Becker's supplemental responses to Walton's interrogatories and requests for production were served on May 22, 2014, and Becker's motion for partial summary judgment was filed on May 23. Walton was entitled to time to review and evaluate Becker's supplemental responses. Walton supplemented her answers to the requests for admission on June 18, less than 1 month after Becker's final discovery supplementation. Partial summary judgment was entered based on the stipulation of the parties on June 19, just 6 months after the complaint was filed, and the remaining issue was tried 2 months later.

Walton supplemented her responses to the requests for admission within a reasonable amount of time, admitting the truth of the matters requested. Therefore, Becker did not have to prove the matters which were the subject of Becker's requests for admission. We conclude that the county court did not abuse its discretion in finding that Becker was not entitled to fees and expenses pursuant to § 6-337(c) because he did not prove the matters which were the subject of Becker's

requests for admission. Further, the district court did not err in affirming this finding.

[11] Becker also assigns that the district court erred in affirming the county court's ruling that Walton's response to request for admission No. 10, regarding injuries to Becker's neck and back, justified a denial of Becker's motion for fees. The county court, in discussing that Walton was entitled to have time to evaluate her case, stated, "[Walton] obtained information during the discovery process that demonstrated that there was no back injury to [Becker], which [Walton] had been asked to admit in the original requests for admission." The district court did not separately address request for admission No. 10, and there is no indication that the error now raised before this court was raised before the district court. In the absence of plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *Woodle v. Commonwealth Land Title Ins. Co.*, 287 Neb. 917, 844 N.W.2d 806 (2014). We find no plain error in the statement made in the county court's order and do not address this assignment of error further.

[12] Becker also assigns that the district court erred in ruling that Becker's motion for fees and expenses was not timely filed; erred in affirming the county court's ruling that Walton met her burden of proof under § 6-337(c)(3) and (4); and erred in affirming the county court's ruling which denied him an award of fees and expenses associated with the proceedings held on the § 6-337(c) motion for fees and expenses, and in denying an award of fees incurred on appeal. Because we have determined, based on the reasons set forth above, that Becker is not entitled to fees and expenses pursuant to § 6-337(c) because he did not prove the matters which were the subject of his requests for admission, we need not address Becker's remaining assignments of error. See *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015) (appellate court is not

obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

CONCLUSION

Because Becker did not prove the matters which were the subject of his requests for admission, we affirm the district court's judgment affirming the county court's decision denying Becker's motion for fees and expenses pursuant to § 6-337(c).

Affirmed.

Mark G. Floerchinger, appellee, v. Stacey Leigh Floerchinger, appellant.

883 N.W.2d 419

Filed June 21, 2016. No. A-15-833.

1. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
2. **Child Custody: Jurisdiction: Appeal and Error.** The question whether jurisdiction should be exercised under the Uniform Child Custody Jurisdiction and Enforcement Act is entrusted to the discretion of the trial court and is reviewed de novo on the record for abuse of discretion by the appellate court.
3. ____: ____: ____. The question as to whether jurisdiction existing under the Nebraska Child Custody Jurisdiction Act should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record for abuse of discretion by the appellate court. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal.
4. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
5. **Judgments: Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

7. ____: ____. 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.
8. **Child Custody: Visitation: Jurisdiction.** A district court has exclusive and continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act over custody and visitation issues if the court made the initial child custody determination in accordance with Neb. Rev. Stat. § 43-1238 (Reissue 2008).
9. **Child Custody: States: Jurisdiction.** In order for a state to exercise jurisdiction over a child custody dispute, that state must be the home state as defined by the Uniform Child Custody Jurisdiction and Enforcement Act or fall under limited exceptions to the home state requirement specified by the act.
10. **Child Custody: Jurisdiction.** Exclusive and continuing jurisdiction remains with the district court under the Uniform Child Custody Jurisdiction and Enforcement Act either until jurisdiction is lost under Neb. Rev. Stat. § 43-1239(a) (Reissue 2008) or until the court declines to exercise jurisdiction under Neb. Rev. Stat. § 43-1244 (Reissue 2008) on the basis of being an inconvenient forum.
11. ____: ____. Jurisdiction is lost under Neb. Rev. Stat. § 43-1239(a) (Reissue 2008) if neither the child nor the child and one parent have a significant connection with Nebraska and substantial evidence pertaining to custody is no longer available in the state, or if a court determines that the child and parents no longer reside in Nebraska.
12. **Child Custody: Evidence: Jurisdiction.** The Uniform Child Custody Jurisdiction and Enforcement Act lists evidence concerning the child's care, protection, training, and personal relationships as relevant evidence regarding custody.
13. **Statutes: Appeal and Error.** In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
14. **Child Custody: Final Orders.** The grant of temporary custody is not a final, appealable order, as it does not affect a substantial right.
15. **Child Custody: Proof.** In a child custody modification case, first, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.
16. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been

known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.

17. **Child Custody.** While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration.
18. **Child Custody: Appeal and Error.** In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Affirmed.

Liam K. Meehan, of Schirber & Wagner, L.L.P., for appellant.

Angela M. Minahan, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Moore, Chief Judge.

I. INTRODUCTION

Stacey Leigh Floerchinger appeals from a modification order entered by the district court for Sarpy County, in which the court found that a material change in circumstances had occurred since the original dissolution of marriage decree and awarded joint legal custody of the parties' minor child to Stacey and her former husband, Mark G. Floerchinger, with "primary possession" of the child awarded to Mark. On appeal, Stacey challenges the court's exercise of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the entry of a temporary order, and the modification of custody. Because the district court properly exercised jurisdiction and we find no abuse of discretion in the custody determination, we affirm.

II. BACKGROUND

1. Procedural Background

Mark and Stacey were married in 1993 in the State of Maine and are the biological parents of Brayden Floerchinger (age 15) and his older sister (age 21). The parties moved from Maine to Papillion, Nebraska, soon after their marriage. The parties separated in August 2002, at which time Stacey returned to Maine with Brayden and his sister while Mark remained in Papillion.

On April 28, 2003, Mark filed a "Petition for Dissolution of Marriage" in the district court for Sarpy County, in which Mark alleged, in part, that while both he and Stacey were fit parents, it was in the best interests of the minor children that their custody be awarded to Stacey, subject to Mark's reasonable rights to share time with the minor children.

On September 12, 2003, a "Decree of Dissolution of Marriage" was entered. Pursuant to the parties' agreed-upon parenting plan, the legal custody of the children was awarded to Stacey, subject to Mark's visitation rights set forth in the parenting plan. The decree is silent as to Stacey and the children's place of residence, although the parenting plan references Mark's visitation with the children in Maine. Mark's visitation included a split holiday parenting schedule along with 2 months of summer visitation in Nebraska each year.

Mark maintained his residence in Nebraska from the entry of the decree through the present case, residing in Plattsmouth, Nebraska, at the time of trial. Stacey and the children remained in Maine from August 2002 until the current proceedings. Mark testified that the decree was never registered in Maine although he thought there was an attempt to do so.

On July 17, 2013, Mark filed a complaint to modify just Brayden's custody (Brayden's sister having already reached the age of majority). Mark alleged that a material change in circumstances had occurred, namely that Brayden expressed a desire to reside with Mark in Nebraska. Mark requested that the parties be awarded joint legal custody with primary

possession of Brayden being placed with him. Mark also sought termination of his child support obligation, although he did not seek child support from Stacey.

On August 27 and 29, 2013, Stacey filed objections to the district court's exercise of jurisdiction over the complaint to modify, asserting that pursuant to the UCCJEA, the proper jurisdiction is the State of Maine. In addition, Stacey alleged that Nebraska lacks the requisite minimum contacts to justify the case's being heard in Nebraska.

Mark filed a motion for temporary allowances on August 29, 2013, requesting that the court order that custody of Brayden be placed temporarily with Mark and that it temporarily suspend his child support payments. On September 3, Stacey filed a motion to enforce the decree, seeking the return of Brayden to Maine.

On September 18, 2013, the district court entered a temporary order denying Stacey's motion to enforce the decree and granting Mark's motion. Specifically, the court placed temporary legal custody of Brayden with the court and primary possession with Mark, suspended child support payments, established telephonic visitation between Brayden and Stacey, and granted Stacey visitation with Brayden in Maine for the first half of his upcoming Christmas holiday.

On September 26, 2013, Stacey filed a request for clarification, asking the court to provide the parties with findings regarding the court's denial of Stacey's motion to enforce the decree, for its reasons in granting temporary custody to Mark, and for a ruling on Stacey's objections to the court's exercise of jurisdiction. The court denied this motion.

On January 13, 2014, Stacey's attorney filed a motion to withdraw, which was granted. On March 12, Stacey's new attorney entered his appearance and filed a motion to vacate the temporary order, once again challenging jurisdiction under the UCCJEA and disputing the appropriateness of ordering a temporary custody change on a nonemergency basis. On April 11, the court denied this motion.

2. Trial

On May 20, 2014, trial was held. Stacey's counsel preserved the objections to the court's exercise of jurisdiction under the UCCJEA and to the temporary modification of custody.

Both parties testified in their own behalf. Mark also called two witnesses, Mark Smith, the principal of Plattsmouth Middle School, and Brayden. Stacey did not present any witness testimony beyond her own. Mark introduced into evidence Brayden's Plattsmouth Middle School individualized education plan and student Spring progress report for the 2013-14 school year and an affidavit completed by Brayden with attached text message communications between Brayden and Stacey. Stacey introduced the results of a Maine standardized test taken by Brayden, Brayden's Plattsmouth Middle School semester report cards for the 2013-14 school year, and Brayden's report cards from Maine for 2011 through 2013.

(a) History of Custody and Parenting Time

Stacey and the children moved to Maine in August 2002, prior to the initiation of the divorce. Brayden and Stacey have resided in Maine since that time. Mark has continuously resided in Nebraska, and he was living in Plattsmouth at the time of trial. Mark has always exercised his 2 months of summer parenting time as awarded by the divorce decree. Mark has exercised his winter or Christmas holiday visitation on some years, but not every year. Stacey testified that Mark exercised winter or Christmas visitation only three or four times during the 11-year period. Mark testified that he was occasionally limited in his ability to exercise winter visitation due to travel costs and his work schedule. Mark has maintained regular contact with Brayden through telephone calls and text messages; has called Brayden on holidays, birthdays, and special occasions; and has sent Brayden presents.

(b) Brayden's Desire to Live With Mark

Mark does not challenge Stacey's fitness as a parent. Rather, he maintains that Brayden's desire to reside with Mark supports the modification of custody and that granting such modification is in Brayden's best interests.

Mark testified that Brayden began expressing his desire to live with Mark permanently in Nebraska during the summer of 2012. Mark had responded that the matter would need to be discussed with Stacey. Mark contacted Stacey, and they discussed Brayden's desire to move. Mark claims that this upset Stacey and that she responded by requesting that Brayden return to Maine following the summer 2012 visitation for 1 more year after which Brayden could live with Mark in Nebraska. When Brayden returned to Mark's home for the summer 2013 visitation, Brayden continued to express to Mark a desire to reside with him. Mark testified that Brayden told him that he felt more comfortable in Nebraska and enjoyed living with Mark.

Mark responded by filing the modification complaint. After the complaint was filed, conversations between Mark and Stacey regarding a change in Brayden's residence continued, resulting in Mark's belief that the parties had reached an agreement. Specifically, Mark claimed that during a telephone call in July or August 2013, Stacey gave consent for Brayden to move to Nebraska. Mark similarly testified that Stacey cooperated in providing Brayden's medical records necessary to enroll him in school in Nebraska. Nevertheless, Stacey refused to sign a stipulation which would have modified the divorce decree and given Mark custody.

Mark introduced Brayden's affidavit into evidence along with an attached text message conversation between Brayden and Stacey. Brayden expressed in the affidavit his longstanding and continuous desire to reside with Mark and claimed that Stacey had agreed to this arrangement. The text messages attached to the affidavit included a message from Stacey

wishing Brayden a great first day at school and later another asking how his first day went.

Brayden testified at trial regarding his desire to reside with Mark in Nebraska. Brayden stated that during the summer of 2012, he had asked to live with Mark and Stacey had agreed, during a telephone conversation, to allow a change in residency under the condition that Brayden reside with her in Maine for 1 more year. In July 2013, Brayden again told Mark that he wanted to live with him, but he did not speak to Stacey about it at this time. Brayden did discuss the matter with Stacey after she was served with the modification complaint, expressing his desire to live in Nebraska.

Brayden testified that he preferred living in Nebraska due to the comfortable and relaxed environment at Mark's house and because he enjoyed the interaction he had with Mark. Brayden also expressed that his living situation in Nebraska was better because in Maine, he was pestered by his stepsiblings. Brayden stated that his home in Maine is a "single wide" trailer being shared by his biological sister, Stacey, a stepfather (Stacey's fiance), and the stepfather's two young daughters.

Stacey admitted Mark called her in August 2012 and told her that Brayden wanted to live in Nebraska and that Stacey should let him move. Stacey responded by saying no and that Brayden needed to come back to Maine. Stacey questioned Brayden about where he wanted to live. She testified that at no point during the 2012-13 school year while Brayden was residing with her in Maine did he express a desire to live with Mark. Brayden told her that Mark was making him feel guilty, that he felt bad for Mark, and that he did not really want to live in Nebraska. Stacey also testified that Brayden had expressed a desire to move back to Maine, even in the summer of 2013, and that he tended to want to stay wherever he was currently located. After Stacey was served with the modification papers in late July 2013, she tried to call Brayden but had difficulty reaching him despite trying from several different telephones. She received a call from Brayden the following day wherein

he expressed a desire to live in Nebraska. Stacey claims that Brayden did not give a clear reason why he wanted to live in Nebraska, other than that he just wanted to try it. Mark then joined in on the telephone call, stating that Brayden wanted to live in Nebraska and that Stacey should let him. Stacey became upset and cried, telling Mark that she was going to seek an attorney. Mark allegedly responded by stating that because Brayden was 12 years old, he gets to decide where to live. Stacey stated that Mark enrolled Brayden in school in Plattsmouth without her consent. Stacey denied sending any medical records or other information necessary for Brayden's enrollment and stated she had believed Brayden would return to her when she wished him luck on the first day of school.

(c) Brayden's Current Situation

Mark testified that Brayden has adapted well to Plattsmouth. Brayden is involved in extracurricular activities in Plattsmouth, including sports; has developed a network of friends in the community; and is relaxed and comfortable in Mark's home. During cross-examination, Mark admitted that Brayden enjoyed some similar benefits in Maine. Overall, Mark claims that Brayden has adjusted well to his new home in Nebraska and has shown signs of academic progress, success, and increased maturity.

During the school enrollment process, Mark discovered that Brayden suffered from learning disabilities, struggling in particular with the subjects of reading, math, and science. He further claims that Brayden was in extreme need of special education assistance. Upon Brayden's enrollment at Plattsmouth Middle School, it was determined that his academic ability was below average for his age based on school records obtained from Brayden's school in Maine along with new test results gathered by the Plattsmouth school system. Mark also learned during a school meeting that Brayden had been diagnosed with attention deficit hyperactivity disorder while in Maine.

Smith, the principal of Plattsmouth Middle School, provided additional testimony regarding Brayden's academic performance at that middle school. Smith testified that when Brayden was enrolled there, he was reading below grade level. In response, Brayden was enrolled in a specialized reading course. An individualized education plan was also created for Brayden. The reading course resulted in an improvement in Brayden's reading level scores. Smith also testified that Brayden's academic performance was slightly deficient in the subjects of language arts, math, and science. Brayden was enrolled in a study hall and provided with a resource teacher to improve his academic performance. Smith claims that since Brayden's enrollment at the school, he has made great educational progress as documented through his test results.

Since the discovery of Brayden's academic deficiencies, Mark has worked with Brayden, assisting him with homework, and they read together every night. Brayden's testimony confirmed that Mark assists him with homework and reading. Mark attends all parent-teacher conferences and individualized education plan meetings on behalf of Brayden. Mark feels that Brayden has been successful at school since moving to Plattsmouth.

On cross-examination, Smith admitted that Brayden's academic improvements could have possibly occurred at any school rather than as a result of a unique benefit provided by Plattsmouth Middle School. However, Smith stated that Brayden's growth may be attributable to the excellent teachers, support staff, and specialized reading course available at Plattsmouth Middle School. Smith observed that Brayden also had above-typical academic growth while attending school in Maine. Brayden's seventh grade report card showed that he received five C's and one D while enrolled in Plattsmouth, whereas he received only two grades that were in the C range while enrolled in the fifth and sixth grades in Maine. However, due to the lack of a grading scale on the Maine report cards and the possibility that Maine uses a different

approach to scoring, Smith was unable to reliably compare grades between the two schools, which is in part why he focused more on standardized scores than individual grades in assessing growth.

Stacey also testified regarding Brayden's grades, claiming that the academic growth Brayden experienced during the school year in Nebraska was similar to that which occurred while he was in Maine. Stacey expressed her concerns regarding Brayden's five C's and one D since enrolling at Plattsmouth Middle School.

Brayden testified that he learns more at his new school, that he has "made way more friends" in Nebraska, that there is no fighting and arguing at Mark's house such as occurs at Stacey's house between Stacey and Brayden's stepfather, and that overall, Mark's house is a better place to live. Brayden testified that the town Stacey resides in is substantially similar in size to Plattsmouth.

As instructed under the temporary order, Stacey was granted visitation with Brayden in Maine during the first half of his Christmas holiday in 2013. During this visit, Stacey attempted to discuss with Brayden why he wanted to reside in Nebraska. She admitted to becoming frustrated with Brayden and expressed that she did not understand why he wanted to move. Brayden claimed that Stacey became angry with him while discussing why he wanted to move to Nebraska, shouting and swearing at him during the ride from the airport. He stated that later that evening, Stacey hugged him and apologized.

Brayden also testified about an altercation between Stacey and his stepfather during the holiday visit in which his stepfather shoved Stacey. Brayden claims that Stacey told him to call the police, but that he chose not to at the request of his stepfather. This quarrel caused Brayden to feel sad, unsafe, and scared. Brayden testified that the remainder of his visit was "mostly good." Stacey admitted that an argument occurred between her and Brayden's stepfather in the presence of

Brayden. However, Stacey denied that this altercation became physical, denied requesting that Brayden call the police, and clarified that it was purely a verbal altercation.

At the close of evidence, the court found that there existed a material change in circumstances based on Brayden's articulation of a reason for moving in with Mark. As a result, the court awarded "primary possession" to Mark subject to Stacey's parenting time, along with granting joint legal custody to both parties. The court also ordered that neither party was to pay child support. On August 10, 2015, the court memorialized its holding in a modification order.

Stacey subsequently perfected this appeal.

III. ASSIGNMENTS OF ERROR

Stacey assigns, restated, that the district court (1) erred in finding that Nebraska had continuing jurisdiction under the UCCJEA; (2) abused its discretion in granting Mark temporary custody prior to a full evidentiary hearing, which grant was prejudicial to Stacey; and (3) erred in finding that a material change in circumstances occurred justifying a transfer of custody.

IV. STANDARD OF REVIEW

[1-3] Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *In re Guardianship & Conservatorship of Barnhart*, 290 Neb. 314, 859 N.W.2d 856 (2015). The question whether jurisdiction should be exercised under the UCCJEA is entrusted to the discretion of the trial court and is reviewed de novo on the record for abuse of discretion by the appellate court. *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006). See, also, *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010) (subject matter jurisdiction is question of law for court, which requires appellate court to reach conclusion independent of lower court's decision). The same standard of review applies to jurisdiction existing under the previously operative Nebraska Child Custody Jurisdiction Act (NCCJA). *White v.*

White, 271 Neb. 43, 709 N.W.2d 325 (2006). As in other matters entrusted to a trial judge's jurisdiction, absent an abuse of discretion, the decision will be upheld on appeal. *Id.*

[4] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015). See, also, *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

[5] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013).

[6,7] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Schrag v. Spear, supra*. A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id*.

V. ANALYSIS

1. Jurisdiction

The district court, both in its initial exercise of jurisdiction over Brayden's custody in the decree of dissolution and in its continuing exercise of jurisdiction in the modification order, claimed "jurisdiction over the parties and the subject matter of this action."

Stacey argues that the district court erred in finding that Nebraska could exercise continuing jurisdiction over Brayden's custody. Stacey first challenges the exercise of continuing

jurisdiction based upon her argument that the court's exercise of initial jurisdiction at the time of the decree was erroneous. Next, she challenges the district court's exercise of continuing jurisdiction based upon her assertion that Maine was the home state of Brayden for 11 years and within the 6 months prior to the modification filing.

(a) Initial Child Custody Jurisdiction Under NCCJA

Jurisdiction over child custody proceedings is currently governed by the UCCJEA. *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006). The UCCJEA became operative on January 1, 2004, and establishes that all motions made in a child custody proceeding commenced prior to that date are governed by the prior law in effect at that time. Neb. Rev. Stat. § 43-1266 (Reissue 2008). The law governing child custody jurisdiction prior to the effective date of the UCCJEA was the NCCJA. Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissue 1998).

Mark filed the petition for dissolution of marriage on April 28, 2003. The court subsequently issued the dissolution decree, which approved the parties' agreed-upon initial custody arrangement, on September 12. Thus, the jurisdiction of the court over the initial custody determination was governed by the NCCJA and not the UCCJEA.

The NCCJA provided that a Nebraska court had jurisdiction to make an initial child custody determination if Nebraska was "the home state of the child at the time of commencement of the proceedings" or

> had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his or her removal or retention by a person claiming his or her custody or for other reasons, and a parent or person acting as parent continues to live in this state.

§ 43-1203(1)(a). The NCCJA defined "home state" as the "state in which the child immediately preceding the time involved

lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months." § 43-1202(5). These "home state" provisions are substantially similar to the UCCJEA.

However, the NCCJA provided another means for a Nebraska court to exercise jurisdiction if Nebraska was not the home state, an alternative eliminated from the UCCJEA. Specifically, the NCCJA provided that a Nebraska court may nonetheless exercise jurisdiction if "[i]t is in the best interest of the child" because the child and his or her parents "have a significant connection with this state" and "there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships." § 43-1203(1)(b). See, also, *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999) (paramount consideration in determining whether state is convenient forum under NCCJA is determination of what court is most able to act in best interests of child); *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994) (home state under NCCJA may be overcome by circumstances of particular case). The end goal of the NCCJA is that litigation concerning the custody of a child takes place in the state which can best decide the case. *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006).

Brayden resided with Stacey in Maine for approximately 8 months preceding Mark's dissolution petition. Consequently, Nebraska was not the child's "home state" for purposes of the NCCJA. However, that does not necessarily end the analysis; the remaining question is whether the best interests of Brayden were served by the district court's exercising jurisdiction over the initial custody determination because of a significant connection with this state and the availability of substantial evidence in this state. Based upon our review of the record, we conclude that the district court properly exercised initial jurisdiction over the custody determination under this analysis.

The issue of the district court's exercise of initial jurisdiction is complicated, in part due to the fact that neither party challenged the court's exercise of jurisdiction, and thus, the district court did not make any findings regarding its reasons for accepting jurisdiction. Rather, both parties voluntarily appeared before the court and presented an agreement for the court's approval on all matters relating to the dissolution of their marriage, including custody and a parenting plan.

We acknowledge that subject matter jurisdiction can be challenged at any point and cannot be waived through consent. However, we consider Stacey's approval of the dissolution decree as evidence that the district court's exercise of initial jurisdiction was in the best interests of Brayden. Specifically, by exercising jurisdiction and approving the parties' agreement, the court promoted the best interests of the child through facilitating the reasonable custody and visitation arrangement desired by both parents.

Further, Brayden and both parties had a significant connection with Nebraska. Brayden was born in Nebraska and resided in Nebraska for almost 2 years prior to his removal to Maine. The parties had lived together in Nebraska for at least 5 years prior to separation, and Mark continued to reside in the state. Stacey had been away from Nebraska for only 8 months when Mark filed for divorce. Although no contested trial took place, due to the parties' agreement, there would have existed substantial evidence in Nebraska concerning Brayden's care.

The Nebraska Supreme Court, in *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994), found similar circumstances to support the exercise of jurisdiction in Nebraska over a child custody proceeding under the NCCJA. In *Zach*, the child was born in Nebraska and lived in Nebraska for 3 years prior to removal by the mother, the mother sought a custody determination from a Nebraska district court, and the child's father resided in Nebraska. The court found that the child and father both had a significant connection with Nebraska. *Id.*

Here, the same considerations apply in determining that the initial exercise of jurisdiction was appropriate, namely that Brayden was born and lived in Nebraska for a period of time, Mark continued to reside in Nebraska, and they both had a significant connection with Nebraska.

Given the parties' agreement regarding custody and parenting matters, it was appropriate for the district court to accept and exercise jurisdiction at the time of the entry of the decree. For the district court to decline to exercise jurisdiction at that time would have needlessly delayed the marital dissolution and resolution of custody and visitation matters, against the best interests of Brayden.

Given our determination that the district court properly exercised jurisdiction over the initial custody determination, we next consider whether the court correctly exercised continuing jurisdiction over the modification complaint in accordance with the UCCJEA.

(b) Continuing Jurisdiction Under UCCJEA

[8,9] A district court has exclusive and continuing jurisdiction under the UCCJEA over custody and visitation issues if the court made the initial child custody determination in accordance with Neb. Rev. Stat. § 43-1238 (Reissue 2008). Neb. Rev. Stat. § 43-1239(a) (Reissue 2008). As established by § 43-1238 of the UCCJEA, in order for a state to have exercised initial jurisdiction over a child custody dispute, that state must have been the child's home state or fall under limited exceptions to the home state requirement specified by the act. See *Carter v. Carter*, 276 Neb. 840, 758 N.W.2d 1 (2008). Unlike the NCCJA discussed above, the UCCJEA does not contain the alternative analysis allowing jurisdiction to be established in Nebraska when it is not the child's home state but when it is in the best interests of the child to exercise jurisdiction.

[10-12] Exclusive and continuing jurisdiction remains with the district court under the UCCJEA either until jurisdiction is lost under § 43-1239(a) or until the court declines to exercise jurisdiction under Neb. Rev. Stat. § 43-1244 (Reissue 2008) on the basis of being an inconvenient forum. See *Watson v. Watson*, 272 Neb. 647, 653, 724 N.W.2d 24, 29 (2006). In *Watson*, both parents and the child resided in Nebraska at the time the decree was entered, the mother subsequently was granted permission to move the child to Maryland, and the Supreme Court held that continuing jurisdiction remained in Nebraska unless it was lost or the court declined to exercise it. Jurisdiction is lost under § 43-1239(a) if neither the child nor the child and one parent have a significant connection with Nebraska and substantial evidence pertaining to custody is no longer available in the state, or if a court determines that the child and parents no longer reside in Nebraska. § 43-1239(a)(1). The UCCJEA lists evidence concerning the child's care, protection, training, and personal relationships as relevant evidence regarding custody. § 43-1239(a)(1).

[13] Stacey's primary argument is that the district court did not have continuing jurisdiction over this case because it did not make the initial child custody determination in accordance with the UCCJEA. While Stacey's argument is technically correct, its application to the facts of this case would lead to an absurd and unjust result. This is so because the UCCJEA was not in existence at the time the initial custody determination was made. We agree with Stacey that under the "home state" provisions of the UCCJEA, § 43-1238(a), Nebraska did not have jurisdiction at the time of the initial custody determination. However, as we have determined above, Nebraska did properly exercise jurisdiction under the provisions of the NCCJA in existence at that time. Thus, we conclude that the court properly applied continuing jurisdiction over the custody of Brayden under § 43-1239(a). See *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007) (construing statute, appellate court will try if

possible to avoid construction which would lead to absurd, unconscionable, or unjust results), *superseded by statute on other grounds* as stated in *Telrite Corp. v. Nebraska Pub. Serv. Comm.*, 288 Neb. 866, 852 N.W.2d 910 (2014).

Further, the district court's jurisdiction was not lost under § 43-1239(a) of the UCCJEA. Continuing jurisdiction was proper because Brayden had a significant connection with Nebraska through his annual summer visitation; substantial evidence was available in Nebraska regarding his "care, protection, training, and personal relationships," § 43-1239(a)(1); and Mark continued to reside in Nebraska from the time of the dissolution through the proceedings at issue. See, also, *Watson v. Watson, supra*, quoting *Grahm v. Superior Court*, 132 Cal. App. 4th 1193, 34 Cal. Rptr. 3d 270 (2005) (as long as parent remains in state of original custody determination, only that state may determine when relationship between child and remaining parent has deteriorated to point that jurisdiction is lost, and if remaining parent continues to exercise visitation rights, this relationship is strong enough to oppose termination of jurisdiction).

Jurisdiction remains in Nebraska so long as the requirements of § 43-1239(a) are met, as they were in this case. See *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006). The district court's exercise of initial jurisdiction under the NCCJA was not in error, and the court properly exercised continuing jurisdiction over the custody modification at issue pursuant to the UCCJEA.

Stacey's first assignment of error is without merit.

2. Temporary Custody Order

Stacey alleges that the district court abused its discretion in granting temporary custody to Mark and allowing Brayden to remain in Nebraska prior to a full evidentiary hearing.

[14] The grant of temporary custody is not a final, appealable order, as it does not affect a substantial right. See *Carmicheal v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010). See, also,

Fitzgerald v. Fitzgerald, 286 Neb. 96, 835 N.W.2d 44 (2013) (ordinarily, order modifying dissolution decree to grant permanent change of child custody would be final and appealable as order affecting substantial right made during special proceeding).

Stacey relies on the Nebraska Supreme Court's holding in *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000), in support of her claim that the temporary custody order was inappropriate. *Jack* was a removal case in which the Supreme Court discouraged trial courts from granting temporary orders allowing removal of children to another jurisdiction prior to ruling on permanent removal. Instead, the Supreme Court encouraged the prompt conducting of a full hearing on permanent removal. *Id.* We find no merit to Stacey's argument based upon *Jack*. First, this is not a removal case; rather, it is a custody modification case in which the trial court had authority to enter a temporary order pending trial. Second, even if the proposition in *Jack* were applicable to this case, the Supreme Court in *Jack* did not determine that the temporary order of removal was appealable; rather, it simply discouraged the practice.

Because the temporary order herein was itself not a final, appealable order and was effectively adopted by the final order, we focus in the following section on whether the final order modifying custody was an abuse of discretion.

Stacey's second assignment of error is without merit.

3. Material Change in Circumstances

Stacey asserts that the district court erred in finding that a material change in circumstances existed to modify custody and that the modification was in Brayden's best interests. She argues that the court abused its discretion in finding Brayden had articulated a sufficient reason to relocate, that her 11 years of sole parenting were not given adequate deference, and that she had a healthy and good relationship with Brayden

before the complaint was filed in 2013. She also alleges there was little to no evidence that a change in custody would benefit the general health and social behavior of Brayden.

[15,16] In a child custody modification case, first, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests. *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015). See, also, *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015) (party seeking modification of child custody bears burden); *McDonald v. McDonald*, 21 Neb. App. 535, 840 N.W.2d 573 (2013) (ordinarily, custody of minor child will not be modified unless there has been material change in circumstances showing custodial parent is unfit or best interests of child require such action). A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Schrag v. Spear, supra*.

[17] Neb. Rev. Stat. § 43-2923 (Cum. Supp. 2014) of Nebraska's Parenting Act sets forth a nonexhaustive list of factors to be considered in determining the best interests of a child in regard to custody. Such factors include the relationship of the minor child with each parent, the desires of the minor child, the general health and well-being of the minor child, and credible evidence of abuse inflicted on the child by any family or household member. Specifically regarding the desires of a minor child, the statute provides that the court should consider "[t]he desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning." § 43-2923(6)(b). The Nebraska Supreme Court in applying this provision has stated that while the wishes of a child are not controlling in the determination of custody, if

a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). See, also, *Adams v. Adams*, 13 Neb. App. 276, 691 N.W.2d 541 (2005). The Supreme Court has also found that in cases where the minor child's preference was given significant consideration, the child was usually over 10 years of age. *Vogel v. Vogel, supra*.

The district court found that a material change in circumstances had occurred subsequently to the decree which justified modification of custody and that such a modification is in the best interests of Brayden. The court specifically focused on Brayden's desire to reside with Mark in Nebraska, concluding that Brayden was articulate and that his decision was based on sound reasoning.

Based upon our de novo review, we find no abuse of discretion in the district court's finding of a material change in circumstances that justified granting Mark physical custody of Brayden and its finding that such a modification was in Brayden's best interests.

[18] Mark and Stacey presented conflicting testimony regarding whether a change in custody would be in Brayden's best interests, including whether Brayden actually desired to change his permanent residence to Nebraska and whether his reasons were sound. Conflicting testimony was also provided regarding the academic and social benefits available to Brayden in Nebraska and Maine, respectively. In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). The trial court in this case had an opportunity to observe the testimony of both parties, as well as the testimony of Brayden. The court found that Brayden, through his trial testimony, expressed a clear

and intelligent desire to reside with Mark; accordingly, his preference was entitled to consideration.

Upon our review, we can find no abuse of discretion in the district court's consideration of Brayden's articulated reasons for wanting to live with Mark. Brayden was of sufficient age (13 at the time of trial) and expressed an intelligent custody preference based on sound reasoning. Brayden, in his own words, testified to preferring life in Nebraska due to the comfortable and relaxed environment at Mark's house, as opposed to the home in Maine which he shared with five other people and where he was exposed to fighting and arguing between Stacey and his stepfather. He also expressed the satisfaction he receives from interacting with Mark on a regular basis. Additionally, Brayden feels that he learns more at Plattsmouth Middle School and has "made way more friends" in Nebraska. Brayden desires to reside with Mark because he believes it is "a better place" to live.

Most importantly, the record shows that Brayden's desire to live with Mark was not a hasty decision, but, rather, was thoughtfully developed over a period of a couple years. Brayden understood that this change would be permanent. Because Brayden is of an age of comprehension and clearly expressed his desire to reside with Mark, having formed an intelligent preference based on sound reasoning, we give Brayden's preference significant consideration in our de novo review.

While the desire of Brayden to move to Nebraska formed the primary basis for the custody modification, the court also had an opportunity to consider other factors. These included Brayden's academic performance, extracurricular activities, friends, living environment, and general quality of life in both Nebraska and Maine. The record indicates that Brayden has been thriving both socially and academically in Nebraska, although he may have enjoyed similar benefits in Maine. The court also was in a position to consider that Stacey had been the primary caregiver for Brayden for 11 years, along with the

generally positive relationship between Brayden and Stacey prior to the filing of the modification complaint. On the other hand, Brayden has a very positive relationship with Mark and has been thriving in his custody.

Upon our de novo review, we conclude that the district court did not abuse its discretion in finding that a material change in circumstances existed and that Brayden's best interests would be served through a custody modification.

Stacey's final assignment of error is without merit.

VI. CONCLUSION

Upon our de novo review, we conclude that the district court did not abuse its discretion in exercising jurisdiction over the complaint to modify, granting Mark temporary custody of Brayden, and finding a material change in circumstances affecting the best interests of Brayden, justifying a custody modification. We therefore affirm.

Affirmed.

Wahoo Locker, LLC, appellant, v. Farm Bureau Property and Casualty Insurance Company, appellee.

885 N.W.2d 731

Filed June 28, 2016. No. A-15-435.

1. **Contracts: Reformation: Equity.** An action to reform a contract sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Reformation: Intent.** Reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument.
4. ____: ____. The right to reformation depends on whether the instrument to be reformed reflects the intent of the parties.
5. **Reformation: Presumptions: Intent: Evidence.** To overcome the presumption that an agreement correctly expresses the parties' intent and therefore should be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence.
6. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
7. **Reformation: Fraud.** A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought.
8. **Reformation: Intent: Words and Phrases.** A mutual mistake is a belief shared by the parties, which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to

be reformed, each party laboring under the same misconception about their instrument. A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.

9. **Contracts: Reformation.** The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake or prevent reformation.
10. **Insurance: Contracts.** The reasonable expectations of an insured are not assessed unless the language of the insurance policy is found to be ambiguous.

Appeal from the District Court for Saunders County: Mary C. Gilbride, Judge. Affirmed.

Dean F. Suing and Milton A. Katskee, of Katskee, Suing & Maxell, P.C., L.L.O., for appellant.

Gary J. Nedved, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

Pirtle and Riedmann, Judges.

Per Curiam.

INTRODUCTION

Wahoo Locker, LLC, sought reformation of an insurance policy issued by Farm Bureau Property and Casualty Insurance Company (Farm Bureau) providing replacement coverage for the Wahoo Locker building in Wahoo, Nebraska. The district court for Saunders County found that Wahoo Locker was entitled to coverage as set forth in the policy and that Wahoo Locker was not entitled to reformation based upon a mutual mistake regarding the terms of the policy. Wahoo Locker appeals the order of the district court, and for the reasons that follow, we affirm.

BACKGROUND

In 1997, Charlie Emswiler bought Wahoo Locker, a meat processing facility, for approximately $75,000 to $85,000.

In 2009, Emswiler and his wife were the sole owners of Wahoo Locker. Through the years, the Emswilers purchased several insurance policies on behalf of Wahoo Locker. Wahoo Locker was insured by Iowa Mutual Insurance Company (Iowa Mutual) from 2006 until June 14, 2009. Wahoo Locker was insured by Midwest Family Mutual Insurance Company (Midwest Family Mutual) from June 14 to September 14, 2009.

On September 14, 2009, Farm Bureau issued a policy insuring Wahoo Locker for $491,000. The policy was renewed annually, and the limit of insurance did not change from year to year. The policy was in effect on May 8, 2013, the day of a grease fire which caused catastrophic loss to the Wahoo Locker building. At the time of the fire, the Emswilers were the majority owners of the business. The insurance policy in effect on that day contained the following provisions:

> **4. Loss Payment**
>
> a. In the event of loss or damage covered by this Coverage Form, at [Farm Bureau's] option, [Farm Bureau] will either:
>
> (1) Pay the value of lost or damaged property;
>
> (2) Pay the cost of repairing or replacing the lost or damaged property, subject to b. below;
>
> (3) Take all or any part of the property at an agreed or appraised value; or
>
> (4) Repair, rebuild or replace the property with other property of like kind and quality, subject to b. below.
>
> We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.
>
> b. The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

On September 6, 2013, Wahoo Locker filed a complaint in equity alleging the Emswilers, as agents of Wahoo Locker, reasonably relied on representations of Farm Bureau's soliciting agents that their insurance policy would cover the "full replacement cost" for the damage caused to property insured by Farm Bureau. Wahoo Locker alleged Farm Bureau breached its contract by failing to pay the full replacement cost of the building, an amount greater than the insurance policy limit of $491,000. The replacement cost allegedly exceeded $950,000. Wahoo Locker alleged that "Farm Bureau breached [the implied contractual covenants] of good faith and fair dealing and violated the Nebraska Uniform Insurance Claim Practices Act and acted in bad faith." Wahoo Locker sought a judgment against Farm Bureau for (1) damages for breach of its insurance contract; (2) reformation of the insurance contract to provide full replacement cost coverage; (3) damages for "breach of Farm Bureau's duty of good faith and fair dealing, violation of the Nebraska Unfair Claim Practices Settlement Act, and damages allowable for acting in bad faith in investigating and resolving this claim"; (4) attorney fees; and (5) any other allowable relief under contract, tort, or applicable Nebraska law.

Trial was held in the district court for Saunders County on November 5 and 6, 2014.

The parties stipulated that Dirk Westercamp was hired by Farm Bureau to render an opinion regarding the fair and reasonable cost to repair, rebuild, or replace the building with other property of like kind and quality so that the building would be the same as it was immediately prior to the fire. They stipulated that Westercamp concluded the fair and reasonable cost would be $490,632. They further stipulated that Westercamp's statement did not offer an opinion as to whether repairing, rebuilding, or replacing the building with other property of like kind and quality would have permitted the structure to be compliant with the regulations of the U.S. Department of

Agriculture (USDA) in order to operate as a locker plant, as it had prior to the fire.

Gerald Beller is a general contractor who works on projects, including locker plants and distribution, cold storage, and meat processing facilities. Beller testified that Wahoo Locker was regulated by the USDA and was given a custom exempt privilege to operate as a meat processing facility prior to May 8, 2013. He testified that if the damaged facility were to be repaired, it would not be able to operate as a meat processing facility because it was primarily composed of wood, which is no longer approved by the USDA. Plans for a new facility were submitted for review and approval by the USDA.

Beller was asked to calculate the cost of replacing the damaged locker plant, and his findings were included in the stipulation. Beller concluded that in order for the locker plant to be compliant with the USDA regulations, it required "ground up construction with new and different materials and property as the locker plant could not be repaired, rebuilt or replaced with other property of like kind and quality and be compliant with the [USDA] regulations in 2013." Beller's report stated that his opinion of the fair and reasonable replacement cost was $983,438. This estimate was based on a completely new building with modern materials and equipment that would comply with the 2013 USDA standards. Beller concluded that at the time the policy went into effect in 2009, the fair and reasonable cost to replace the Wahoo Locker with new and different materials and property to be USDA compliant would have been $767,998, excluding the value of the processing equipment.

Lonny Neiwohner is an agent for Scribner Insurance Agency, and he testified by deposition regarding Wahoo Locker's insurance history. In a letter dated July 27, 2006, Neiwohner recommended changes to Wahoo Locker's coverage through Iowa Mutual. The letter noted the insurance company recommended increasing coverage to $370,000 for replacement

cost, or $156,000 for actual cash value. At that time, Wahoo Locker was insured for actual cash value coverage of $79,000. Emswiler declined replacement cost coverage, but increased the actual cash value coverage of the building from $79,000 to $100,000. Emswiler signed a cancellation request dated May 18, 2009, terminating Iowa Mutual's coverage, effective June 14, 2009. At that time, Emswiler told Neiwohner that he canceled the policy because he could obtain replacement cost coverage from Midwest Family Mutual for a lower premium than the Iowa Mutual policy, which provided coverage only for actual cash value.

Cole Williams is an agent with Insurance Associates, Inc., in Norfolk, Nebraska, and he issued a policy for Wahoo Locker through Midwest Family Mutual. Williams also testified by deposition. Emswiler met with Williams in April 2009, and Williams obtained the necessary information to estimate the replacement cost for the building through the Marshall & Swift/Boeckh computer system (Marshall system). The Marshall system was used because it is the standard for replacement cost estimates in the insurance industry. The commercial building valuation report which Williams obtained through the Marshall system indicated a replacement cost valuation of $490,943 for Wahoo Locker on April 22, 2009.

Williams prepared a spreadsheet for Emswiler showing that at the time, Wahoo Locker was insured for a building value of $100,000 by Iowa Mutual, and that for a premium increase of $831, Wahoo Locker could be insured by Midwest Family Mutual for a building value of up to $490,943. Emswiler elected to obtain coverage through Midwest Family Mutual, effective June 14, 2009. On September 14, 2009, Emswiler signed a cancellation request terminating the Midwest Family Mutual policy. Williams called Emswiler to find out why he intended to cancel his coverage, and he was told Emswiler switched to Farm Bureau to "pay less premium for the same amount of coverage."

The evidence reveals that on May 7, 2009, Kyle Cooper, a local Farm Bureau agent, and Lisa Miller, a property casualty consultant for Farm Bureau, met with Emswiler. As set out above, at the time of this initial meeting, Wahoo Locker was insured by Iowa Mutual under an actual cash value policy with a limit of $100,000. Miller and Cooper suggested that Emswiler obtain replacement cost coverage for Wahoo Locker. Cooper was tasked with making a determination of what level of insurance was necessary to provide replacement cost coverage to rebuild and operate as a meat processing facility in case of a catastrophic loss.

Emswiler testified that he relied on Cooper to make a determination of the full replacement cost and believed that whatever amount Cooper insured the building for would be sufficient to rebuild and operate as a meat processing facility in case of a catastrophic loss. He testified that the existing plant was a USDA inspected plant. After the fire, the damaged locker plant could not be repaired because the USDA would not license it. Emswiler was told by an adjustor for Farm Bureau that the company would pay only $491,000, although the replacement cost would be in excess of $982,000. Emswiler testified that he did not look at the coverage limits on the building that his insurance premiums were based upon. He did not discuss the replacement cost figure with Cooper, and Cooper did not tell him that the coverage was restricted, or less than the cost of replacing the Wahoo Locker building as a meat processing facility. Emswiler said Cooper did not deny that it was his duty as an agent to determine the replacement cost value and to be certain that the business was adequately covered in the event of a catastrophic loss.

Cooper testified that he knew the Emswilers would rely on him to determine what level of coverage was necessary to rebuild and have an operating meat processing facility in the event of a catastrophic loss. Prior to 2009, Cooper had not worked with or written a policy for a meat processing facility. Cooper testified that it was his intention to have sufficient

coverage in place to provide the full replacement cost in the event of a catastrophic loss. He testified that the Marshall system produced a form indicating the replacement cost for Wahoo Locker in 2009 was $509,527 and that the building was insured for $491,000. The Farm Bureau policy went into effect on September 14, 2009.

Cooper testified there was no agreement between Farm Bureau and Wahoo Locker to insure the building for anything other than the $491,000 provided in the policy. He said that replacement cost coverage is a more expensive policy than actual value coverage. He defined replacement cost coverage as "coverage on your insurance policy to rebuild or replace your property with like kind materials and, you know, as it is, basically." He said replacement coverage is intended for the insured to be "whole" again, without out-of-pocket expenditures. He testified that it was his routine practice to represent to clients that replacement cost coverage was the amount to replace the building "as it stood with materials of like kind and quality" up to the policy limits. Cooper defined actual cash value coverage as the depreciated value of the building at the time of the loss.

Cooper said the building was not intentionally underinsured, and he was surprised that the cost to rebuild was almost double the policy limit. He testified that when renewing the policy, he did not recalculate replacement cost to confirm that the coverage limits were adequate, taking into account inflation or increased construction costs.

Miller testified that at the first meeting with a potential insured, agents obtain information about a business, including declarations pages which are a starting point used in the calculation of potential coverage. She said that at the initial meeting, the agent does not know whether Farm Bureau will insure the business; that determination is made by the commercial underwriting department. Miller said that replacement cost coverage is determined by inspecting the building, determining the square footage, and obtaining other pertinent

information, then inputting the information into the Marshall system. She stated the replacement cost coverage obtained through the Marshall system is used to determine the premium to be charged to insure a building. She testified that there is no way to obtain a premium for coverage without a limit and that there is no way to issue a policy without a limit on replacement coverage.

A commercial underwriter for Farm Bureau testified that her duties included reviewing applications for insurance that are sent to her by agents and giving approval or permission to notify a potential client regarding whether Farm Bureau will assume their risk. To help determine risk, underwriters ask about liability, existing hazards, experience, and loss history. She testified that Wahoo Locker required a special kind of rate to help generate a premium, as it was a type of risk that was "generally ineligible." She consulted the "insurance services office" Web site and found the rates at Cooper's request, and she requested further information from Cooper to determine whether Farm Bureau would accept the risk. She gave Cooper the authority to bind Farm Bureau on June 18, 2009. At that time, she was not aware that Cooper did not use the form generated by the Marshall system to calculate the estimated replacement cost for Wahoo Locker. She canceled Wahoo Locker's fire coverage in December 2009, because she had not received supporting documentation from Cooper, including the Marshall system form and pictures of the Wahoo Locker building. The policy was reinstated later.

John Hruska was called as an expert for Wahoo Locker on the issue of insurance risk management. He testified that in an operation like Wahoo Locker, reconstruction would have additional considerations such as compliance with the "ADA . . . , city ordinances [and] other authorities." He recommended discussing these issues with the client and speaking to an architect or contractor in addition to obtaining an appraisal through the Marshall system. He explained that an inflation guard endorsement is designed to increase the

property values on an insurance policy each year, to protect the client if the insurance agent does nothing to adjust the value of the property from year to year. The Farm Bureau policy had an inflation guard endorsement available but it was not utilized.

Following the bench trial, the district court found that there was no mutual mistake with regard to the policy limits and that the limit for replacement cost was $491,000. The court further found that the "[i]ncreased costs to replace the building to standards imposed by code [were] not recoverable under the express terms of the policy." The court found that the cost to replace the building as it existed prior to the fire was $490,632 and that Wahoo Locker was entitled to judgment in that amount. The issue of "bad faith" was still at issue at that time. Wahoo Locker moved to dismiss the second cause of action for bad faith, and the district court dismissed the claim, without prejudice, at Wahoo Locker's cost.

ASSIGNMENTS OF ERROR

Wahoo Locker asserts, summarized and restated, that the trial court erred in finding there was no mutual mistake or unilateral mistake regarding the terms and conditions of the Farm Bureau policy. Wahoo Locker asserts the trial court erred in finding there was no basis upon which to provide recovery in an amount which would permit Wahoo Locker to rebuild and continue to operate as a meat processing facility.

STANDARD OF REVIEW

[1,2] An action to reform a contract sounds in equity. *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706, 798 N.W.2d 121 (2011). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Id. See, also, *Ficke v. Wolken*, 291 Neb. 482, 868 N.W.2d 305 (2015).

ANALYSIS

Policy Not Subject to Reformation.

[3-6] Reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument. *R & B Farms v. Cedar Valley Acres, supra.* The right to reformation depends on whether the instrument to be reformed reflects the intent of the parties. *Id.* To overcome the presumption that an agreement correctly expresses the parties' intent and therefore should be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence. Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *Id.*

[7] The Nebraska Supreme Court has held that a court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004).

Wahoo Locker asserts the district court erred in finding there was no mutual or unilateral mistake upon the issuance of the policy which is the subject of this action. Wahoo Locker argues that the policy issued does not reflect the real agreement between the parties, because Farm Bureau's agent represented that the policy would provide full replacement cost coverage assuring "the reconstruction of Wahoo Locker's plant in the event of a catastrophic loss." Brief for appellant at 18.

[8] Wahoo Locker asserts the district court erred in finding there was not sufficient evidence that a mutual mistake occurred. A mutual mistake is

> "'"a belief shared by the parties, which is not in accord with the facts. . . . A mutual mistake is one common to

> both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument. . . . 'A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.'"'"

R & B Farms v. Cedar Valley Acres, 281 Neb. 706, 715, 798 N.W.2d 121, 129 (2011).

[9] The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake or prevent reformation. *Id.* However, upon our de novo review, we find there is not clear and convincing evidence of a mutual mistake in this case which would justify reformation of the insurance contract.

The evidence shows that in May 2009, Cooper and Miller met with Emswiler and recommended replacement cost coverage for the Wahoo Locker building. Wahoo Locker asserts that Cooper represented to Emswiler that "'replacement cost'" was cost incurred in "constructing a building, utility equivalent using modern materials, current standards, design, and layout." Brief for appellant at 31. Emswiler understood this to include any improvements or upgrades that may be required to meet the current USDA regulations. However, Cooper testified at trial that replacement coverage "is to rebuild the property like it is, like it stands." Cooper further testified that he explained this definition to Emswiler during their discussions before the policy was issued. Therefore, the evidence is not clear, convincing, or satisfactory that at the time Cooper sold the policy to Wahoo Locker, he was under the mistaken belief that replacement cost coverage would include improvements or upgrades that may be required to meet the current USDA regulations. Nor is there clear, convincing, or satisfactory evidence that Cooper ever told Emswiler that coverage would include the cost of reconstructing a facility with modern materials in accordance with current building standards.

While the term "replacement cost" may have held a different meaning to Emswiler, there was no mutual mistake as to the coverage provided.

We find this case akin to *Ridenour v. Farm Bureau Ins. Co.*, 221 Neb. 353, 377 N.W.2d 101 (1985). In *Ridenour*, the insureds sought to reform their insurance policy on the basis of mutual mistake. They claimed that they had requested coverage on their hogs and hog confinement building to protect them in the event of a collapse. The policy issued, however, excluded loss caused by collapse. The insureds testified that the agent assured them that the hogs and building would be covered in the event of collapse. The agent, however, testified that they had not requested such coverage and that, in fact, he knew the insurer did not provide collapse coverage for outbuildings. Given the conflicting testimony, the court refused to reform the policy, concluding that "[a]ny mistake which may have existed was therefore one made only by plaintiff." *Id.* at 359, 377 N.W.2d at 105.

In the present case, there is no dispute that Emswiler requested replacement coverage for Wahoo Locker; however, the evidence is in conflict on what that term was represented to mean. Given Cooper's testimony that he knew replacement coverage was limited to costs incurred to replace the building as it stood before the loss and his testimony that he would have conveyed that to Emswiler before he sold the policy, any mistake which may have existed as to its meaning was therefore one made only by Emswiler. Therefore, there was no mutual mistake upon which reformation may be granted.

A policy may also be reformed when there has been a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought. *Twin Towers Dev. v. Butternut Apartments*, 257 Neb. 511, 599 N.W.2d 839 (1999). Although the district court's order does not specifically address this issue, we determine that the lower court implicitly found no unilateral mistake given its refusal to reform the contract, and we find no error in that decision.

Cooper testified he was surprised that the cost to replace the locker plant was nearly double what he had insured the property for and that he never had any intent to underinsure the building. This evidence does not support a finding of fraud or inequitable conduct.

Based upon the above, we find no error in the district court's refusal to reform the policy.

Recovery Limited to Policy Limits.

Wahoo Locker argues that the trial court erred in finding that there was no basis to provide Wahoo Locker a recovery beyond the stated policy limits. It argues that based upon the representations of Cooper and the reasonable expectations of Wahoo Locker, coverage in excess of the policy limits should be provided. We disagree.

The parties stipulated that Westercamp concluded the fair and reasonable cost to repair, rebuild, or replace the building with other property of like kind and quality so that the building owned by Wahoo Locker would be the same as it was immediately before the fire was $490,632. The evidence also shows that the Wahoo Locker building could not be rebuilt "as it stood with materials of like kind and quality" and still operate as a meat processing facility, due to changes in the USDA regulations.

The parties also stipulated that Beller determined the fair and reasonable cost of replacing the Wahoo Locker building with new and different materials which would be compliant with the USDA regulations at both the inception of the policy in 2009 and the time of the fire in 2013.

Wahoo Locker asserts that Cooper represented to Emswiler that replacement cost was being provided; however, by limiting the amount of recovery to the costs incurred to rebuild the locker plant with materials of like kind and quality is to provide "reproduction cost" and not "replacement cost." Brief for appellant at 30. The policy, itself, defines the extent of Farm Bureau's liability. It specifically states that

in the event of a loss covered by the policy, Farm Bureau would either:

> (1) Pay the value of lost or damaged property;
>
> (2) Pay the cost of repairing or replacing the lost or damaged property, subject to b. below;
>
> (3) Take all or any part of the property at an agreed or appraised value; or
>
> (4) Repair, rebuild or replace the property with other property of like kind and quality, subject to b. below.
>
> . . . .
>
> b. The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

The extent of Farm Bureau's coverage is specifically defined in the policy provision set forth above, and according to Cooper, he advised Emswiler that replacement coverage is to rebuild the property as it stands. We therefore reject Wahoo Locker's argument that Cooper's representations were contrary to the terms of the policy.

[10] In support of its position that its reasonable expectations were not met, Wahoo Locker refers to out-of-state cases in which policy exclusions were not applied and the increased costs to repair or rebuild the covered property were awarded. See *Bering Strait School Dist. v. RLI Ins.*, 873 P.2d 1292 (Alaska 1994), and *Dupre v. Allstate Ins. Co.*, 62 P.3d 1024 (Colo. App. 2002). Under Nebraska law, however, the reasonable expectations of an insured are not assessed unless the language of the insurance policy is found to be ambiguous. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). Neither Wahoo Locker nor Farm Bureau contend the policy provision is ambiguous. In another case relied upon by Wahoo Locker, *U.S.D. No. 285 v. St. Paul Fire and Marine Ins. Co.*, 6 Kan. App. 2d 244, 627 P.2d 1147 (1981), *overruled on other grounds, Thomas v. American Family Mut. Ins. Co.*, 233 Kan. 775, 666 P.2d 676 (1983), the

court held that the insurer could be held liable up to the limits of coverage. Here, Wahoo Locker seeks to recover beyond the policy limits.

Having reviewed the evidence, we agree with the district court that Wahoo Locker is not entitled to a recovery beyond the stated policy limits in the present action.

CONCLUSION

For the foregoing reasons, we find the district court did not err in refusing to reform the policy and in limiting Wahoo Locker's recovery to the policy limits of $491,000.

Affirmed.

Bishop, Judge, participating on briefs.

State of Nebraska, appellee, v.
Joseph D. Senn, Jr., appellant.
884 N.W.2d 142

Filed July 5, 2016. No. A-15-734.

1. **Criminal Law: Weapons.** Neb. Rev. Stat. § 28-1202 (Cum. Supp. 2014) provides that generally, any person who carries a weapon or weapons concealed on or about his or her person, such as a handgun, a knife, brass or iron knuckles, or any other deadly weapon, commits the offense of carrying a concealed weapon.
2. **Pleadings: Appeal and Error.** An appellate court will decide a case on the theory on which it was presented in the trial court.
3. **Criminal Law: Weapons.** The purpose of Neb. Rev. Stat. § 28-1202 (Cum. Supp. 2014), Nebraska's concealed weapon statute, is to prevent the carrying of weapons because of the opportunity and temptation to use them which arise from concealment.
4. **Weapons: Words and Phrases.** A weapon is concealed on or about the person if it is concealed in such proximity to the driver of an automobile as to be convenient of access and within immediate physical reach.
5. **Weapons: Evidence.** Neb. Rev. Stat. § 28-1212 (Reissue 2008) provides that the presence in a motor vehicle of any firearm shall be prima facie evidence that it is in the possession of, and is carried by, all persons occupying such motor vehicle at the time such firearm is found, unless such firearm is found upon the person of one of the occupants.

Appeal from the District Court for Richardson County: Daniel E. Bryan, Jr., Judge. Reversed and remanded with directions to dismiss.

Keith M. Kollasch, of Kollasch Law Office, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Riedmann, Judge.

INTRODUCTION

Following a jury trial in the district court of Richardson County, Nebraska, Joseph D. Senn, Jr., was convicted of carrying a concealed weapon and acquitted of three other charges—attempted second degree murder, use of a firearm to commit a felony, and terroristic threats. A second terroristic threat charge was dismissed following the State's presentation of evidence. On appeal, Senn argues that the evidence was insufficient to support his conviction of carrying a concealed weapon. We agree and accordingly reverse the conviction and remand the cause with directions to dismiss.

BACKGROUND

On October 4, 2014, Senn drove a U-Haul truck to the home of Buckley Auxier with the purpose of assisting Natalie Auxier in removing some of her possessions from the home. At that time, Natalie and Buckley were involved in divorce proceedings. Buckley is a farmer, and his farmhand Shaun Robertson was also present at Buckley's home during the incident and testified in court. Upon arriving, Senn represented to Buckley that he had been directed by Natalie's lawyer to retrieve her property. Buckley began yelling at Senn and Natalie. Using obscene language, he directed them to leave his home.

Buckley testified at trial that at this point, Senn returned to the U-Haul and pulled out a handgun. When asked where in the U-Haul the handgun had been stored, Buckley replied, "It might have been underneath the seat. I don't know. It was in the U-Haul, easy to reach." Robertson described the handgun retrieval by saying that Senn "went over to the U-Haul and obtained a pistol that was hidden in there." Buckley

and Robertson testified that Senn then pointed the gun at Robertson and ordered him to "'[g]et back in the house . . . .'" They testified that Senn then pointed the handgun at Buckley, pulled the trigger, and fired a shot—but missed. Buckley states that after firing the shot, Senn left the premises with Natalie in the U-Haul. Senn testified that he left the property when the confrontation grew heated and that he neither retrieved the handgun nor fired a shot at Buckley.

Buckley stated that he telephoned law enforcement officers immediately after Senn departed from the property. Buckley and Robertson testified that they discovered a spent shell casing on the property after Senn left. Robertson testified that the shell casing smelled like it had just been fired.

The Richardson County Sheriff and his deputy intercepted the U-Haul some distance from Buckley's property and initiated a traffic stop. Senn was driving the U-Haul, and Natalie was riding as a passenger. During the stop, the deputy noticed a blue plastic manufacturer's firearms box behind the passenger seat in the U-Haul. The firearms box contained a 9-mm semiautomatic handgun. The deputy testified that given the location of the firearms box during the stop, the driver of the vehicle could not have reached the weapon while driving. The sheriff testified that the firearms box was found "against the wall of the truck — between the passenger seat and the right side wall of the truck, partially behind the seat, with some clothing on top of it" and that "it was completely on the other side of the cab" from the driver.

Senn admitted that the handgun in the blue plastic case belonged to him. A forensic scientist testified to his opinion that the shell casing found on Buckley's property was fired from the handgun found in the U-Haul during the traffic stop. Senn testified that although he had not fired his handgun on October 4, 2014, he had visited Buckley's property approximately a week earlier with Natalie to remove other possessions and had fired several shots using an old basketball as a target on that occasion. He testified that he did not

remove all of the shell casings after firing the handgun the week before.

During closing arguments, the State and defense counsel presented opposing views about whether the elements of carrying a concealed weapon had been met. The State asserted that the pistol "was found on or about his person [given that it] was found in the driver's compartment of the U-Haul vehicle when [the sheriff and deputy] conducted the traffic stop. There's no doubt that the elements [of] carrying a concealed weapon[] have been met." Defense counsel argued that the pistol was not "on or about his person" because the pistol "was unreachable" during the traffic stop.

The jury instruction on the concealed weapon charge states that the elements the State must prove beyond a reasonable doubt on that charge are "(1) That . . . Senn . . . ; (2) On or about October 4, 2014; (3) In Richardson County, Nebraska; (4) Did carry a weapon concealed on or about his person to-wit: 9mm semi-automatic handgun."

After deliberation, the jury found Senn guilty of carrying a concealed weapon and not guilty of the remaining charges. The district court sentenced Senn to a fine of $200 on the concealed weapon conviction. Senn appeals from his conviction.

ASSIGNMENT OF ERROR

Senn assigns that the evidence adduced at trial was insufficient to support the jury's guilty verdict for the charge of carrying a concealed weapon.

STANDARD OF REVIEW

When reviewing the sufficiency of the evidence to support a conviction, 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. Irish*, 292 Neb. 513, 873 N.W.2d 161 (2016).

ANALYSIS

[1] Senn's only argument on appeal is that the evidence adduced at trial was insufficient to demonstrate that during the traffic stop the handgun was concealed "on or about" Senn's person as required by Neb. Rev. Stat. § 28-1202 (Cum. Supp. 2014), Nebraska's statute prohibiting carrying a concealed weapon. Section 28-1202 provides:

> (1)(a) Except as otherwise provided in this section, any person who carries a weapon or weapons concealed on or about his or her person, such as a handgun, a knife, brass or iron knuckles, or any other deadly weapon, commits the offense of carrying a concealed weapon.

[2] A weapon is concealed on or about the person if it is concealed in such proximity to the driver of an automobile as to be convenient of access and within immediate physical reach. *State v. Saccomano*, 218 Neb. 435, 355 N.W.2d 791 (1984). At trial, the State argued that the elements of the concealed weapon statute were met based upon the handgun's location in the cab of the U-Haul at the time the sheriff and deputy conducted a traffic stop. On appeal, the State argues that the jury could have found that Senn carried a concealed weapon immediately before he allegedly shot at Buckley. However, as a general rule, an appellate court will decide a case on the theory on which it was presented in the trial court. *Nelson v. Cool*, 230 Neb. 859, 434 N.W.2d 32 (1989). Therefore, we consider only the argument presented at trial—that Senn carried a concealed weapon when stopped by the sheriff and deputy.

The issue in this appeal is the meaning of the statutory language "concealed on or about [the defendant's] person." § 28-1202. Specifically, we consider whether, as Senn argues, a weapon inside the cab of a vehicle but in a location where it could not be reached by the driver is not "in such proximity to the driver . . . as to be convenient of access and within immediate physical reach," *State v. Saccomano*, 218 Neb. at 436, 355 N.W.2d at 792, or whether, as the State asserted at trial,

a firearm's location in the cab of the vehicle is enough to satisfy the element that the weapon be concealed "on or about" the defendant's person. We note that no jury instruction was tendered to define the phrase "on or about" the defendant's person and that the prosecutor and the defense counsel argued conflicting definitions in closing arguments.

[3,4] The purpose of § 28-1202, Nebraska's concealed weapon statute, is to prevent the carrying of weapons because of the opportunity and temptation to use them which arise from concealment. *State v. Saccomano, supra*. In applying the concealed weapon statute to the vehicular context, the Nebraska Supreme Court has held that "[a] weapon is concealed on or about the person if it is concealed in such proximity to the driver of an automobile as to be convenient of access and within immediate physical reach." *State v. Saccomano*, 218 Neb. at 436, 355 N.W.2d at 792. Nebraska case law has not specifically addressed whether a firearm concealed within the cab of the vehicle but outside the reach of the driver may be considered to be "within immediate physical reach" of the driver. See *id.*

In Nebraska vehicular concealed weapon cases, physical proximity to the driver is an essential factor in determining whether a weapon is concealed "on or about" one's person under § 28-1202. The majority of Nebraska case law finding firearms to be concealed "on or about" the person of a motor vehicle's driver have specified that the firearm was within physical access or reach of the driver. See, *State v. Saccomano, supra* (defendant carried concealed weapon when he operated automobile with gun concealed under front seat); *Kennedy v. State*, 171 Neb. 160, 105 N.W.2d 710 (1960) (defendant, who was driving vehicle, was guilty of carrying concealed weapon where two revolvers were found on center of back seat where they were readily accessible to occupants of vehicle); *Phillips v. State*, 154 Neb. 790, 49 N.W.2d 698 (1951) (defendant driver convicted of carrying concealed weapon where two

loaded revolvers were found under right front seat where they were readily accessible).

In *State v. Goodwin*, 184 Neb. 537, 169 N.W.2d 270 (1969), the Nebraska Supreme Court considered the question of whether a weapon within easy reach of a defendant still satisfied the concealed weapon statute if it were in a locked container. In *Goodwin*, the defendant concealed a weapon in his locked glove compartment. The Nebraska Supreme Court relied upon the weapon's physical proximity to the driver and the driver's command of the situation to find the weapon to be concealed "on or about" the person of the driver notwithstanding the lock. *Id.* The *Goodwin* court referred to the reasoning of an Ohio court presented with similar facts and law, which emphasized that a glove compartment is "within easy reach" of the driver and that locking the glove compartment should not save a defendant from conviction when the locked or unlocked status of the glove compartment is the driver's choice and under his immediate command. *Id.* at 542, 169 N.W.2d at 274, citing *City of Cleveland v. Betts*, 107 Ohio App. 511, 148 N.E.2d 708 (1958), *affirmed* 168 Ohio St. 386, 154 N.E.2d 917. The reasoning in *Goodwin* therefore confirms that physical proximity is an essential factor in determining whether a weapon is concealed "on or about" one's person under § 28-1202.

Other states with similar concealed weapon statutes have considered the question of whether a weapon within the cab of a vehicle but outside the reach of the driver is concealed "on or about" the person of the driver and have concluded as we do that it is not. In *The People v. Niemoth*, 322 Ill. 51, 152 N.E. 537 (1926), the Illinois Supreme Court reversed a conviction of carrying a concealed weapon, determining that two firearms could not be said to be concealed "on or about" the defendant's person where there was no evidence that he could have "reached them without moving from his position in the front seat." *Id.* at 53, 152 N.E. at 537. The Illinois court went on to opine that to hold otherwise would improperly

extend the statute into one barring all transportation of loaded firearms in vehicles. *Id.* See, also, *The People v. Liss*, 406 Ill. 419, 94 N.E.2d 320 (1950) (reversing conviction for carrying concealed weapon and holding that immediate accessibility of weapon requires that it be within easy reach of one who need not make appreciable change in his position in order to use it).

Similarly, a North Carolina appellate court reversed a jury verdict finding a defendant guilty of carrying a concealed weapon based on insufficiency of the evidence. *State v. Soles*, 191 N.C. App. 241, 662 S.E.2d 564 (2008). In *Soles*, a search of a van revealed a loaded pistol in a backpack located in the rear of the van. A state statute made it illegal for a person "'to carry concealed about his person'" a deadly weapon. *Id.* at 243, 662 S.E.2d at 566. The driver was charged as a felon in possession and for carrying a concealed weapon. A jury convicted him of both charges. On appeal, the court acknowledged that the pertinent statute did not require that the weapon actually be concealed *on* the person, but, rather, only *about* the person. It recognized that cases addressing this requirement "have focused on the ready accessibility of the weapon, such that it was 'within the *reach* and control of the person charged.'" *Id.* at 244, 662 S.E.2d at 566, quoting *State v. Gainey*, 273 N.C. 620, 160 S.E.2d 685 (1968).

Reviewing the evidence, the North Carolina court noted that the State did not present any evidence of the backpack's precise location in the van and that the State conceded the record was silent as to this issue. Emphasizing that it was the State's burden to prove each element of the crime, including that the firearm was concealed in close proximity and within the defendant's convenient control and easy reach, it concluded the trial court should have granted the defendant's motion to dismiss at the close of the State's case. See *id.* Accordingly, it reversed the defendant's conviction and remanded the cause with instructions to dismiss the charges. Like these other jurisdictions, the Nebraska Supreme Court has interpreted the

phrase "concealed on or about" the person of a driver to mean "in such proximity to the driver . . . as to be convenient of access and within immediate physical reach," *State v. Saccomano*, 218 Neb. 435, 436, 355 N.W.2d 791, 792 (1984), and all of our case law has focused on the physical accessibility of the firearm. We further note that under Nebraska law, the construction of what it means to conceal a weapon "on or about" one's person is distinct from the broader concept of "possessing" a weapon. In contrast to the specific requirement that a weapon concealed "on or about" a driver's person must be "convenient of access and within immediate physical reach," *State v. Saccomano, supra*, "possession" requires only knowing dominion or control over an object even if that object is physically remote. See, *State v. Long*, 8 Neb. App. 353, 594 N.W.2d 310 (1999); *State v. Frieze*, 3 Neb. App. 263, 525 N.W.2d 646 (1994). Given this precedent, we find it appropriate in this case to interpret "within immediate physical reach" of a driver to mean within Senn's reach at the time he was pulled over. To hold otherwise would disregard the requirement that the firearm be "within immediate physical reach" and would obliterate the distinction between carrying a concealed weapon and mere possession.

In this case, the evidence establishes that the sheriff and deputy uncovered the firearm in a part of the U-Haul where Senn could not reach it when he was apprehended. The deputy who conducted the traffic stop testified that the driver of the vehicle could not have reached the weapon while driving. The sheriff agreed that the firearms box was completely on the other side of the cab from the driver's seat. The State's assertion during closing arguments that a gun found anywhere in the driver's compartment of a vehicle is "on or about" the person of the driver is an overbroad statement of the law because it neglects the Nebraska Supreme Court's requirement that the weapon be "convenient of access and within immediate physical reach" of a driver. See *State v. Saccomano*, 218 Neb. at 436, 355 N.W.2d at 792. It was the

State's burden to prove that the firearm was concealed on or about Senn's person, which, under the facts of this case, we interpret to mean in a location that Senn could reach at the time he was pulled over. Because the uncontroverted testimony in this case establishes that the gun was not within immediate physical reach of Senn, the evidence is insufficient to support a conviction that Senn was carrying a concealed weapon at the time of the traffic stop. Accordingly, we reverse Senn's conviction and direct that the charge against him be dismissed.

The dissent argues that *State v. Goodwin*, 184 Neb. 537, 169 N.W.2d 270 (1969), and *Kennedy v. State*, 171 Neb. 160, 105 N.W.2d 710 (1960), expand the meaning of the phrase "within immediate physical reach" to "include situations in which access [to the weapon] may require a two-step process or require some change in position of the driver." We disagree with this interpretation, because in both *Goodwin* and *Kennedy* there is no indication that the defendants were required to move from their seats in order to access the weapons. To the contrary, both cases identify the weapons as being "within easy reach" or "readily accessible" to the defendants.

We also think this interpretation too broadly expands the concept of a weapon being "on or about" one's person and, as the Illinois court notes in *The People v. Niemoth*, 322 Ill. 51, 152 N.E. 537 (1926), this interpretation could make it illegal to transport any firearm in a vehicle that does not have a separate trunk compartment. This is particularly the case given the *Goodwin* court's refusal to hold that a lock prevents a proximate weapon from being "on or about" the person. Were we to adopt the dissent's expanded proximity for carrying a concealed weapon, a defendant could be found to be carrying a concealed weapon even if he transported the weapon in a locked firearms box in an out-of-reach location in the cab of a vehicle.

[5] In the case before us, the only evidence as to the firearm's accessibility to Senn came from the two law enforcement

officers who both testified that Senn could not reach the firearm at the time he was pulled over. Given the State's burden to prove the weapon was concealed "on or about" Senn's person, as defined by case law to mean "in such proximity to the driver . . . as to be convenient of access and within immediate physical reach," see *State v. Saccomano*, 218 Neb. 435, 436, 355 N.W.2d 791, 792 (1984), we determine the evidence was insufficient to sustain the conviction. The dissent also contends that pursuant to Neb. Rev. Stat. § 28-1212 (Reissue 2008), the evidence was sufficient to present a jury question and therefore, given our standard of review, we should not reverse. Section 28-1212 states:

> The presence in a motor vehicle . . . of any firearm . . . shall be prima facie evidence that it is in the possession of and is carried by all persons occupying such motor vehicle at the time such firearm . . . is found, [unless] such firearm . . . is found upon the person of one of the occupants . . . .

However, given the phrasing of § 28-1212, presence in the vehicle constitutes prima facie evidence only that the firearm is "carried," but does not speak to the additional statutory requirement of § 28-1202 that the weapon be concealed "on or about" the person of the defendant. An appellate court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning. *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015).

In § 28-1202, the phrase "on or about his or her person" modifies the word "concealed" and adds a locational element, defining where that weapon must be concealed in order to sustain a conviction. Therefore, giving meaning to every word or phrase of § 28-1212, the elements of the crime of carrying a concealed weapon are that (1) "any person" (2) "who carries" (3) "a weapon" (4) "concealed" (5) "on or about his or her person" then "commits the offense of carrying a concealed weapon."

Section 28-1212 creates a statutory presumption that a firearm in a vehicle is carried by any person within the vehicle, which speaks to elements (1), (2), and (3) above. However, § 28-1212 says nothing about elements (4) and (5) of § 28-1202. In asserting that a weapon's presence in a vehicle is prima facie evidence sufficient to submit a carrying a concealed weapon charge to the jury, the dissent appears to presume that elements (4) and (5) of the charge—"concealed on or about [the defendant's] person"—are encompassed by the words "carried by" in § 28-1212. This construction denies meaning to the Legislature's use of the phrase "on or about his or her person" in its definition of the offense. See § 28-1202. Under the plain meaning of § 28-1202, the phrase "on or about his or her person" is not duplicative of the word "carries" in § 28-1202, but instead modifies where the weapon must be concealed in order to secure a conviction. Indeed, there would be no reason for the Legislature to include the phrase "on or about his or her person" if that location were necessarily implied by the word "carries."

We note that the U.S. Supreme Court, in construing the meaning of the phrase "carries a firearm," has held that the phrase does not refer exclusively to carrying a weapon upon the person but may also refer to carrying a weapon in the trunk of a vehicle. *Muscarello v. United States*, 524 U.S. 125, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998). While the statute at issue in that case differs from the one before us, the U.S. Supreme Court's construction of this phrase supports our understanding that § 28-1212 is not prima facie evidence of a violation of § 28-1202. Therefore, the Legislature's inclusion of the requirement that a weapon be concealed "on or about [the defendant's] person" is a meaningful element that prevents a conviction for carrying a weapon in a location such as a trunk of the vehicle that is not accessible to the person of the defendant.

Further, we have significant case law defining the statutory phrase "on or about his or her person" in the context of

weapons discovered in vehicles, as outlined elsewhere in this opinion. If § 28-1212 created a prima facie case that a weapon was "on or about" the person of all occupants of a vehicle, this case law would be superseded.

In sum, § 28-1212 creates a presumption that a firearm in a vehicle is carried by its passengers; it does not create a presumption that a firearm in a vehicle is "concealed on or about" the driver. Its inapplicability to prove all the elements of the crime of carrying a concealed weapon is exemplified in *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991).

In *State v. Jasper, supra*, the Nebraska Supreme Court disapproved of a jury instruction incorporating the language of § 28-1212 in a case involving a charge of possession of a short shotgun. Although the primary basis for its decision was that an instruction creating a presumption of guilt impermissibly relieves the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime, it also highlighted the statute's limitation. The court noted that such an instruction may lead a juror to conclude that the shotgun's presence established the defendant's commission of the firearms crime. This would be erroneous because the crime required proof not only of possession, but that the defendant willfully, intentionally, and knowingly possessed the firearm. The court stated that "the crime charged was not 'presence in a vehicle containing a short shotgun,' but was 'possessing a short shotgun.'" *State v. Jasper*, 237 Neb. at 763, 467 N.W.2d at 861.

Likewise, in the present case, Senn was charged with carrying a concealed weapon, not just presence in a vehicle containing a concealed weapon. Because the presence of the firearm in the vehicle does not create a prima facie case that the weapon was located "on or about" the person of Senn, § 28-1212 does not preclude a reversal of the conviction on the basis of insufficiency of the evidence.

The Nebraska Supreme Court has said that a weapon is concealed "on or about" the person if it is concealed "in such

proximity to the driver . . . as to be convenient of access and within immediate physical reach." *State v. Saccomano*, 218 Neb. 435, 436, 355 N.W.2d 791, 792 (1984). Since the uncontroverted evidence regarding the weapon's location in this case is that it was not within the driver's immediate physical reach, it was not concealed "on or about [Senn's] person" and the evidence is insufficient to support the conviction.

CONCLUSION

Following our review of the record considering the evidence in the light most favorable to the State, we reverse, and remand to the district court with directions to dismiss this action.

Reversed and remanded with directions to dismiss.

Pirtle, Judge, dissenting.

I agree with the majority that the issue in this case is what it means for a weapon to be "concealed on or about [the defendant's] person." See Neb. Rev. Stat. § 28-1202 (Cum. Supp. 2014). However, I respectfully dissent with the majority's interpretation of the statutory language and its decision to reverse Senn's conviction.

Senn's sole argument on appeal is that the evidence adduced at trial was insufficient to support the jury's verdict for the charge of carrying a concealed weapon. His motion to dismiss on that basis made at the end of the State's evidence was overruled by the trial court. I also note that Senn's attorney made no objections to any of the 12 proposed jury instructions, nor did he tender any proposed jury instructions that would have further defined what it means for a weapon to be concealed "on or about [Senn's] person."

I would conclude that the evidence was sufficient to place the issue before the jury based on Neb. Rev. Stat. § 28-1212 (Reissue 2008). In determining whether the evidence is sufficient to place the issue before a jury, § 28-1212 provides:

> The presence in a motor vehicle . . . of any firearm . . . shall be prima facie evidence that it is in the possession of and is carried by all persons occupying such motor vehicle at the time such firearm . . . is found, [unless] such firearm . . . is found upon the person of one of the occupants . . . .

See *State v. Jasper*, 237 Neb. 754, 756, 467 N.W.2d 855, 858 (1991) (explaining that "'[p]rima facie evidence'" means proof presented on issue is sufficient to submit issue to jury).

Given the evidence adduced at trial, it was appropriate for the issue to be submitted to the jury for its determination. The jury decided, after considering the evidence presented and the instructions it was given, that Senn was guilty of carrying a concealed weapon. Our standard of review in this case 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. See *State v. Irish*, 292 Neb. 513, 873 N.W.2d 161 (2016). Given our standard of review in this case, I believe that there was sufficient evidence to support the jury's verdict and that Senn's conviction should be affirmed.

As set forth in the majority opinion, the Nebraska Supreme Court has held that "[a] weapon is concealed on or about the person if it is concealed in such proximity to the driver of an automobile as to be convenient of access and within immediate physical reach." *State v. Saccomano*, 218 Neb. 435, 436, 355 N.W.2d 791, 792 (1984). After relying on Illinois and North Carolina law, the majority concludes that "within immediate physical reach" of a driver means within Senn's reach at the time he was pulled over. I believe the Nebraska Supreme Court's decisions in *State v. Goodwin*, 184 Neb. 537, 169 N.W.2d 270 (1969), and *Kennedy v. State*, 171 Neb. 160, 105 N.W.2d 710 (1960), indicate otherwise.

In *State v. Goodwin, supra*, a loaded pistol was found in the locked glove compartment of the defendant's automobile during a postarrest search. The defendant testified that the gun

had been locked inside the glove compartment for over a year. The Supreme Court affirmed the defendant's conviction for carrying a concealed weapon. It stated:

> Is a loaded pistol locked in a glove compartment concealed on or about the person of the driver? We determine that it is. The words "concealed on or about the person" mean concealed in such close proximity to the driver as to be convenient of access and within immediate physical reach. As we said in *Kennedy v. State*, . . . a weapon is concealed when it is hidden from ordinary observation and is readily accessible on his person or in a motor vehicle operated by the defendant. In that case the arresting officer opened the back door of defendant's car and found two loaded revolvers on the back seat.

State v. Goodwin, 184 Neb. at 541-42, 169 N.W.2d at 273.

In *State v. Goodwin, supra*, there was no evidence as to whether the defendant had the key to the glove compartment when his vehicle was stopped, nor did the court consider whether the defendant actually could have retrieved the weapon from the locked glove compartment. Instead, the Supreme Court found the evidence to be sufficient that the defendant had intentionally concealed the weapon in an accessible location and had control of and operated the vehicle. See *id.*

Further, there was no mention in the Supreme Court's decision of what type or size of vehicle the defendant had been driving, and thus, it is not clear whether the gun was actually "within immediate physical reach" of the defendant while in the driver's seat.

In *Kennedy v. State, supra*, after the defendant was arrested, a police officer opened a back door of the defendant's vehicle and found, visible for the first time, two revolvers lying beside a satchel and on top of an overcoat in the center of the back seat. The Supreme Court stated that the guns were readily accessible to the occupants of the vehicle and concluded

that the evidence was sufficient to support the guilty verdict on the concealed weapons charge.

I believe *Goodwin* and *Kennedy* extend the "within immediate physical reach" component to include situations in which access may require a two-step process or require some change in position of the driver. In *Goodwin*, the defendant would have had to unlock the glove compartment, assuming he had the key, and then retrieve the gun. The majority acknowledges that *Goodwin* stretches the requirement that the firearm be "within immediate physical reach."

Similarly, in *Kennedy*, the guns were on the back seat and found to be readily accessible. However, we do not know whether the defendant driver could have reached the guns on the back seat without changing his position to some extent.

I believe the present case is similar to *State v. Goodwin*, 184 Neb. 537, 169 N.W.2d 270 (1969), and to *Kennedy v. State*, 171 Neb. 160, 105 N.W.2d 710 (1960). The gun was in a firearms box in the cab of the U-Haul "partially behind the seat, with some clothing on top of it." Although the sheriff testified that Senn could not have reached the weapon while driving, a jury could have determined that it was in a location that was generally "readily accessible" and within immediate physical reach of Senn. While reaching the weapon would have required some maneuvering, this situation is analogous to the locked glove compartment in *State v. Goodwin, supra*.

Further, the evidence at trial showed that Senn could not have reached the weapon *while driving*. Although the Nebraska Supreme Court has interpreted "on or about" the person of the driver to mean "convenient of access and within immediate physical reach," see *State v. Goodwin, supra*, and *State v. Saccomano*, 218 Neb. 435, 355 N.W.2d 791 (1984), it has never said that the weapon must be within physical reach of the driver *while driving*.

Given our standard of review requiring us to view the evidence in the light most favorable to the prosecution, I would conclude that any rational trier of fact could have found

beyond a reasonable doubt that Senn was concealing a firearm on or about his person.

Further, the Nebraska Supreme Court has stated that the Legislature recognized that there may be mere technical violations without criminal intent and, therefore, provided the courts with great latitude in the imposition of penalties. *Bright v. State*, 125 Neb. 817, 252 N.W. 386 (1934). It is worthy of note that under § 28-1202, a first offense is a Class I misdemeanor and subsequent offenses are Class IV felonies. Neither carries a minimum penalty. See Neb. Rev. Stat. §§ 28-106 and 28-105 (Cum. Supp. 2014). In this case, Senn was fined only $200. Therefore, a decision affirming this conviction would not lead to unintended consequences. I believe the jury's verdict in this case should have been affirmed.

In re Interest of Darius A., a child under 18 years of age. State of Nebraska, appellee and cross-appellee, v. Stephanie H., appellant, and Gregory A., appellee and cross-appellant.

884 N.W.2d 457

Filed July 19, 2016. No. A-15-773.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
2. **Juvenile Courts: Jurisdiction.** The purpose of an adjudication phase of a neglect petition is to protect the interests of the child.
3. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247.

Appeal from the Separate Juvenile Court of Lancaster County: Reggie L. Ryder, Judge. Affirmed.

Lisa M. Gonzalez, of Gonzalez Law Office, L.L.C., for appellant.

Joe Kelly, Lancaster County Attorney, and Ashley J. Bohnet for appellee State of Nebraska.

Susan L. Kirchmann, of Wertz & Associates, for appellee Gregory A.

Pirtle and Bishop, Judges.

Pirtle, Judge.

I. INTRODUCTION

Stephanie H. appeals and Gregory A. cross-appeals from the order of the separate juvenile court of Lancaster County adjudicating the minor child, Darius A., as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014). For the reasons that follow, we affirm.

II. BACKGROUND

Stephanie and Gregory are the parents of Darius. They were married from December 2004 until February 2015. Darius was born in November 2001 and has significant neurological problems that stem from prematurity. Darius was born with periventricular leukomalacia, central apnea, severe seizure disorder, and cerebral palsy. He is intellectually challenged, has some behavioral problems, and has been diagnosed as a child on the autism spectrum.

Multiple reports were made to the abuse hotline regarding Darius, but they were screened out by the Nebraska Department of Health and Human Services (DHHS) and not accepted. There were also numerous reports made in the past related to Darius' medical condition, all of which were determined to be unfounded. A case was accepted by DHHS regarding Darius due to concerns raised by Dawes Middle School (Dawes) in Lincoln, Nebraska, and Dr. George Wolcott, Darius' pediatric neurologist. The concerns were that Stephanie was not able to meet Darius' medical, mental, educational, or physical health needs. The case was assigned as a "dependent child intake" case, rather than a case with allegations of abuse or neglect at the fault of the parent.

On February 28, 2015, the State filed a petition alleging that Darius was within the meaning of § 43-247(3)(a) due

to the fault or habits of Stephanie and Gregory. The petition alleged that Stephanie and Gregory failed to provide for Darius' educational needs, as Darius had missed numerous days of school during the 2014-15 school year. The absences were marked "parent acknowledged, medically documented or illness," and only the medically documented absences were marked excused. The petition also alleged that Stephanie failed to administer Darius' medication as prescribed and/or recommended by Darius' treating neurologist and that she failed to follow up with medical appointments or treatment as recommended by Darius' treating physician.

A formal adjudication hearing was held on May 19, June 15, and July 16 and 20, 2015. Toward the end of the formal hearing, the State was given leave to amend the petition to conform to the facts presented at the hearing.

On July 23, 2015, the separate juvenile court of Lancaster County issued an order adjudicating Darius as a child within the meaning of § 43-247(3)(a). The court found that Darius lacked proper parental care by reason of the fault or habits of his parents. The court found Stephanie and Gregory neglected or refused to provide the necessary education or other care necessary for the health, morals, or well-being of Darius in that Darius missed almost 60 days of school in the 2014-15 school year. The court also found Stephanie failed to administer his medication as prescribed or recommended by Darius' treating neurologist and failed to follow up with medical appointments or treatments as recommended.

1. Medical History

Wolcott testified that several of Darius' medical conditions fall under the "umbrella [of] Lennox Gastaut" syndrome. Darius' medical conditions affect his intellect, behavior, and ability to complete physical tasks. Stephanie testified that Wolcott was Darius' neurologist from 2000 to 2005 and that he then retired. Wolcott began practicing again and resumed treating Darius. Karee Shonerd is a registered nurse and the

coordinator of specialty clinics at a Lincoln hospital. When Wolcott is not in the office, Shonerd calls him with urgent concerns from parents or takes messages on his behalf.

Darius has been prescribed a number of medications consistently including Klonopin and Banzel. Darius started on Lamictal in 2005. By 2014, Wolcott became concerned with the use of Lamictal due to toxicity and prescribed a medication called Onfi instead. Wolcott prescribed a decrease in the Lamictal dose and prescribed an initial dose of 10 milligrams of Onfi twice per day, to be increased to 20 milligrams twice per day after 1 week. Onfi was to be given in the morning and the evening, when Darius was at home, and his parents were responsible for the proper administration of the medication.

On July 7, 2014, Stephanie called Wolcott's office to discuss Darius' medication, as he started taking Onfi. Stephanie was given specific instructions for the dosage of Onfi. On July 21, Gregory reported to Wolcott's office that Stephanie misread the dosage instructions for Onfi and administered the drug at 10 milligrams twice per day for 2 weeks instead of 1 week.

On July 31, 2014, Stephanie called Wolcott's office with concerns about discontinuing Lamictal. Shonerd discussed the correct dosages with Stephanie; the prescribed dosage of Onfi at that time was to be 10 milligrams in the morning and 20 milligrams at bedtime. Stephanie reported to Shonerd that she was administering 15 milligrams, instead of 10 milligrams, of Onfi in the morning and 20 milligrams, as directed, at bedtime. Shonerd's notes indicate that Stephanie said she increased the dose of Onfi in the morning because she felt Darius needed an extra 5 milligrams of Onfi to compensate for the decrease in Lamictal.

Stephanie became concerned with Darius' behavior while taking Onfi, as she observed that he would not speak, eat, walk, or feed himself and that he would merely stare at the wall. She communicated her concerns with Wolcott 1 week after Darius started taking Onfi, and Darius was brought in for a followup

appointment on August 12, 2014. Stephanie indicated in a call to Wolcott's office on September 5 that she wanted to take Darius off of his medications because of the effect they were having on him.

Darius was admitted to the emergency room on September 8, 2014, and it was reported that he had a series of fairly significant seizures accompanied by significant respiratory issues. At that time, Wolcott became aware that Darius' medication was not being given as prescribed. Wolcott learned that Stephanie had initiated a "drastic taper" from the Onfi medication prior to Darius' hospitalization; she reported that she had been administering 5 milligrams of Onfi twice per day instead of the prescribed 20 milligrams twice per day. Wolcott determined there was a correlation between the seizures and the decreased dosages of Onfi, and testified that he believed the seizures were withdrawal seizures. He testified that with almost every patient, decreasing medications like Onfi too quickly can cause significant withdrawal symptoms including agitation, seizures, and death.

Wolcott developed a plan to wean Darius off of Onfi gradually over the course of 54 days. Starting on September 9, 2014, Stephanie was to administer 15 milligrams of Onfi for 3 days, then drop to 5 milligrams twice a day for 2 weeks, and then drop down to 5 milligrams for 30 days. This plan was provided to Stephanie when Darius was discharged, and she signed the form acknowledging her receipt.

Stephanie testified that she understood the plan was to decrease the dosage of Onfi slowly and that she "did the best [she] could with the knowledge [Wolcott] gave [her]." She was aware that decreasing Onfi drastically could cause a seizure that Darius may not recover from, and he had several seizures while he was being weaned off of Onfi.

Stephanie called Wolcott's office on September 23, 2014, to report that she decreased the Onfi dosage to 2.5 milligrams for 5 days and planned Darius' last dose of Onfi to be given on September 26. Shonerd's call logs indicate that she relayed this

information to Wolcott. Wolcott told Shonerd that Stephanie's dosage schedule meant Darius would be weaned from Onfi a month earlier than planned and that this was not as directed. Wolcott told Shonerd that he wanted to see Darius in October if he was coming off of Onfi so rapidly. The office notes indicate Darius' next appointment was moved from November to October. Wolcott testified that he had hoped that Darius would be weaned off of Onfi slowly, but because Darius was already on a lowered dose of Onfi, going back to the planned dosage schedule at that point would "re-exasperate the symptoms" that he had been concerned about.

A post on Stephanie's "Facebook" page, dated September 21, 2014, stated "TODAY: Starts The (1st) Day Without That *POISON*~~~"ONFI"! [reproduced as it appears]," which indicated she may have stopped administering Onfi prior to consulting Wolcott.

Wolcott testified that if changes to Darius' medication are made over the telephone, he immediately calls Shonerd to document the changes. He said that he trusts Stephanie to know what medication Darius is on and that she reports the medication Darius is taking at each appointment.

Shonerd testified that Stephanie is knowledgeable about Darius' diagnoses and symptoms and that the type of medication prescribed for Darius and the prescribed dosages changed frequently. However, Shonerd also testified that Stephanie had a history of not following Wolcott's recommendations regarding Darius' medication. She stated that Stephanie had a tendency to alter the medication dosage if she felt it was causing Darius problems and that these changes were made without the knowledge or consent of the treating doctor. Nevertheless, Shonerd said that she did not feel the need to contact Child Protective Services on Darius' behalf because she did not believe his life was in danger.

Stephanie told Shonerd on several occasions that she was administering Darius' prescriptions in amounts which were different than prescribed. On October 3, 2014, Stephanie

increased Darius' dosage of Klonopin without consulting Wolcott, and on October 31, she decreased the dosage of Dilantin. On November 21, Stephanie called to request that Darius' medication bottles be changed to reflect the way she was giving it. Shonerd's notes on November 25 indicate Shonerd told Stephanie that she should not increase Darius' medication on her own and that "Dr. Wolcott needs to be the one to make adjustment[s]." The clinic notes on May 26, 2015, indicate Darius' Dilantin prescription was not administered as directed.

Stephanie testified that she stopped attending Darius' appointments so she could rest while Darius was with Gregory, but that she had attended the most recent two appointments. She said Darius has followup appointments when Wolcott requests, or when the medication is not "going right." Wolcott's office notes indicate Stephanie told Shonerd that she did not attend the appointment on October 14, 2014, because she disagreed with Wolcott's treatment of Darius.

At the time of the adjudication hearing, Darius was prescribed Dilantin, Banzel, and Klonopin. Stephanie said that this medication regimen had been in place since October 2014 and that Darius continued to have seizures every 7 to 14 days.

Michelle Nunemaker, a child and family services specialist with DHHS, testified that she implemented drop-in visits in March 2015 due to concerns raised by Wolcott that Stephanie was administering Darius' medication incorrectly. Nunemaker reviewed the reports from drop-in workers and testified that she had no concerns with the administration of medication.

A family support worker testified that he provided drop-in services for Darius' family. He testified that he checked the prescription provided by the doctor, verified that the prescription matched the medication bottle, verified that the correct medication was given, and watched as it was administered. At the time he provided services, Darius was taking three medications and the family support worker did not have any concern regarding the correct administration of medication.

He testified that he never witnessed the wrong medication or dosage being given to Darius. The family support worker witnessed one seizure during a visit and testified that the parents reacted appropriately.

Another family support worker also provided drop-in services. She testified that she did not observe either parent make medication changes, unless verified by Darius' doctor, and that the administration of medication was consistent.

Darius had a primary care physician until approximately 6 weeks prior to the adjudication hearing. During his last office visit, Darius hugged a woman without her permission. Stephanie said she received a letter shortly after the appointment stating that the primary care physician's office could no longer treat Darius. Stephanie testified that she called four physician groups, but she was unable to find one who would accept Darius as a patient. She stated that if Darius were to become ill, she would try to get him into Wolcott's office or take him to "Urgent Care." Wolcott testified that he is not capable of being Darius' primary care physician.

2. Education

Darius was enrolled for the 2014-15 academic year at Dawes. Before the school year began, Stephanie gave a presentation to approximately 70 school staff members including paraeducators, the principal, and the vice principal. The presentation included instructions for Darius' wheelchair and how to pick Darius up from the floor after a seizure. A week prior to the start of the school year, Nancy Salsman, a special education coordinator at Dawes, met with Stephanie to discuss Darius' medication and preseizure activity. They also discussed the individualized education plan (IEP) and individualized health plan (IHP) in place for Darius from the school Darius attended during the previous academic year.

The school nurse at Dawes testified that she has spoken to Stephanie on several occasions regarding Darius' reaction to certain medication, the appropriate dosages of each medication,

and his overall well-being. The school nurse is present in the school 2 days per week. When she is not present, there is no other registered nurse present, but there is a health technician who is tasked with providing first aid and administering medication. The school nurse testified that Stephanie expressed concern that there is no nurse present at school for 3 of the 5 school days. The school nurse said the concern was passed on to her supervisor at the district office.

Nunemaker testified that Stephanie expressed concern that school staff were not trained or capable of caring for Darius' medical needs. Stephanie reported to her that she was concerned that Darius was not properly monitored after having a seizure at school.

During the 2014-15 school year, Darius had 11 seizures at school. When this occurs, the school contacts Darius' parents to determine whether Darius should stay at school or go home. Dickinson testified that if Darius goes home after a seizure, his absence is marked "M.D. or excused," which indicates a medically documented absence. On a few other occasions, Darius was sent home because his ambulation was unsteady, causing a safety risk. These absences were also marked as medically documented absences.

Salsman testified that a collaborative plan meeting is held once a student is absent from school for 10 days. The goal is to discuss the student's needs and how those needs are impacting attendance, so a plan can be made to improve attendance. A collaborative plan meeting was held for Darius on September 24, 2014, because he had missed 10 days of school. Stephanie indicated that Darius was taking a medication called Onfi and that it was contributing to his instability in school. Salsman stated that the school was aware of Darius' health issues and that there was an understanding that he may miss school. Salsman observed that at the beginning of the school year, Darius was very unstable. She said Darius' gait was labored, he was nonverbal, and he was not able to do tasks independently.

Darius was absent from school for almost all of the month of October 2014. Stephanie testified that issues which occurred at school on October 1 and 2 "set the course for 30 days of him missing school." She felt Darius was being isolated at school, which went against the conditions of the IEP. The "Facebook" account in Stephanie's name indicated she removed Darius from school because he was put into "Room #140" (Room 140). Darius' activity log for the day indicated he "went to Room 140 to sit in a safe seat" at various times throughout the school day on October 1, because he was extremely talkative and disruptive. Stephanie stated that his behavior could have been preseizure activity and that she was concerned that he was with a paraeducator and not with a teacher. She said paraeducators would not be trained to handle a seizure should one occur. Stephanie testified that she had never seen or requested to see Room 140 and that she was told the room is used for disruptive behavior.

Gregory testified that the decision to keep Darius out of school was a joint decision between him and Stephanie. He testified that he had not ever seen the inside of Room 140. He said, "Just the description of what they were doing to him was enough. Also because of his medical condition of the Onfi, he was not capable of going to school." Gregory testified that socialization provided in school is important and that Darius is able to learn certain skills. He also testified that it was his opinion that missing 60 days of school is not harmful to Darius.

Nunemaker testified that she was not concerned by Darius' extended absence from school, because of his medical condition. In addition, she noted that Onfi caused him to lose the ability to function in the way that he needed to before he could go back to school.

Salsman testified that Room 140 is a resource room. She testified that when Darius is in a room with students who function at the same level as him, he can be placed in a "safe seat" and he can practice behaviors. She said that a safe seat is

a seat away from the rest of the class and is used to "redirect . . . behaviors and get focused on the task at hand." Students in a safe seat are not left alone or physically restrained. In larger classrooms, Darius worked with a paraeducator, and when his behavior became disruptive, the safe seat did not help because his volume would increase and his behavior would disrupt everyone. Salsman said in that situation "we felt like it would be best to move towards the resource room and work on independent tasks there versus being in the large classroom setting."

A paraeducator who worked at Dawes testified that Room 140 can be used as a regular classroom. The room is a "Life Skills" classroom, and Darius reported there each morning and also had a few classes that were scheduled to meet in that room. She said if Darius struggled in a different classroom, he could be taken to Room 140 to calm down. She said the paraeducator would return with him to his regular classroom, if he was able.

Mary Ells, the assistant director of special education for Lincoln Public Schools, testified that she was made aware of Stephanie's concern that Room 140 was an "isolation placement" for Darius. She said that Room 140 is a classroom that is not used for seclusion, isolation, or punishment. She stated that if a child is taken to Room 140 to sit in a safe seat, the child is not left without a teacher or paraeducator present.

Ells and Salsman met with Stephanie in her home in late October or early November 2014 to discuss the learning processes used in the school and the behavior interventions used. They discussed how to work with the family to get Darius back to school. They addressed Stephanie's concerns that Darius was being placed in Room 140 as an isolation placement by telling her that is not what had happened and that is not what the room is used for. At the meeting, a checklist was made to clear up confusion related to the "communication book" that had been used to track Darius' activity at school. The checklist was to track seizure activity and

provide documentation for the school and the parents about Darius' health.

Ells said they also discussed Stephanie's vehicle at the meeting and how to respond to Darius' needs when transportation was or was not available. Salsman testified that Stephanie's car was not working at the time and that Stephanie did not want to send Darius to school without a car at her house. Stephanie was concerned that if Darius had a seizure at school, she would not be able to transport him home from school or home from the hospital, if necessary. Salsman stated that she worked with Stephanie's social worker to ensure that Darius' Medicaid would allow him to be transported from the hospital to the home. Stephanie was not comfortable with this arrangement, and she did not want him to return to school if she could not provide transportation.

Stephanie testified that Darius was transported to school by bus in the 2014-15 school year. She stated that she took him to doctor appointments and to school on several occasions, but also stated that she had not driven since 2001 and did not have a current driver's license. She did not have a vehicle at the time of the hearing. She said Gregory provided transportation for Darius on the occasions that he did not travel to school by bus. The school informed each busdriver regarding Darius' medical condition and what his needs were, should a seizure take place.

Salsman stated that it was her understanding that Darius was no longer taking Onfi when he returned to school in November 2014. She stated that he was still somewhat unstable in his gait and that he needed assistance with tasks, but he gradually improved and became more independent and stable. She said Darius improved through spring break and was able to perform simple tasks independently. After spring break, Darius had an increase in seizure activity, needed more assistance, and was not as communicative.

A Life Skills teacher in special education who taught at Dawes during the 2014-15 school year testified that Room

140 is a "work station area." This classroom has five work stations and a table set up for small group instruction. The Life Skills teacher testified that Darius did not make progress on the goals set forth in his IEP during the first part of the academic year. His goals were revised and made easier, and she stated that Darius made progress after his IEP meeting in October. Darius' IEP was reassessed in January 2015 when he was attending school more consistently, and his goals were made more difficult. She stated that Darius made progress at school when he attended school regularly, because the repetition of skills helped him to maintain and retain what he had learned.

Salsman testified that consistent attendance at school is important for students, particularly those with Darius' needs because missing school means he misses opportunities to make academic progress and to work on his social skills. She testified that when Darius attended school consistently during the second semester, he made "really great gains," including being social with his peers, being independent in his tasks, and reading out loud. She said she did not see the same level of progress during the first semester of 2014, because he was absent so often. Salsman said Darius' absences at the beginning of the 2014-15 school year did not correspond with the seizure patterns that were medically reported. After winter break, his absences more closely corresponded to the seizures that were reported.

III. ASSIGNMENTS OF ERROR

Stephanie asserts the juvenile court erred in adjudicating Darius as a child within the meaning of § 43-247(3)(a), finding by a preponderance of the evidence that she neglected or refused to provide the necessary health and educational care.

On cross-appeal, Gregory asserts he did not neglect his child's educational needs by consenting to Stephanie's decision to keep Darius out of school for medical reasons.

IV. STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Zanaya W. et al.*, 291 Neb. 20, 863 N.W.2d 803 (2015).

V. ANALYSIS

[2,3] The purpose of an adjudication phase of a neglect petition is to protect the interests of the child. See *In re Interest of Laticia S.*, 21 Neb. App. 921, 844 N.W.2d 841 (2014). At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Laticia S., supra*. Section 43-247(3)(a) states the juvenile court shall have jurisdiction of any juvenile who "lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile."

1. Adjudication Based Upon Acts of Stephanie

(a) Medication

Stephanie asserts the juvenile court erred by finding the State proved by a preponderance of the evidence that Darius lacked proper parental care because she failed to administer his medication as prescribed and failed to follow up

with medical appointments or treatment as recommended by Darius' treating physician. She asserts the State failed to prove that she was not administering medication appropriately and that she failed to take Darius to medical appointments. She also asserts the State failed to prove that her actions placed Darius at a definite risk for harm.

Stephanie argues that her testimony indicated that medication changes were frequently made over the telephone and were not always documented, other than in her calendar. She argues the testimony of Shonerd and Wolcott validates her testimony that medication changes were frequent and not always done when Wolcott was in the office. She testified that she followed Wolcott's dosage instructions to the best of her ability.

The evidence shows that Darius was born with several medical conditions requiring medication, as prescribed by a neurologist. The evidence also shows that at times, Stephanie made mistakes regarding the dosage of Darius' medication, and that at times, she adjusted dosages against medical advice. In July 2014, Darius was prescribed a specific dosage of Onfi. Shortly after starting the medication, Gregory reported to Darius' doctor that Stephanie made a mistake in administering the correct dosage. Darius was admitted to the emergency room in September, and Stephanie reported that Darius was taking 5 milligrams of Onfi twice a day. The prescribed dose at that time was 20 milligrams twice a day.

Stephanie had concerns about Darius' behavior and well-being while taking Onfi, and Wolcott developed a plan to wean Darius from the medication gradually over the course of approximately 6 weeks. Stephanie signed a copy of Wolcott's plan to remove Onfi from Darius' medication regimen upon discharge from the hospital on September 9, 2014. Nonetheless, Stephanie informed Wolcott on September 23 that September 26 would be Darius' last day on Onfi. By September 23, Darius was only receiving a quarter of the dose prescribed in

Wolcott's plan to wean Darius from the medication. Wolcott indicated that Stephanie was not giving the medication as directed. He testified that the seizures that Darius suffered during this time period could be correlated to withdrawal from the medication. He testified that medications like Onfi should not be decreased quickly because side effects can include agitation, seizure, and death.

There is evidence that on several occasions, Stephanie did not give some of Darius' other medications as prescribed. Darius is a child with serious medical needs that are regulated with medication. It is imperative that his medication is given as prescribed. Wolcott testified that Stephanie always informed him at appointments what medication Darius was taking, but there is evidence that she adjusted his medication dosage, at times, prior to or without consulting Wolcott.

Stephanie asserts that medication compliance checks were implemented by DHHS in March 2015 and that "it was determined that medication was being properly administered and [she] was not purposefully altering dosage instructions." Brief for appellant at 22. While this may be true, even an occasional mistake in the administration of Darius' medication could have a serious effect on Darius' health. Further, Stephanie asserts the evidence shows that medication changes were frequent and could occur over the telephone. The evidence before us shows that there are at least a few instances in which Wolcott's records indicate Stephanie did not give medication in accordance with the dosage noted in Wolcott's records.

When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Zanaya W. et al.*, 291 Neb. 20, 863 N.W.2d 803 (2015). Upon our review of the evidence, the State proved, by a preponderance of the evidence, that Stephanie's actions with regard to his medical care placed Darius at risk for harm. Thus, the court did not

err in adjudicating Darius as a child within the meaning of § 43-247(3)(a) due to the fault or habits of Stephanie.

(b) School Attendance

During the 2014-15 school year, Darius missed almost 60 days of school and had 388 periods of unexcused absences. Stephanie concedes Darius missed an abnormal amount of school in 2014-15, but argues that the school was not able to safely and appropriately care for Darius' medical needs and that the absences did not place him at risk for harm due to his diminished intellectual and learning capacity. She argues that Dawes did not make the same effort to accommodate Darius that previous schools had and that the school did not adequately document Darius' seizure activity. She asserts Dawes marked incidences when Darius left school early as parent excused, when he was not medically able to stay at school because of complications he had with taking Onfi.

The evidence shows Darius' medical condition results in periodic absences from school. Absences which are parent acknowledged or due to illness are marked as unexcused absences, while absences marked with "medical documentation" are excused. Stephanie testified that Darius attended school on October 1 and 2, 2014, and that due to a perceived issue with how staff handled Darius' behavior and health, she decided to keep him home from school for the remainder of the month.

Stephanie testified that based on the information in the "communication book," she believed Darius was placed in isolation in Room 140 and was being punished for behavior that could have been characterized as "pre-seizure activity." Stephanie did not address her concern with the school or ask to see the room.

School personnel testified that Room 140 is a room used by the special education program. It is a calm and quiet environment where students are allowed to refocus without

disrupting other students. Personnel testified that Darius was never left alone and was always accompanied by a paraeducator.

Stephanie was also concerned that Dawes could not adequately handle Darius and his medical needs when seizures occurred. The evidence shows the school had an IHP in place which allowed school officials to evaluate Darius' ability to continue learning after a seizure. Wolcott testified that he reviewed the school's plan during the school year and that it sounded "extremely reasonable and safe." The plan included monitoring during a seizure and evaluation to determine the severity of the episode. Wolcott testified that if a seizure did not last very long, it would not be necessary to send Darius home. He said if Darius is medically stable after a seizure, there is no advantage for Darius to be at home versus at school.

Stephanie attributed Darius' absence from school in October 2014, in part, to the number of seizures he was experiencing. As previously addressed, Wolcott's plan to wean Darius from Onfi included a gradual decrease in dosage throughout September, October, and part of November. Stephanie stopped administering Onfi in September after sharply decreasing his dosage. Wolcott testified that a rapid decrease in Onfi could cause agitation, seizures, and death. As a result, Darius' absences due to Stephanie's concern regarding increased seizures could very well have been caused by her decision to administer medication other than as prescribed.

School administrators testified that Stephanie stated at a meeting that she was not comfortable sending Darius to school unless her vehicle was in working order. However, the evidence shows Stephanie did not have a vehicle or a driver's license. Darius was transported to and from school by bus, and Lincoln Public Schools was able to provide adequate transportation, if the need arose.

The evidence shows that Darius has lower intellectual function than the average student, but that he is capable of

learning and practicing academic and social skills while at school. His special education teachers and administrators testified that Darius benefits from the repetition of skills practiced at school and that consistent attendance is important for Darius.

The evidence indicates that Darius had safe transportation to and from school and that the school had plans in place to support his educational and medical needs. The school recognized that Darius would miss school periodically because of his medical condition. The evidence shows Darius was not being punished or isolated for preseizure activity or for behavioral issues which were beyond his control. Educators and school officials testified that even with his limitations, Darius benefited from regular attendance, and that his attendance during the 2014-15 school year was not consistent and his absences did not all correspond with documented seizure activity or medical need. Upon our review of the evidence, we find the State proved by a preponderance of the evidence that Darius lacked proper parental care by reason of the fault or habits of Stephanie in that she failed to adequately provide for Darius' educational needs.

2. Adjudication Based Upon Acts of Gregory

Gregory acknowledges that Darius missed a substantial number of school periods, but asserts that he and Stephanie chose to keep Darius out of school until he was healthy enough to attend and the school was made safe enough for Darius to attend. He refers to Neb. Rev. Stat. § 79-201(2) (Reissue 2014), which states that school attendance is required "except when excused by school authorities or when illness or severe weather conditions make attendance impossible or impracticable." He argues the court erred in failing to consider whether Darius' attendance at school was impracticable, whether Darius was homebound, and whether the school met its obligation to ensure Darius' safe attendance.

As previously discussed, Darius benefits from consistent attendance in school. Stephanie and Gregory are divorced, but share the responsibility of parenting Darius. Gregory stated that as a parent, he is responsible for helping to ensure that Darius attends school. Stephanie testified that even though Gregory does not live in the same home as Stephanie and Darius, he is actively involved in coparenting. Gregory is responsible for transporting Darius to appointments and takes him to school when he is unable to take the bus because of seizure activity or medical appointments.

Gregory testified that he agreed with Stephanie to keep Darius home from school in October 2014 because of the belief that Darius was isolated or punished for preseizure behavior and his medical and intellectual issues. He testified that he visited the school, but because another student was in Room 140 at the time, he decided not to look inside out of respect for that student's privacy. Stephanie and Gregory were both concerned about Room 140, but paraeducators, teachers, and administrators testified that Room 140 was not used to punish or isolate Darius and that the fears of Stephanie and Gregory were unfounded.

Gregory asserts the court erred in not considering whether attendance was impracticable or whether the school was a safe place for Darius to be. This assertion is refuted by the evidence. The evidence shows that the school was notified of Darius' needs prior to the school year and that school officials met with his parents on multiple occasions to address these needs. The protocol for addressing Darius' medical and educational needs were adjusted throughout the year according to the progress he made toward the goals stated in his IEP. School officials, teachers, paraeducators, and staff were aware of Darius' medical needs, and individuals who came in contact with him were given specific instructions for handling medical situations.

The evidence shows that the State proved by a preponderance of the evidence that Darius lacked proper parental

care by reason of the fault or habits of Gregory as he failed to adequately provide for Darius' educational needs, allowing him to miss almost 60 days of school in a single academic year.

VI. CONCLUSION

For the reasons stated above, we find the juvenile court properly adjudicated Darius as a child within the meaning of § 43-247(3)(a) due to the fault or habits of both Stephanie and Gregory.

Affirmed.

Riedmann, Judge, participating on briefs.

Yessica Y. Panameno Maradiaga, appellant, v. Specialty Finishing and Travelers Indemnity Company, appellees.

884 N.W.2d 153

Filed July 19, 2016. No. A-15-845.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. An appellate court will not disturb a compensation court judge's findings of fact unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Proof.** In a workers' compensation case, the plaintiff must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment.
5. ____: ____. The two phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 2010) are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist.
6. ____: ____. The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 2010), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident.

7. **Workers' Compensation.** All risks causing injury to an employee can be placed within three categories: (1) employment related—risks distinctly associated with the employment; (2) personal—risks personal to the claimant, e.g., idiopathic causes; and (3) neutral—a risk that is neither distinctly associated with the employment nor personal to the claimant.
8. ____. Under the positional risk doctrine, when an employee, in the course of his or her employment, is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his or her employment, that accident is one "arising out of" the employment of the person so injured.
9. ____. Generally, a risk may be classified as "neutral" for either of two reasons: (1) the nature of the risk may be known, but may be associated neither with the employment nor the employee personally, or (2) the nature of the cause of harm may be simply unknown.
10. ____. When there is at least some evidence of a possibility of a personal or idiopathic factor contributing to a fall, the fall is not properly categorized as a purely unexplained fall.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Affirmed.

Terry M. Anderson and David M. O'Neill, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

Patrick B. Donahue and Dennis R. Riekenberg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

Pirtle and Bishop, Judges.

Bishop, Judge.

Yessica Y. Panameno Maradiaga appeals from an order of the Nebraska Workers' Compensation Court dismissing with prejudice her amended petition for workers' compensation benefits against her employer, Specialty Finishing, and its insurer, Travelers Indemnity Company. Maradiaga challenges the court's determination that the ankle fracture she sustained in her employer's parking lot did not "arise out of" her employment. For the following reasons, we affirm.

BACKGROUND

On May 18, 2014, Maradiaga was employed as a "box feeder" at Specialty Finishing. She arrived for her 12-hour shift just prior to 6 p.m., parking in her employer's parking lot. At trial, Maradiaga testified she exited her car and fell down while walking in the parking lot. At the time, the only item she was carrying was a small lunchbox. She then returned to her car and sat down. When she got up again, she felt pain and could not walk. She summoned another employee's help and was transported to the hospital. She was diagnosed with a "left lateral malleolus fracture with medial clear space widening," otherwise known as an "unstable ankle fracture." Maradiaga underwent surgery to repair the fracture on May 23.

One of the exhibits Maradiaga offered into evidence at trial was the deposition of Myrna Partida, who worked in human resources at Specialty Finishing. Attached to Partida's deposition was a transcript of the recorded statement Maradiaga gave to an insurance claims adjuster on June 2, 2014. When the adjuster asked Maradiaga to explain how she injured her ankle, she said she got out of her car, took one step, and her foot twisted. She fell to the ground, then got up and sat back down in her car. When she exited her car and began to walk, the pain was too great to continue.

Partida testified at trial that on the day following the incident, she spoke with Maradiaga on the telephone. According to Partida, Maradiaga told her she got out of her car, stood up, and felt pain in her leg. She then "fell back down." When she "got back up" and started walking, the pain was "really bad," so she summoned another employee to assist her. She was then taken to the hospital. According to Partida, Maradiaga described the injury as "strange," because she put both feet on the ground and "just felt this pain." Insurance forms that Partida completed on May 29 and 30, 2014, indicated that Maradiaga reported feeling "pain in her foot" upon exiting her car and placing her feet on the ground.

The medical records received into evidence also contained accounts of the incident. The emergency room records indicate Maradiaga twisted her left ankle getting out of her car at work. They further indicate she did not report falling. Records from a physician's office visit on May 21, 2014, state that Maradiaga was exiting her car and slipped, causing her feet to go out from under her. An orthopedist's records dated May 23, 2014, indicate Maradiaga twisted her ankle in her employer's parking lot.

Following trial, in its written order entered on August 21, 2015, the compensation court found that Maradiaga was exiting her car in Specialty Finishing's parking lot when she took a step, twisted her ankle, and felt pain. The court found that although Maradiaga then fell to the ground, she "injured her left ankle before falling to the ground." The court indicated that "[a]s best [it could] discern, [Maradiaga] suffered no injuries from actually falling." The court found Maradiaga had no preexisting condition that contributed to her injury. It further found that Maradiaga's employment did not contribute to the injury:

> [Maradiaga] was merely walking. She did not trip. She did not slip. There was nothing in the parking lot that created a hazard for her. She was not carrying anything heavy that stressed her body or her ankle, specifically. [Maradiaga] broke her ankle while taking a step. It just happened to occur at work. Work did not contribute to her injury, so Specialty [Finishing] should not be liable for it. The Court finds [Maradiaga] did not suffer an injury that arose out of her employment with Specialty [Finishing].

The court specifically determined the case was not controlled by *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000), which involved application of the positional risk doctrine to an unexplained fall on an employer's premises. The court explained that Maradiaga did not sustain injuries during

an unexplained fall, but fell after injuring her ankle while taking a step.

Based on its determination that Maradiaga's injury did not arise out of her employment, the compensation court dismissed with prejudice Maradiaga's amended petition for compensation benefits, and Maradiaga timely appealed to this court.

ASSIGNMENT OF ERROR

Maradiaga assigns that the compensation court erred in determining that her injury did not arise out of her employment.

STANDARD OF REVIEW

[1-3] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. *Logsdon v. ISCO Co., supra*. A reviewing court will not disturb a compensation court judge's findings of fact unless clearly wrong. See *id*. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id*.

ANALYSIS

[4] The Nebraska Workers' Compensation Act (Act) provides that "[w]hen personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer . . . ," as long as the employee was not willfully negligent at the time of receiving the injury. Neb. Rev. Stat. § 48-101 (Reissue 2010). The Act defines "[a]ccident" as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of

an injury." Neb. Rev. Stat. § 48-151(2) (Reissue 2010). The Act places the burden of proof on the claimant "to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment." *Id*. "There is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment." *Id*.

[5,6] "The two phrases 'arising out of' and 'in the course of' in § 48-101 are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist." *Zoucha v. Touch of Class Lounge*, 269 Neb. 89, 93, 690 N.W.2d 610, 614-15 (2005). The phrase "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of" refers to the time, place, and circumstances surrounding the accident. *Id*. Whether an injury arose out of and in the course of employment must be determined from the facts of each case. *Murphy v. City of Grand Island*, 274 Neb. 670, 742 N.W.2d 506 (2007).

In this case, it is undisputed that Maradiaga sustained an injury "in the course of" her employment. See *Zoucha v. Touch of Class Lounge, supra* (employee who is injured in accident on his or her employer's premises while coming to or leaving work is injured within course of his or her employment). The issue before us is whether Maradiaga has satisfied the "arising out of" prong of § 48-101.

[7] We begin by looking to the three categories into which all risks causing injury to an employee can be placed. See *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). The first category, employment-related risks, includes "risks distinctly associated with the employment." *Id*. at 628, 618 N.W.2d at 672. Injury caused by risks falling within this category is "universally compensable." *Id*. at 629, 618 N.W.2d at 672. The second category, personal risks, encompasses "risks

personal to the claimant, e.g., idiopathic causes." *Id*. at 628, 618 N.W.2d at 672. Injury caused by personal risks is "universally noncompensable." *Id*. at 629, 618 N.W.2d at 672. The third category, neutral risks, includes risks that are "neither distinctly associated with the employment nor personal to the claimant." *Id*. In Nebraska, injury arising from neutral risks is "generally compensable." *Id*.

Maradiaga argues that because her injury "was not shown to be related to any personal condition . . . nor any other personal activity, the injury had a 'neutral' cause." Brief for appellant at 7. She maintains she is entitled to compensation because Nebraska has adopted the "'positional risk' doctrine," under which "[a]n injury that has a 'neutral' cause, but is otherwise incurred 'in the course' of employment, is presumed to 'arise out of' that employment." *Id*. In order to address Maradiaga's argument, it is necessary to provide some background on the positional risk doctrine and its limited application in Nebraska law.

The positional risk doctrine is one of several approaches to determining whether an employee's injury arises out of his or her employment. 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law §§ 3.01 and 3.05 (2016). As a point of reference, we note that the "prevalent" approach in the United States is still the "increased risk doctrine." *Id.*, § 3.02 at 3-6. "The increased risk doctrine requires an employee to demonstrate that his employment duties expose him to a greater risk or hazard than that to which the general public in the area is exposed." *Nippert v. Shinn Farm Constr. Co.*, 223 Neb. 236, 238, 388 N.W.2d 820, 822 (1986).

[8] According to Larson, only "[a] few courts have accepted the full implications" of the positional risk doctrine, 1 Larson & Larson, *supra*, § 3.05 at 3-7, which has been articulated as follows:

> "'[W]hen one in the course of his employment is reasonably required to be at a particular place at a particular

> time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his employment, that accident is one "arising out of" the employment of the person so injured.'"

Nippert v. Shinn Farm Constr. Co., 223 Neb. at 238-39, 388 N.W.2d at 822 (quoting treatise passage currently found at 1 Larson & Larson, *supra*, § 5.01[5]).

The positional risk doctrine is usually "approved and used in very particular situations." 1 Larson & Larson, *supra*, § 3.05 at 3-7. The common characteristic among the situations to which it applies is that "the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he or she was injured by some neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment." *Id.*, § 3.05 at 3-8.

[9] Generally, a risk may be classified as "'neutral'" for either of two reasons: (1) "[t]he nature of the risk may be known, but may be associated neither with the employment nor the employee personally," or (2) "the nature of the cause of harm may be simply unknown." *Id.*, § 7.04[1][a] at 7-25. Examples of neutral risks of the first type are stray bullets, lightning, or hurricanes, see *id.*, § 4.03, while the most common example of a neutral risk of the second type is a purely unexplained fall, *id.*, § 7.04[1][a].

The Nebraska Supreme Court has applied the positional risk doctrine in cases involving both types of neutral risks. *Nippert v. Shinn Farm Constr. Co., supra*, involved a neutral risk of the first type—a known risk neither associated with the employment nor the employee personally. In *Nippert*, a farm employee was injured on the job when a tornado picked him up and "hurled him to the ground some 30 feet away." 223 Neb. at 237, 388 N.W.2d at 821. The compensation court denied benefits, relying on *McGinn v. Douglas County Social*

Services Admin., 211 Neb. 72, 317 N.W.2d 764 (1982), in which the court applied the increased risk doctrine to a case involving similar facts. Reversing the compensation court's denial of benefits, the court in *Nippert* overruled *McGinn*, holding that the positional risk doctrine was the "better rule." *Nippert v. Shinn Farm Constr. Co.*, 223 Neb. at 238, 388 N.W.2d at 822. It is clear that a tornado is a known neutral risk which is neither associated with the employment nor the employee personally. In *Nippert*, the court concluded the employee's injury was compensable because under "the positional risk test . . . '"any other person then and there present would have met"'" with the same accident "'"irrespective"'" of employment, and the claimant's employment required him to be in the area where the tornado struck. 223 Neb. at 238, 388 N.W.2d at 822.

The Nebraska Supreme Court next applied the positional risk doctrine in *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000), a case involving a neutral risk of the second type—where the nature of the cause of harm may be simply unknown. In *Logsdon*, an employee was walking on his employer's premises during a morning break. He turned around to talk to some coworkers who were walking behind him, and the next thing he knew, he was in an ambulance. There was no other evidence indicating how the employee fell, but it was undisputed that he fell and fractured his skull while in the course of his employment.

In holding that the employee's injury was compensable, the court in *Logsdon* discussed the three categories of risk and framed the issue before it as "whether an injury without an explanation is a compensable neutral injury." 260 Neb. at 629, 618 N.W.2d at 672. The court indicated it had already "adopted the positional risk doctrine in the context of injuries arising from neutral risks." *Id.* at 629, 618 N.W.2d at 673, citing *Nippert v. Shinn Farm Constr. Co.*, 223 Neb. 236, 388 N.W.2d 820 (1986). The court then reasoned that "because

the cause of an unexplained fall is unknown, the fall must be attributed to a neutral risk, i.e., one neither distinctly personal to the claimant nor associated with the claimant's employment." *Logsdon v. ISCO Co.*, 260 Neb. at 632, 618 N.W.2d at 674. After reaffirming its holding that the positional risk doctrine applies "in the case of an injury arising from a neutral risk," the court concluded that because the employee "would not have been at the place of injury *but for* the duties of his employment," a presumption arose that "his injuries 'arose out of' his employment." *Id*. The court further noted that the "presumption was not rebutted by evidence of any idiopathic cause or other risk personal to the claimant." *Id*.

The case before us does not present a neutral risk of the type presented in *Nippert v. Shinn Farm Constr. Co., supra*, or in *Logsdon v. ISCO Co., supra*. Unlike the facts in *Nippert*, we are not dealing with a known neutral risk which is neither associated with the employment nor the employee personally—the kind of risk that any other person then and there present would have met with irrespective of employment. Stray bullets and tornados are examples of this type of known neutral risk; twisted ankles are not.

However, this case is also not one in which "the nature of the cause of harm" is "unknown" in the same way that the cause of a purely unexplained fall is "unknown." See *Logsdon v. ISCO Co.*, 260 Neb. 624, 631, 618 N.W.2d 667, 673 (2000). The only evidence in *Logsdon* was that the employee turned around while walking, and the next thing he knew he was in an ambulance. There were a myriad of things that might have contributed to the employee's fall, but no evidence to establish what actually did. Given this absence of evidence, the positional risk doctrine was the only avenue available to the employee to establish the "arising out of" requirement of § 48-101, and the Nebraska Supreme Court endorsed its application under those circumstances. *Logsdon v. ISCO Co., supra*.

The court explained that "'[i]n a pure unexplained-fall case, there is no way in which an award can be justified as a matter of causation theory except by a recognition that [the positional risk doctrine's] but-for reasoning satisfies the "arising" requirement. . . .'" *Id.* at 631, 618 N.W.2d at 673-74, quoting 1 Larson & Larson, *supra*, § 7.04[1][a].

Here, Maradiaga faced no similar hurdle in proving that her injury arose out of her employment. Based upon the compensation court's findings, Maradiaga took a step, twisted her ankle, and felt pain. She did not wake up in an ambulance or hospital, not knowing what happened to her. If Maradiaga's employment contributed to her injury in some way, she could have presented evidence to establish that fact. If, for example, she stepped on a rock or a slick spot in the parking lot which caused her to twist her ankle, she could have so testified. However, Maradiaga presented no such evidence, and it is difficult to imagine that any risk of employment caused her to twist her ankle, or otherwise caused her bone to fracture, as she stepped out of her car. This type of injury does not satisfy the type of "unknown" cause of harm that warranted application of the positional risk doctrine in *Logsdon v. ISCO Co.*, 260 Neb. at 630, 618 N.W.2d at 673, where the employee woke up in an ambulance.

The distinction between this case and *Logsdon v. ISCO Co., supra*, becomes clearer when one considers that the mechanism of the fall in *Logsdon* is what was unknown. The employee turned while walking, and the next thing he knew he was in an ambulance. We do not know if the employee tripped over a crack in the sidewalk, stumbled over a rock, or simply tripped over his own feet. Perhaps because the absence of evidence made it impossible to rule out the possibility that a risk of employment contributed to the fall, the court permitted the employee to rely on the positional risk doctrine to satisfy the "arising out of" requirement of § 48-101: "[I]t logically follows that if the 'in the course of' employment test

is met in a purely unexplained-fall case, the injury will be presumed to 'arise out of' the employment." *Id*. at 632, 618 N.W.2d at 674.

In our case, by contrast, the mechanism of the twisted ankle is not a mystery. As the compensation court found: "[Maradiaga] was merely walking. She did not trip. She did not slip. There was nothing in the parking lot that created a hazard for her. She was not carrying anything heavy that stressed her body or her ankle, specifically. [Maradiaga] broke her ankle while taking a step." If Maradiaga's employment did contribute to the injury in some way, there was nothing to prevent her from establishing that fact. This case did not involve a completely unexplained fall like the situation in *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000), and the Act places the burden of proof on the claimant "to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment." § 48-151(2).

Maradiaga at one point in her brief suggests that "perhaps the fall did cause the injury here, or exacerbate it." Brief for appellant at 13. In this passage, Maradiaga appears to be contesting the compensation court's finding that her injury occurred before her fall, seemingly in an attempt to fit this case within *Logsdon v. ISCO Co., supra*. However, the compensation court's finding that the injury preceded the fall was not clearly wrong, as we discuss next.

Although Maradiaga testified at trial that she fell in the parking lot, returned to her car, and then felt pain upon standing, her testimony was inconsistent with much of the remaining evidence. Partida testified that the day following the accident, Maradiaga told her she got out of her car, stood up, and felt pain in her leg. She then fell back down, and when she got up again and started walking, the pain was "really bad." This account of the injury was consistent with the insurance forms Partida completed on May 29 and 30, 2014,

and was largely consistent with the account Maradiaga gave to the insurance adjuster on June 2, as well as the accounts in the emergency room records and the orthopedist's records, although these accounts indicated that Maradiaga twisted either "her foot" or her ankle. It was only the records from a physician's office visit on May 21 that indicated Maradiaga slipped and fell. Considering all of the evidence, the court's finding that Maradiaga's injury preceded her fall was not clearly wrong.

At another point, Maradiaga suggests the issue of whether her fall contributed to her injury is not relevant, because "[i]t is enough that an 'accident' of some kind occurred on the employer's premises, and that [she] was injured in that accident." Brief for appellant at 13. However, applying the positional risk doctrine in this manner would dilute the "arising out of" requirement of § 48-101 to where it would cease to have any significant meaning. Further, to presume that every accident occurring on the employer's premises is caused by employment would be contrary to the provision of § 48-151(2) which states that "[t]here is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment."

[10] Although the Nebraska Supreme Court did allow for the presumption of an injury arising out of employment in a purely unexplained-fall case if it occurred in the course of employment, we note that it also stated that "[w]hen there is at least some evidence of a possibility of a personal or idiopathic factor contributing to the fall, the fall is not properly categorized as a purely unexplained fall." *Logsdon v. ISCO Co.*, 260 Neb. at 633, 618 N.W.2d at 675. It clarified that "[i]n the instant case, we are presented with a purely unexplained fall, which can be attributed only to a neutral risk." *Id.* at 634, 618 N.W.2d at 675. This is a narrow holding applicable to purely unexplained falls; extending the positional risk doctrine to the circumstances of the case before us would broaden the presumption—that the

mere occurrence of an injury at work was caused by employment—to the point of making § 48-151(2) meaningless. We decline to do so.

We recognize that an injury resulting from an "everyday activity" may be compensable if the activity "constituted a risk contributed by employment." *Cox v. Fagen Inc.*, 249 Neb. 677, 684, 545 N.W.2d 80, 86 (1996). However, as we said in *Carter v. Becton-Dickinson*, 8 Neb. App. 900, 907, 603 N.W.2d 469, 474 (1999), nonstrenuous walking is the "epitome of a nonemployment risk." Here, there is no evidence that the everyday activity of exiting a car, while carrying nothing heavier than a small lunchbox, was a risk of Maradiaga's employment.

CONCLUSION

For the foregoing reasons, the judgment of the Nebraska Workers' Compensation Court is affirmed.

Affirmed.

Moore, Chief Judge, participating on briefs.

State of Nebraska, appellee, v. Cletus S. Alford, appellant.

884 N.W.2d 470

Filed July 26, 2016. No. A-15-527.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Criminal Law: 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.
3. ____: ____: ____. 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. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
5. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
6. ____: ____. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
7. **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.
8. ____: ____. 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.

9. **Criminal Law: Plea in Abatement.** A defective verification is subject to a motion to quash or a plea in abatement.
10. **Criminal Law: Pleadings: Waiver.** A defendant who pleads the general issue without raising the question waives the defect.
11. **Criminal Law: Pleas: Plea in Abatement: Waiver.** A plea of not guilty ordinarily waives all matters which might have been raised by a motion to quash or a plea in abatement.
12. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
13. **Criminal Law: Lesser-Included Offenses: Jury Instructions.** In nonhomicide cases, a trial court must instruct on a lesser-included offense only if requested to do so.
14. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
15. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
16. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
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. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.
19. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
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 in the area.

21. ____: ____. To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
22. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire effectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. Deficient performance and prejudice can be addressed in either order.
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 amount of violence involved in the commission of the crime.
24. ____. 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 of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Gregory A. Pivovar for appellant.

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

Pirtle and Bishop, Judges.

Pirtle, Judge.

I. INTRODUCTION

After a jury trial, Cletus S. Alford was convicted of second degree assault, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Alford appeals his convictions and sentences. For the reasons that follow, we affirm.

II. PROCEDURAL BACKGROUND

On June 22, 2010, Alford was charged by complaint in the county court for Douglas County with second degree assault, a

Class III felony; use of a deadly weapon to commit a felony, a Class II felony; and possession of a deadly weapon by a prohibited person, a Class III felony. On June 30, Alford appeared before the county court and entered pleas of not guilty to all counts. A preliminary hearing was held, and the county court found probable cause to believe Alford had committed the offenses charged. The matter was bound over to the district court for Douglas County.

On July 1, 2010, Alford was charged by information in the district court. It was alleged that he had committed the same three criminal offenses charged in the original complaints. Alford entered pleas of not guilty to all charges.

A jury trial was held on November 1 and 2, 2010. At the conclusion of the evidence, a jury instruction conference was held. Alford did not request that the district court instruct the jury that third degree assault was a lesser-included offense of second degree assault. The case was submitted to the jury, which returned guilty verdicts on all counts. The district court accepted the jury's verdicts and sentencing was held on December 17, 2010. The district court sentenced Alford to 5 to 5 years' imprisonment for each conviction, and it ordered the three sentences to run consecutively to one another and to a sentence previously imposed. Alford received credit for 178 days served.

Alford filed a motion for postconviction relief alleging that he received ineffective assistance of counsel for failure to file a direct appeal within 30 days after sentencing. After an evidentiary hearing on the sole issue of whether trial counsel was ineffective for failure to file a direct appeal, the district court granted a new direct appeal. Alford timely filed this action.

III. FACTUAL BACKGROUND

Approximately 1 month prior to the offenses charged, Detwone Smith, his girlfriend Megan Marie Odle, and her 3-year-old son moved into an apartment building in Omaha.

They shared an apartment on the third floor of the building with KýAra Williams. Alford is Odle's ex-boyfriend, and the move was undertaken in an effort to avoid further contact with Alford, who had been harassing Odle.

On June 21, 2010, Smith, Odle, and her son left the apartment to go to the grocery store. When they reached the car, they discovered that they had left the car keys upstairs, and Odle returned to get them while Smith and Odle's son waited in the car. Odle testified that she was pushed against a wall inside the apartment building by Alford, and he held her there demanding to speak to her. Odle yelled to Williams for help. Williams was inside of the apartment and responded. Once she saw what was happening, she pulled Alford away from Odle. Williams testified that she was able to clearly see Alford's hands on Odle's mouth and throat and that there was nothing on or in his hands at the time. Alford followed Odle and Williams to the apartment, where he begged the women not to call the police. After a few minutes, Alford left. Odle attempted to call Smith, and when he did not answer, Williams went down the stairs to check on him. Odle stayed in the apartment to calm down after the confrontation.

Smith testified that he and Odle's son returned to the apartment building to look for Odle, because she had been gone for 11 to 12 minutes. Smith saw someone walking down the stairs of the apartment building. When Smith reached the bottom of the flight of stairs that Alford was descending, Smith recognized him. Smith was immediately concerned for Odle's safety. Alford demanded that Smith hand Odle's son over to him, but Smith did not comply. He testified that Alford punched him twice on the side of the face with his bare fist and that the second punch knocked him to the ground. Smith said Alford reached into his pocket and slipped on a pair of brass knuckles. He described the brass knuckles as being silver and bulky, stretching all the way across Alford's fingers with a metal bar along the bottom. He noted there were jagged pieces of metal around each knuckle. Smith testified

that he had no doubt Alford used brass knuckles because he had seen brass knuckles before, and he clearly saw brass knuckles on Alford's hand.

Alford grabbed Smith by the hair with his left hand and began punching him in the face with his right hand. Smith partially blocked many of Alford's punches, but one punch clipped Smith's lower lip and tore it open, causing blood to immediately flow from the wound. Smith testified that one punch landed squarely on his forehead. He said the punches after Alford put on the brass knuckles felt as if they had been amplified "times like 50."

Williams was present for part of the assault, removing Odle's son from Smith's arms and taking him to safety. Alford continued to throw punches at Smith until Williams called the police. Williams could not testify with certainty that Alford had punched Smith with brass knuckles, but she saw something shiny on his hand. Williams testified that there had been nothing in or on Alford's hand moments earlier when she saw his hands on Odle's neck.

After Alford left the building, Smith crawled to the landing of the second floor, where he collapsed. Odle came down the stairs to find Smith bloody and motionless. She testified that she thought he was dead because he did not respond when she spoke to him. She said that immediately after the attack, Smith was "out of it," mumbling, and disoriented. She asked him whether he had been shot, and Smith responded, "He hit me with brass." Smith also told the paramedics and the police that he had been hit with brass knuckles.

Smith was transported to a hospital where he underwent a CT scan and x rays. Smith sustained a concussion, a large bump on his forehead, swelling on both sides of his face, fractures to his nose and jaw, a jagged cut on his lower lip, and various scrapes and bruises on his face, arms, and back. The cut on Smith's lower lip required 12 stitches, and a portion of his lip had been torn off. In the days immediately following the assault, Smith's face became increasingly

swollen and sore, and he had difficulty opening his mouth and chewing. Odle testified that the damage looked worse in person than it appears in the photographs taken on the day of the assault.

IV. ASSIGNMENTS OF ERROR

Alford asserts the district court erred in (1) not dismissing this matter due to defects in charging and the complaint, (2) not properly instructing the jury regarding a lesser-included offense, and (3) overruling his motion for directed verdict. He also asserts there was insufficient evidence to support his convictions, that he received ineffective assistance of counsel, and that the trial court abused its discretion in imposing excessive sentences.

V. STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law. *State v. Samayoa*, 292 Neb. 334, 873 N.W.2d 449 (2015).

[2,3] 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. *State v. Escamilla*, 291 Neb. 181, 864 N.W.2d 376 (2015). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

[4-6] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. DeJong*, 292 Neb. 305, 872 N.W.2d 275 (2015). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id.* With regard to the questions of counsel's

performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. DeJong, supra*.

[7,8] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Trice*, 292 Neb. 482, 874 N.W.2d 286 (2016). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

VI. ANALYSIS

1. Defects in Complaint

Alford asserts the district court erred in not dismissing the matter for fatal defects in the arrest and charging. He argues that the court lacked jurisdiction and that he was deprived of constitutional rights because the original arrest warrant was issued upon an insufficient criminal complaint and because there was no probable cause for his arrest.

Criminal complaints were filed in the county court for Douglas County on June 22, 2010, alleging three criminal violations: second degree assault, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. On June 30, Alford appeared before the county court and entered pleas of not guilty. The matter was bound over to the district court for Douglas County. An information was filed on July 1, charging Alford with the same three criminal counts.

Alford's argument is somewhat unclear, but it appears that he argues that the complaints filed in the county court were invalid because they were filed by an Omaha police officer and not signed on the oath of the victim, Smith. He further argues that the complaints were not valid because they were

not notarized by the clerk of the county court at the time of filing.

Alford has cited no authority requiring the district court to review the sufficiency of the complaints filed in county court after the matter has been bound over and charged by information.

As noted in the State's brief, Alford's argument is taken almost verbatim from *Morrow v. State*, 140 Neb. 592, 300 N.W. 843 (1941), in which the Nebraska Supreme Court found it was the duty of the district court to order a new and proper complaint to be filed due to defects in the complaint. However, in that case, a motion to quash was filed, calling attention to the defective complaint, a procedural step which was not taken in this case.

[9-11] A defective verification is subject to a motion to quash or a plea in abatement. *State v. Gilman*, 181 Neb. 390, 148 N.W.2d 847 (1967). A defendant who pleads the general issue without raising the question, however, waives the defect. *Id.* A plea of not guilty ordinarily waives all matters which might have been raised by a motion to quash or a plea in abatement. *State v. Moss*, 182 Neb. 502, 155 N.W.2d 435 (1968).

The district court's jurisdiction was based upon the information filed on July 1, 2010, in the district court, not the complaints filed on June 22 in the county court. The information filed in the district court was filed by the prosecuting attorney, and notarized by a deputy clerk of the district court, fulfilling the requirements of Neb. Rev. Stat. § 29-404 (Reissue 2008). Alford filed a written waiver of physical appearance on July 2, in which he asked the court to enter pleas of not guilty on his behalf. Any defects appearing in the information before the district court were waived when Alford entered pleas of not guilty to the charges. See *State v. Jones*, 254 Neb. 212, 575 N.W.2d 156 (1998) (objections to verification are waived if not made before arraignment and plea), *disapproved on other grounds, State v. Silvers*, 255

Neb. 702, 587 N.W.2d 325 (1998). This assignment of error is without merit.

[12] Alford asserts, but does not argue, that the district court erred in failing to dismiss this case because the arrest warrant was issued without probable cause. 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. *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016). Therefore, we do not address this assertion.

2. Jury Instructions

Alford asserts the district court erred by failing to instruct the jury that third degree assault was a lesser-included offense of second degree assault. He asserts the district court was obligated to give the lesser-included instruction regardless of whether it was requested.

[13] In *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012), the Nebraska Supreme Court traced the history of case law regarding lesser-included offenses. Although the court noted some inconsistency in the language used, it concluded that, in general, since the decision in *McIntyre v. State*, 116 Neb. 600, 218 N.W. 401 (1928), the case law has been consistent that in nonhomicide cases, "a trial court must instruct on a lesser-included offense only if requested to do so." *State v. Smith*, 284 Neb. at 651, 822 N.W.2d at 413. See, *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009) (child abuse); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008) (possession of controlled substance); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993) (assault). See, also, *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016) (although homicide case, Nebraska Supreme Court noted it had clarified in *State v. Smith, supra*, that in nonhomicide cases, trial court does not have duty to instruct on lesser-included offenses unless defendant requests instruction).

We find the trial court did not err when it did not give an instruction stating that third degree assault is a lesser-included

offense of second degree assault because the instruction was not requested.

3. Sufficiency of Evidence

Alford asserts that the district court erred in denying his motion for directed verdict and that the jury erred in finding there was sufficient evidence to find him guilty beyond a reasonable doubt. In his brief, he argues these two assignments together, challenging the sufficiency of the evidence to support his convictions.

Alford was charged with (1) assault in the second degree, a felony under Neb. Rev. Stat. § 28-309 (Supp. 2009); (2) use of a deadly weapon to commit a felony under Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2014); and (3) possession of a deadly weapon by a prohibited person under Neb. Rev. Stat. § 28-1206 (Cum. Supp. 2014).

Section 28-309(1)(a) states that a person commits the offense of assault in the second degree if he or she intentionally or knowingly causes bodily injury to another person with a dangerous instrument. Neb. Rev. Stat. § 28-109(4) (Reissue 2008) defines bodily injury to mean "physical pain, illness, or any impairment of physical condition."

Any person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state commits the offense of use of a deadly weapon to commit a felony. § 28-1205.

Any person who possesses a firearm or brass or iron knuckles and who has previously been convicted of a felony commits the offense of possession of a deadly weapon by a prohibited person. § 28-1206.

The parties stipulated that Alford was a convicted felon. Multiple witnesses testified that Alford assaulted Smith at the apartment building on June 21, 2010, and this evidence was not disputed. The primary dispute was whether Alford used brass knuckles during the assault. Smith testified that Alford

repeatedly punched him with brass knuckles. Smith's testimony was corroborated by Williams, who witnessed a portion of the assault. Williams testified that she saw Alford's hands moments before the assault. She noted that during the assault she saw something shiny on Alford's hand, which had not been there moments before.

Smith testified that he suffered a concussion, bone fractures, a jagged cut on his lower lip, a black eye, swelling to his face, and pain. He testified that Alford punched him a few times and that he then saw Alford reach down and slip something on his hand. He testified that he saw brass knuckles and that he tried to block Alford's punches. He said the subsequent blows, after Alford put on the brass knuckles, felt as if they had been amplified "times like 50." Though Williams was unclear whether brass knuckles were used, Smith's testimony and the nature and extent of Smith's injuries, viewed and construed in the light most favorable to the prosecution, is sufficient to support a finding that Alford possessed and used brass knuckles. We find that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt and that thus, the trial court did not err in accepting the jury's verdicts.

[14,15] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Glazebrook*, 22 Neb. App. 621, 859 N.W.2d 341 (2015). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id.*

Having found that there was sufficient evidence to support the jury's convictions, we find there was also sufficient evidence for the trial court to overrule Alford's motion for directed verdict. Thus, the trial court did not err.

4. Ineffective Assistance of Counsel

[16] In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review. *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013). Alford raises seven instances of alleged ineffective assistance of counsel, which we discuss below.

[17,18] 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. *Id.* An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *Id.* As discussed below, the record is not sufficient to address several of Alford's claims.

[19-22] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Morgan, supra*. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The entire effectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. Deficient performance and prejudice can be addressed in either order. *Id.* We now address the claims of ineffectiveness raised by Alford.

(a) Failure to File Motion to Quash

As previously discussed, Alford asserts that the trial court lacked jurisdiction because there was insufficient probable cause for a warrant and the complaint was insufficient. Alford asserts that trial counsel's failure to file a motion to quash prejudiced him by "allowing the State to take him to trial on a warrant and complaint that was not legally sufficient and in violation of his constitutional rights." Brief for appellant at 29.

Alford fails to show how he was prejudiced by trial counsel's failure to file a motion to quash, alleging the complaints were improperly verified. Even if Alford's counsel had filed a motion to quash the complaints, and even if the motion was sustained, the State could have easily remedied the defects by filing a new complaint. We find Alford was not prejudiced by the actions of his trial counsel, and this assignment of error is without merit. See *State v. Jones*, 254 Neb. 212, 575 N.W.2d 156 (1998).

(b) Assignments of Error Not Reviewable on Direct Appeal

Alford asserts that trial counsel was deficient for failing to request an instruction on third degree assault as a lesser-included offense of second degree assault. He argues that if this instruction had been given, the jury would have been presented with a "full range of possible verdicts," and that there is a reasonable probability the verdict would have been different. Brief for appellant at 28.

The State asserts that this claim cannot be resolved on the record before this court. It is possible that trial counsel did not request an instruction for the lesser-included offense of third degree assault for a strategic reason. Section 28-309(1)(a) states that a person commits the offense of assault in the second degree if he or she intentionally or knowingly causes bodily injury to another person with a dangerous instrument. Neb. Rev. Stat. § 28-310 (Reissue 2008) states that a person

commits the offense of assault in the third degree if he intentionally, knowingly, or recklessly causes bodily injury to another person or threatens another in a menacing manner.

Each of the charges against Alford were based upon the presence and use of brass knuckles. If the lesser-included instruction was not given, and if the jury determined that brass knuckles were not used, then the jury would have no choice but to find Alford was not guilty of second degree assault, or any assault in general. Upon our review, we find that this assertion requires an evaluation of counsel's trial strategy, for which the record is insufficient. See *State v. Brooks*, 23 Neb. App. 560, 873 N.W.2d 460 (2016). Thus, we do not address the merits of this assignment of error.

Alford also asserts his trial counsel was deficient because counsel failed to take specific actions that Alford requested related to his defense. Specifically, he asserts that he asked trial counsel to (1) introduce medical records which would show the injuries Smith sustained were not significant; (2) take Smith's deposition prior to trial; (3) investigate, depose, and call as witnesses all medical personnel who treated Smith for any injuries; (4) consult with an expert to discuss the extent of the injuries Smith sustained; and (5) call Alford as a witness to refute Smith's testimony.

The record does not show whether depositions were taken or medical records obtained, and Alford's assertions require an evaluation of counsel's trial strategy, for which the record is insufficient. We make no comment whether Alford's allegations regarding these claims would be sufficient to require an evidentiary hearing in the context of a motion for postconviction relief. We simply decline to reach these claims on direct appeal, because the record is insufficient to do so. See *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013).

5. Excessive Sentences

Alford asserts the sentences imposed were excessive, because his convictions for the charged offenses were the

result of "inadequate defense and bad jury instructions." Brief for appellant at 33. He argues that the sentences should fit the offender and that the court abused its discretion in imposing excessive sentences.

[23] 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 amount of violence involved in the commission of the crime. *State v. Trice*, 292 Neb. 482, 874 N.W.2d 286 (2016).

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *Id.* An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

[24] 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 of the facts and circumstances surrounding the defendant's life. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

Alford was convicted of one Class II felony and two Class III felonies. The possible penalty for a Class II felony is 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 2008). The possible penalty for a Class III felony is a maximum of 20 years' imprisonment, a $25,000 fine, or both. § 28-105. Alford was sentenced to 5 to 5 years' imprisonment for each conviction, to be served consecutively. The sentences imposed were well within the statutory guidelines.

There is nothing in the record to suggest the district court failed to consider any of the relevant factors in determining the appropriate sentences for Alford. Witnesses testified regarding the nature of the offenses and the amount of violence involved in the commission of the crimes, including the use of

brass knuckles. The presentence investigation report prepared and provided to the district court included information regarding Alford's age, mentality, education and experience, and criminal conduct, and Alford was given the opportunity to be heard regarding the motivation for his offenses.

Having reviewed the record and the presentence investigation report, we find no evidence that the trial court abused its discretion in imposing sentences within the statutory limits.

VII. CONCLUSION

For the reasons stated herein, we affirm the convictions and the sentences imposed by the district court.

Affirmed.

Riedmann, Judge, participating on briefs.

In re Guardianship of Aimee S., an incapacitated and protected person.
Deborah S., appellant and cross-appellee, v. Susanne Dempsey-Cook, Successor Guardian, appellee and cross-appellant, and Kelly Henry Turner, guardian ad litem, appellee.

885 N.W.2d 330

Filed July 26, 2016. No. A-15-767.

1. **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. The defect of standing is a defect of subject matter jurisdiction.
2. **Judgments: Jurisdiction.** A jurisdictional question that does not involve a factual dispute presents a question of law.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
5. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), 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.
6. ____: ____. Pursuant to Neb. Rev. Stat. § 25-1902 (Reissue 2008), a final, appealable order must affect a substantial right.

7. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not merely a technical right.
8. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
9. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
10. **Guardians and Conservators: Parental Rights.** A parent of an incapacitated adult does not have the same rights as a parent of an incapacitated minor.

Appeal from the County Court for Douglas County: Susan Bazis, Judge. Appeal dismissed.

Brent M. Kuhn, of Brent Kuhn Law, for appellant.

Barbara J. Prince for appellee Susanne Dempsey-Cook.

John M. Walker, Sarah F. Macdissi, and Catherine E. French, of Lamson, Dugan & Murray, L.L.P., for appellee Kelly Henry Turner.

Pirtle and Bishop, Judges.

Pirtle, Judge.

INTRODUCTION

Deborah S. and June Berger (June) appeal from an order of the county court for Douglas County which granted their motion for visitation, thereby allowing Deborah to have visits with her incapacitated adult daughter, Aimee S. Deborah takes issue with the trial court's finding that the successor guardian, as well as other individuals, would make the determination of when and how visits between Aimee and Deborah would take place. We determine that the visitation order from which Deborah appeals is not a final, appealable order. Accordingly, the appeal is dismissed.

BACKGROUND

Aimee was determined to be incapacitated by the county court for Douglas County on January 23, 2002, when she

was 23 years old. Deborah was appointed as Aimee's guardian on that same date and continued in that role until 2011. On October 5, 2011, the Nebraska Department of Health and Human Services petitioned for the removal of Deborah as guardian, and she relinquished her role.

In December 2013, Deborah and June, Deborah's friend, petitioned to be appointed coguardians and coconservators for Aimee. In November 2014, the court terminated visits between Aimee and Deborah. In May 2015, Aimee's successor guardian, Susanne Dempsey-Cook, and her guardian ad litem, Kelly Henry Turner (collectively appellees), joined in a motion for summary judgment seeking to have the petition dismissed and seeking attorney fees. Deborah and June filed a motion for visitation, in which Deborah sought to have visits with Aimee. Following a hearing on both motions, the trial court entered an order granting appellees' motion for summary judgment and a separate order granting Deborah and June's motion for visitation. In regard to the order granting visitation, the court ordered that visits between Aimee and Deborah should resume within 30 days of the order and that Aimee's successor guardian, as well as certain individuals who were part of Aimee's treatment team, would determine when and how visits between Aimee and Deborah would take place.

Deborah and June appealed the order granting summary judgment and the order on the motion for visitation. Appellees filed a motion for summary dismissal on both matters. We sustained the motion for summary dismissal in part, concluding that the summary judgment order was not a final, appealable order because a request for attorney fees was still pending. We denied the motion for summary dismissal in regard to the visitation order. Accordingly, the appeal from the visitation order is the only matter now before us.

[1] We note that although June is listed on the notice of appeal as a party appealing, Deborah was the only one seeking visits with Aimee. Counsel for Deborah and June agreed

at oral argument that June did not ask for visitation and, therefore, has no standing in this matter. See *In re Guardianship of Herrick*, 21 Neb. App. 971, 846 N.W.2d 301 (2014) (standing requires that litigant have such personal stake in outcome of controversy as to warrant invocation of court's jurisdiction and justify exercise of court's remedial powers on litigant's behalf; defect of standing is defect of subject matter jurisdiction).

ASSIGNMENTS OF ERROR

Deborah assigns seven errors, six of which relate to the summary judgment issue which, as stated previously, is no longer before us. Accordingly, we do not address those errors.

Deborah assigns, restated, that the trial court erred in ordering that Aimee's successor guardian and other caregivers would determine how and when her visits with Aimee would take place.

On cross-appeal, Aimee's successor guardian assigns that the trial court erred in granting Deborah's motion for visitation and ordering that visits resume within 30 days of the court's order.

STANDARD OF REVIEW

[2] A jurisdictional question that does not involve a factual dispute presents a question of law. *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

ANALYSIS

[3,4] Deborah assigns that the trial court erred in ordering that Aimee's successor guardian and other caregivers would determine how and when her visits with Aimee would take place. However, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction. *Murray v. Stine, supra.* For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.

Echo Financial v. Peachtree Properties, 22 Neb. App. 898, 864 N.W.2d 695 (2015).

[5] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), 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. *In re Guardianship & Conservatorship of Forster*, 22 Neb. App. 478, 856 N.W.2d 134 (2014).

[6-8] Pursuant to § 25-1902, a final, appealable order must affect a substantial right. A substantial right is an essential legal right, not merely a technical right. See *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006). A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken. *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[9] Appellees previously filed a motion for summary dismissal challenging our jurisdiction over the visitation order on the basis that no substantial right had been affected. We denied summary dismissal at that time, citing to *In re Guardianship of Sophia M., supra*, and the proposition noted above. *In re Guardianship of Sophia M.* indicated that "'"whether a substantial right of a parent has been affected . . . is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed."'" 271 Neb. at 139, 710 N.W.2d at 317. Since there were no time limitations on the visitation restrictions indicated in the present matter, this court initially construed *In re Guardianship of Sophia M.* to suggest such an order impacted a substantial right. However, upon further review and consideration, we conclude otherwise. Lack of subject matter jurisdiction may

be raised at any time by any party or by the court sua sponte. *City of Omaha v. C.A. Howell, Inc.*, 20 Neb. App. 711, 832 N.W.2d 30 (2013).

In re Guardianship of Sophia M., supra, involved visitation between a parent and a minor child. The present case, unlike *In re Guardianship of Sophia M.*, involves visitation between a parent and an adult child. Accordingly, the legal principles regarding substantial rights at issue in a juvenile court proceeding are not applicable here. We have found no Nebraska case law that would support a finding that a parent of an incapacitated adult has the same rights as a parent of an incapacitated minor. In a concurrence written by Justice Stephan in *In re Guardianship of Benjamin E.*, 289 Neb. 693, 856 N.W.2d 447 (2014), he discussed whether the parental preference principle, which is applied in guardianship proceedings involving minor children, should extend to protect the relationship between parents and their adult children. Although this concurrence has no precedential value, it does provide some guidance in regard to the jurisdictional question now before us.

The *In re Guardianship of Benjamin E.* case dealt with the priority given by Neb. Rev. Stat. § 30-2627 (Reissue 2008) to a parent of an incapacitated person to be appointed as guardian. Justice Stephan concurred with the majority's holding that the county court erred in bypassing the mother's statutory priority without stating the reasons for doing so.

In regard to the parental preference principle, Justice Stephan explained:

> The parental preference principle arises from the substantive component of the Due Process Clause of the 14th Amendment, which protects the "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" The U.S. Supreme Court has recognized that "[t]he liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty

> interests. . . .” The parental preference principle is based on an acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion into that relationship. The parental preference principle protects the parent’s right to the companionship, care, custody, and management of his or her child and the child’s reciprocal right to be raised and nurtured by a biological or adoptive parent. We have even stated that establishment and continuance of the parent-child relationship is the most fundamental right a child possesses.

In re Guardianship of Benjamin E., 289 Neb. at 706-07, 856 N.W.2d at 457 (Stephan, J., concurring) (citations omitted).

Justice Stephan stated that the constitutional protections of the parental preference principle are not directly applicable to whether a parent has priority to be the guardian for his or her incapacitated adult child. *In re Guardianship of Benjamin E., supra* (Stephan, J., concurring). He further noted that a number of federal circuit courts have addressed the issue of whether the parental preference principle should extend to protect the relationship between parents and their adult children in the context of 42 U.S.C. § 1983 (2012) actions brought by parents of adult children wrongfully killed by state action (such as a shooting by a police officer). Courts have declined to extend the parental preference principle in these cases.

Justice Stephan stated that he found one case that directly addressed whether the parental preference principle applies when a parent wants to be appointed the guardian of an incapacitated adult child and it concluded that it did not apply. *In re Guardianship of Benjamin E., supra*. (Stephan, J., concurring) (citing *In re Tammy J.*, 270 P.3d 805 (Alaska 2012)).

The Alaska court in *In re Tammy J.* recognized that the U.S. Supreme Court has never taken a position on whether the substantive due process rights of parents extend to relationships with adult children and that the Court has been historically reluctant to expand the concept of substantive due process. In addressing the question of whether a parent has a constitutionally protected right to make decisions regarding the care, custody, and control of a developmentally disabled adult, the Alaska court reasoned that caring for such an individual is not a form of "'child rearing.'" *In re Tammy J.*, 270 P.3d at 815. The Alaska court also found that the fundamental liberty interests of the developmentally disabled adult are a significant factor to be weighed against extending substantive due process protection to the parents' care for their developmentally disabled adult child. It noted that in the context of minor children, when a child's preferences and interests conflict with the choices of parents, protection of the parents' rights may come at the expense of the rights of the child. *In re Tammy J., supra*. However, adult individuals with disabilities have independent rights to equality of opportunity, independent living, and personal and economic self-sufficiency, and the trend is that they should not be viewed or treated as "'"eternal children."'" See *id*. at 815.

Similarly, in *In re Lake*, 7 Kan. App. 2d 586, 644 P.2d 1368 (1982), the Kansas court stated that the discretionary decision of the court to make a change of guardian is much like a decision regarding the custody of a child, since both are subject to a number of countervailing circumstances. In both instances, the best interests of a person legally incapable of exercising independent judgment concerning his or her best interests must be determined. However, unlike a custody action in which parental rights must be considered, the guardianship of an incapacitated adult is solely concerned with the rights and interests of the ward. *Id.*

[10] In the present case, Deborah is appealing from an order regarding visitation with her adult incapacitated child. The

limited case law we have found does not support a finding that a parent of an incapacitated adult has the same rights as a parent of an incapacitated minor. However, Deborah continues to have the right to petition the lower court for a change in guardian, as she attempted to do in the underlying action. Accordingly, we conclude that the visitation order does not affect a substantial right because it does not infringe upon Deborah's fundamental right to raise her child. The visitation order is not a final order, and we do not have jurisdiction to hear the appeal.

CONCLUSION

We conclude that the visitation order is not a final order because it did not affect a substantial right of Deborah's. Accordingly, we do not have jurisdiction over the appeal and it is dismissed.

Appeal dismissed.

Inbody, Judge, participating on briefs.

State of Nebraska, appellee, v. Roger K. Schmidt, Sr., appellant.

885 N.W.2d 51

Filed August 9, 2016. No. A-15-584.

1. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014) for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. In an appeal involving such a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
5. **Postconviction: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.
6. **Evidence: Words and Phrases.** Generally, newly discovered evidence is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings.
7. **Effectiveness of Counsel: Proof.** The factual predicate for a claim concerns whether the important objective facts could reasonably have been discovered, not when the claimant should have discovered the legal significance of those facts.

8. **Effectiveness of Counsel: Plea Bargains.** As a general rule, defense counsel has the duty to communicate to the defendant all formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the defendant.
9. **Trial: Attorney and Client: Effectiveness of Counsel: Plea Bargains.** A trial counsel's failure to communicate a plea offer to a defendant is deficient performance as a matter of law.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Jefferson County: Paul W. Korslund, Judge. Affirmed.

Lyle J. Koenig, of Koenig Law Firm, for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Moore, Chief Judge, and Inbody and Riedmann, Judges.

Moore, Chief Judge.

INTRODUCTION

Roger K. Schmidt, Sr., appeals from an order of the district court for Jefferson County denying his second motion for postconviction relief. We determine that Schmidt's second motion was barred by the limitation period set forth in the Nebraska Postconviction Act, specifically Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014), and therefore, we affirm the district court's order denying postconviction relief.

BACKGROUND

Conviction and Sentencing

On March 14, 2007, Schmidt was convicted by jury before the district court of Jefferson County on one count of first degree sexual assault on a child in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), a Class II felony, and four counts of sexual assault of a child in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2004), Class IIIA felonies. The

jury acquitted Schmidt on one count of first degree sexual assault on a child and one count of sexual assault of a child. On May 18, Schmidt was sentenced to imprisonment for a period of 18 to 25 years for the count of first degree sexual assault and a period of 5 years for each of the four individual counts of sexual assault, with all sentences to run consecutively. Schmidt's convictions and sentences were affirmed on direct appeal. See *State v. Schmidt*, 16 Neb. App. 741, 750 N.W.2d 390 (2008). See, also, *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008). Schmidt retained the same counsel, Kelly S. Breen, for both the original trial and his direct appeal.

First Motion for Postconviction Relief

On October 19, 2010, Schmidt, having retained new counsel, filed his first motion for postconviction relief in the district court, alleging in part ineffective assistance of trial counsel. His counsel has remained the same from this first motion through the present appeal. This motion, as supplemented, claimed that Breen failed to investigate and prepare witnesses; to mitigate potentially harmful statements; to adequately challenge various statements, testimony, and the competency of witnesses; to assert available defenses; to make necessary objections and a proper offer of proof; and to employ an expert. This motion did not allege that Breen failed to communicate a formal plea offer.

On October 28, 2011, the district court denied this motion without an evidentiary hearing. This court affirmed the denial on appeal on March 19, 2013. See *State v. Schmidt*, case No. A-11-981, 2013 WL 1111520 (Neb. App. Mar. 19, 2013) (selected for posting to court Web site). The Nebraska Supreme Court subsequently denied Schmidt's petition for further review.

Second Motion for Postconviction Relief

On March 13, 2014, Schmidt filed a second motion for postconviction relief based upon an alleged newly recognized

constitutional right and a new allegation of ineffective assistance of counsel discovered during the pendency of the appeal of the first motion. Specifically, Schmidt asserted that the U.S. Supreme Court, for the first time in *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), and *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (both decided on March 21, 2012), identified defective performance of counsel during plea negotiations as potential ineffective assistance of counsel in violation of the Sixth Amendment to the Constitution.

Schmidt claimed that such ineffective assistance of trial counsel occurred in his case due to Breen's alleged failure to communicate a formal plea offer proffered by the prosecutor, Linda Bauer, prior to the original trial. Specifically, Schmidt alleged that on March 26, 2012, he discovered that the State had offered a plea agreement to Breen, prior to the original trial. The plea offer would have allowed Schmidt to plead guilty to three counts of sexual contact, Class IIIA felonies, carrying a maximum penalty of 15 years' imprisonment and a $30,000 fine during the period at issue, in exchange for all other charges being dismissed. See Neb. Rev. Stat. § 28-105(1) (Supp. 2015). Schmidt claims that Breen never communicated this plea offer to him. Schmidt further alleged that it was the U.S. Supreme Court's rulings in *Lafler v. Cooper, supra*, and *Missouri v. Frye, supra*, that caused Schmidt's present counsel to inquire from Bauer whether a plea agreement had been offered to Schmidt.

Schmidt alleged that his request for postconviction relief was not barred by the Nebraska Postconviction Act's 1-year statute of limitations for filing such motions. See § 29-3001(4).

First, Schmidt asserted that the second motion for postconviction relief was timely filed under § 29-3001(4)(d) due to the presence of the newly recognized constitutional right set forth above. This section provides that the 1-year statute of limitations for postconviction relief runs from "[t]he 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[.]" § 29-3001(4)(d).

Next, Schmidt alleged that his motion for postconviction relief was timely filed under § 29-3001(4)(b), which states that the 1-year statute of limitations for postconviction relief runs from "[t]he date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence." § 29-3001(4)(b).

Although Schmidt claims to have first received information regarding the plea offer on March 26, 2012, he asserted that because the appeal of the denial of his first motion for postconviction relief was pending before this court at that time, the 1-year statute of limitations in § 29-3001 did not begin to run until our opinion was released on March 19, 2013, thus making his second motion filed on March 13, 2014, timely. He similarly alleged that the U.S. Supreme Court cases of *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), and *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), were released during the pendency of the prior appeal which in turn tolled the running of the statute of limitations until the release of this court's opinion on March 19, 2013.

On April 22, 2014, the State filed a motion to dismiss Schmidt's second postconviction motion. On September 12, the court entered an order denying the State's motion to dismiss and determining that Schmidt was entitled to an evidentiary hearing on his claims. However, the State filed a motion to reconsider on September 25, and a hearing was held on this motion on October 14.

First Order of District Court: No Newly Recognized Constitutional Right

On January 14, 2015, the district court entered its order in response to the State's motion to reconsider. The court first

found that Schmidt's claim based upon a "newly recognized right" was time barred under § 29-3001(4)(d), relying upon *Williams v. U.S.*, 705 F.3d 293 (8th Cir. 2013), which concluded that neither *Lafler v. Cooper, supra*, nor *Missouri v. Frye, supra*, announced a new rule of constitutional law.

However, the court held that questions remained surrounding whether and when the factual predicate for Schmidt's claim of ineffective assistance of counsel (the failure to communicate the plea offer) could reasonably have been discovered. Therefore, the court ordered an evidentiary hearing on that issue to determine whether the second motion was timely under § 29-3001(4)(b).

Evidentiary Hearing

On March 19, 2015, an evidentiary hearing was held on Schmidt's second motion for postconviction relief. The State called Breen and Schmidt as witnesses. Schmidt called his wife and his daughter as witnesses. An affidavit of Bauer, the former Jefferson County Attorney who prosecuted the original action against Schmidt for sexual assault, was received in evidence. Attached to the affidavit was the plea letter sent by Bauer to Breen dated November 15, 2006.

In the plea letter, Bauer stated that "[m]y offer of three counts of Sexual Contact (Class IIIA Felonies) still stands." Breen testified that this plea offer was initially an oral offer, made by Bauer after Breen approached her and asked if the State would be making any plea offers. Specifically, the oral offer provided that if Schmidt pled guilty to three counts of sexual contact with a child, each a Class IIIA felony, the State would dismiss the four remaining counts.

Breen testified further regarding the plea offer and discussions with Schmidt concerning the offer. Breen stated that the oral plea offer was made early in the case and that he discussed the offer with Schmidt while he was incarcerated at the Jefferson County jail. Breen believes that this first discussion occurred before September 7, 2006. He remembered this date

because it was when Schmidt's bond was reduced at a bond review hearing, and Schmidt subsequently bonded out of jail on September 11.

During this discussion with Schmidt at the jail, Breen explained that Schmidt would have to plead either guilty or no contest to the Class IIIA felonies. He also explained the elements of the crime of sexual contact with a child. Breen informed Schmidt of the maximum penalty of 5 years and a $10,000 fine per count and that the sentences could run concurrently or consecutively. Breen advised Schmidt that the plea offer was a good deal and recommended accepting it. Schmidt responded that he would have to speak with his wife before agreeing to a deal.

Breen visited Schmidt in jail a second time. Schmidt then informed Breen of his decision not to accept the offer. Schmidt had discussed the offer with his wife and was concerned about the possibility of dying in jail, because of a medical condition, if he was given consecutive sentences. Schmidt also told Breen that he would consider accepting a plea offer if the State would recommend probation. Breen then attempted to garner a better plea offer.

Breen thereafter received the November 2006 plea letter from Bauer. The letter explained that Bauer spoke with the victims' families regarding sentencing and that neither family felt probation would be appropriate. As mentioned previously, the letter provided that the original oral offer "still stands."

Breen testified that within days of receiving this letter, he informed Schmidt over the telephone that the oral offer had been made in writing, but the State would probably withdraw the offer soon. Schmidt again declined the offer, giving the same explanation as before. Breen testified that fairly close to trial, he visited the Schmidt residence and informed Schmidt that the State might be willing to reconsider the plea offer, but Schmidt rejected this proposal.

Schmidt testified that the plea offer was never communicated to him and that neither Schmidt nor his current counsel

were aware of the offer until March 26, 2012, when current counsel received a copy of the letter from Bauer. Schmidt claims that if the offer had been communicated to him, he would have accepted it. Schmidt's wife also testified that Breen never discussed a plea offer with Schmidt or herself. Schmidt's daughter similarly confirmed that there was no discussion of a plea agreement prior to trial. Lastly, Schmidt's wife testified that she retrieved a copy of Schmidt's case file from Breen in March 2010, but the file did not contain the offer letter. Breen testified that he believed the letter was kept in the case file and that only his work product was removed prior to transferring the file to Schmidt's wife.

Second Order of District Court: Plea Offer Discoverable Through Exercise of Due Diligence

On May 20, 2015, the district court entered an order finding that the remaining claim in Schmidt's second postconviction motion—the alleged ineffective assistance of counsel for failure to communicate a plea offer—was both time barred under § 29-3001(4)(b) and procedurally barred. The court determined that Schmidt was not entitled to postconviction relief and denied his second motion with prejudice.

The court specifically found the testimony of Breen to be credible and the testimony of Schmidt, his wife, and his daughter to not be credible. On this basis, the court found that the State had extended the plea offer to Schmidt; Breen communicated this offer to Schmidt in jail on or before September 7, 2006; Breen advised that Schmidt accept; Schmidt discussed the offer with his wife; and Schmidt told Breen that he rejected the offer.

Further, the court determined that on November 15, 2006, the State sent a letter to Breen stating that the offer was still available; Breen contacted Schmidt soon thereafter over the telephone regarding the offer, advising him to accept it; and Schmidt rejected the offer a second time. The court also found

that 2 or 3 weeks before trial, Breen visited Schmidt and his wife at their residence and discussed the possibility of revisiting the original offer with the State; Schmidt once again rejected Breen's suggestion. Lastly, the court found that only one offer was ever extended to Schmidt by the State; Breen placed Bauer's offer letter in his case file following receipt; and after Schmidt's direct appeal, Breen removed his work product from the file and gave the file to Schmidt's wife for purposes of Schmidt's first postconviction action.

As a result of these factual findings, the court determined that Schmidt's claim was time barred under § 29-3001(4)(b). Specifically, the court held that "[t]he factual predicate of [Schmidt's] claim was discoverable through the exercise of due diligence on or before September 7, 2006, when the State's formal plea offer was actually communicated to [Schmidt] by his trial counsel."

Lastly, the district court also found that Schmidt's claim was procedurally barred. Because Schmidt was informed of the plea offer prior to his trial and convictions, his initial opportunity to raise claims of ineffective assistance of counsel pertaining to that offer was within his first motion for postconviction relief, not his second.

Because Schmidt assigns as error only the finding that his second postconviction motion was time barred due to the unavailability of § 29-3001(4)(b) and (d), this court need not address whether the claim was procedurally barred.

Schmidt subsequently perfected this appeal.

ASSIGNMENTS OF ERROR

Schmidt assigns, combined and restated, that the district court erred in holding that the second motion for postconviction relief was time barred as a result of being subject to neither (1) an exception when the factual basis for the motion was not reasonably discoverable through due diligence nor (2) an exception for a newly recognized constitutional right.

STANDARD OF REVIEW

[1,2] In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014) for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. In an appeal involving such a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous. *State v. Armstrong*, 290 Neb. 991, 863 N.W.2d 449 (2015). See, also, *State v. Ware*, 292 Neb. 24, 870 N.W.2d 637 (2015) (defendant requesting postconviction relief must establish basis for such relief, and findings of district court will not be disturbed unless clearly erroneous).

[3,4] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015). When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion. *Id*.

ANALYSIS

[5] The Nebraska Postconviction Act, § 29-3001 et seq., is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights. *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015). Section 29-3001 establishes a 1-year statute of limitations pertaining to the filing of verified motions for postconviction relief and provides that such period begins to run on the later of one of five dates, as follows:

> (4) A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;

(b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;

(c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;

(d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or

(e) August 27, 2011.

Discoverability of Factual Basis for Constitutional Claim

Section 29-3001(4)(b) provides the statutory basis by which the finding of a factual predicate for a constitutional claim not previously discoverable through due diligence can extend the period of available relief under the 1-year statute of limitations governing motions for postconviction relief.

[6,7] Generally, newly discovered evidence is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). The factual predicate for a claim concerns whether the important objective facts could reasonably have been discovered, not when the claimant should have discovered the legal significance of those facts. *State v. Mamer*, 289 Neb. 92, 853 N.W.2d 517 (2014). Stated another way, the limitations period "begins when the *facts* underlying the claim could reasonably be discovered" which is "distinct from discovering that those facts are actionable." *Id.* at 99, 853 N.W.2d at 524.

Schmidt maintains on appeal that the discovery of the plea offer, the factual basis for his second motion for postconviction

relief, did not occur until March 26, 2012. The State argues that the district court correctly found the plea offer to have been communicated to Schmidt on or before September 7, 2006, and that therefore, the second motion for postconviction relief was not timely filed under § 29-3001(4).

Upon our review, we find that Schmidt's second motion for postconviction relief was time barred and ineligible for the discovery exception provided by § 29-3001(4)(b). The court's factual finding that Breen communicated the plea offer to Schmidt on or before September 7, 2006, while Schmidt was being held in jail, was not clearly erroneous. Although Schmidt, his wife, and his daughter provided conflicting testimony that the plea offer letter was not communicated to Schmidt, we give weight to the fact that the district court observed the testimony of the witnesses and specifically found that Breen's testimony was credible while Schmidt and his family's testimony was not credible. We can find no error in the trial court's determination in this regard. Although Breen was not absolutely certain regarding the timing of all the events in this case, Breen's testimony about the occurrences was sufficiently specific and deliberate to support his credibility.

Therefore, because the plea offer was disclosed to Schmidt on or before September 7, 2006, the statute of limitations exception provided under § 29-3001(4)(b) for a newly discovered constitutional claim was not applicable and Schmidt's second motion for postconviction relief on March 13, 2014, was time barred.

Schmidt's first assignment of error is without merit.

Existence of Newly Recognized Constitutional Right

Schmidt asserts that the district court erred when it found defendant's second motion for postconviction relief was also time barred under § 29-3001(4)(d), as it did not assert a newly recognized constitutional claim. As noted above, the court in

its first order determined that Schmidt's second motion was time barred under § 29-3001(4)(d), finding no newly recognized constitutional right supporting Schmidt's claim.

Schmidt argues on appeal that the district court incorrectly determined that the Supreme Court in *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), and *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), did not establish a new constitutional right. Specifically, Schmidt claims these cases provided, for the first time, that an attorney has a duty to present his criminal client with notice of a plea offer and that failure to do so may amount to ineffective assistance of counsel in violation of the Sixth Amendment.

The Eighth Circuit Court of Appeals in *Williams v. U.S.*, 705 F.3d 293 (8th Cir. 2013), clearly held that *Lafler* and *Frye* did not announce a new rule of constitutional law. Specifically, the court stated:

> In [*Lafler*] and *Frye*, the Court noted that its analysis was consistent with the approach many lower courts had taken for years, as well as with its own precedent. . . . We therefore conclude, as have the other circuit courts of appeals that have addressed the issue, that neither [*Lafler*] nor *Frye* announced a new rule of constitutional law.

Williams v. U.S., 705 F.3d at 294.

Upon our review, we find that the district court was correct in its determination that *Lafler v. Cooper, supra*, and *Missouri v. Frye, supra*, did not present a new constitutional right. Schmidt's claim of ineffective assistance of counsel based on failure to present a plea offer falls within a category of constitutional claims long recognized by the courts. Therefore, Schmidt's second motion for postconviction relief was ineligible for the statute of limitations exception provided under § 29-3001(4)(d).

[8] Schmidt also cites to *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014), arguing that the Nebraska Supreme Court did not clearly identify the constitutional right at issue

until the issuance of this opinion on February 21, 2014. We disagree with Schmidt's interpretation of the *Alfredson* opinion. The Supreme Court in *Alfredson* was also presented with a claim that the defendant's trial counsel was ineffective for failing to disclose an offered plea bargain. An evidentiary hearing was held on that claim. The Supreme Court affirmed the denial of the postconviction claim, finding that the district court was not clearly wrong in its factual finding that no formal offer was made as alleged by the defendant. The Supreme Court began its analysis by noting that "[r]elying on federal circuit court precedent, we have *previously stated* that a trial counsel's failure to communicate a plea offer to a defendant is deficient performance as a matter of law." *Id.* at 483-84, 842 N.W.2d at 821 (emphasis supplied), citing to *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). The Supreme Court further noted that "[t]his proposition of law has not been explored by our court with any detail" and proceeded to analyze the U.S. Supreme Court's holdings in *Frye* which "clarified the issue" that defense counsel has a duty to communicate formal plea offers. *State v. Alfredson*, 287 Neb. at 484, 842 N.W.2d at 821. After considering the holding in *Frye*, the Supreme Court stated: "We now hold that, as a general rule, defense counsel has the duty to communicate to the defendant all formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the defendant." *State v. Alfredson*, 287 Neb. at 485, 842 N.W.2d at 821-22.

[9] We read *Alfredson* as confirmation and further explanation of the Supreme Court's prior recognition in 2011, in *State v. Iromuanya, supra*, that a trial counsel's failure to communicate a plea offer to a defendant is deficient performance, in light of the subsequent holding in 2012 in *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). Thus, the *Alfredson* opinion did not amount to recognition of a new constitutional right by the Nebraska Supreme Court.

Because Schmidt cannot show that a newly recognized constitutional right existed to extend the period of limitations for his claim, the district court did not err in finding that his claim was barred under § 29-3001(4)(d). See *State v. Goynes*, 293 Neb. 288, 876 N.W.2d 912 (2016) (similarly holding that because defendant's second motion for postconviction relief filed in 2015 asserted constitutional claim initially recognized in 2012, it was barred by 1-year limitation period set forth in § 29-3001(4)(d)).

[10] Lastly, based on our above holdings, this court need not address whether the statute of limitations was tolled during the appeal of Schmidt's first motion for postconviction relief. See *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

Schmidt's second assignment of error is without merit.

CONCLUSION

The district court properly determined that Schmidt's second motion for postconviction relief was time barred pursuant to § 29-3001(4). Therefore, we affirm.

Affirmed.

Amy Marshall, appellee, v.
Brian W. Marshall, appellant.
885 N.W.2d 742

Filed August 16, 2016. No. A-15-035.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial court. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, and alimony.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Property Division.** The equitable division of marital property is a three-step process: The first step is to classify the parties' property as marital or nonmarital, the second step is to value the marital assets and marital liabilities of the parties, and the third step is to calculate and divide the net marital estate between the parties in accordance with statutory principles.
4. ____. The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
5. **Divorce: Property Division.** Compensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate.
6. **Property Division.** Compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate as they properly replace losses of property created by the marital partnership.
7. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.

8. **Property Division: Proof: Workers' Compensation: Presumptions.** Where the party making the claim of nonmarital property fails to prove that all or portions of an injury compensation are for purely personal losses or loss of future earning capacity, the presumption remains that the proceeds from the personal injury or workers' compensation settlement or award are marital property.
9. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
10. **Child Support.** The provision of in-kind benefits, from an employer or other third party, may be included in a party's income for child support purposes.
11. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is 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.
12. **Alimony.** In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), the income and earning capacity of each party as well as the general equities of each situation.
13. ____. Disparity in income or potential income may partially justify an award of alimony.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed in part, and in part reversed and remanded with directions.

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

Anthony W. Liakos, of Govier & Milone, L.L.P., for appellee.

Moore, Chief Judge, and Irwin and Bishop, Judges.

Irwin, Judge.

I. INTRODUCTION

Brian W. Marshall appeals from a decree of dissolution entered by the district court, which decree dissolved Brian's marriage to Amy Marshall; divided the marital assets and

debts; awarded Amy sole physical custody of the parties' minor child; and ordered Brian to pay child support, alimony, and a portion of Amy's attorney fees. On appeal, Brian asserts that the district court erred in calculating and dividing the marital estate, in calculating his income for child support purposes, in admitting into evidence certain documentation about personal injury settlement proceeds received by the parties during the marriage, and in awarding Amy alimony in the amount of $2,000 per month for 21 years.

Upon our de novo review of the record, we find that the district court erred in failing to include all of the proceeds from the personal injury settlement in the marital estate and in calculating Brian's current income. As a result of these errors, we remand the matter to the district court to recalculate the value of the parties' marital estate, redistribute the assets and debts between the parties, and recalculate Brian's child support obligation. In addition, we reverse the district court's determination concerning Amy's alimony award, because the court should reconsider this award in light of any changes to the marital estate and to the calculation of Brian's child support.

II. BACKGROUND

Brian and Amy were married on August 20, 1993. Two children were born of the marriage; however, by the time of the dissolution proceedings, only one child remained a minor, the parties' daughter, born in August 1996.

On February 8, 2013, Amy filed a complaint for dissolution of marriage. In the complaint, Amy specifically asked that the parties' marriage be dissolved; that their marital assets and debts be equitably divided; that she be awarded custody of the parties' daughter; and that she be awarded child support, alimony, and attorney fees.

On March 4, 2013, Brian filed an answer and cross-complaint for dissolution of marriage. In his cross-complaint, he asked that he be awarded custody of the parties' daughter, child support, and attorney fees.

On March 21, 2013, the district court entered a temporary order awarding Amy sole physical custody of the parties' daughter and awarding Brian and Amy joint legal custody of her pending a trial. Brian was ordered to pay temporary child support in the amount of $514 per month. In addition, he was ordered to maintain health insurance for the family and to pay the real estate taxes for the marital home.

Trial was held in October 2014. At trial, both Brian and Amy agreed that they would continue to share legal custody of their daughter and that Amy would retain sole physical custody. As a result of this agreement, the issues left to be resolved at trial included division of the parties' assets and debts, child support, alimony, and attorney fees. The parties' trial testimony centered on their current financial circumstances. In particular, a great deal of testimony focused on the disabling effects of a stroke Amy suffered in 2003 and a personal injury settlement that Brian and Amy received as a result of Amy's stroke. More specific details about this testimony will be discussed as necessary in our analysis below.

After the trial, the district court entered a decree of dissolution. In the decree, the court ordered Brian to pay $935 per month in child support. In addition, the court ordered Brian to pay Amy alimony in the amount of $2,000 per month for 21 years and $5,000 of her attorney fees. The court calculated and divided the marital estate such that Amy received the marital home and her personal vehicle and Brian received a rental home owned by the parties; two trucks and two boats; his interest in a business referred to as "Elite Fitness"; and his 49-percent interest in his family's business, Marshall Enterprises. The court divided equally the cash value of various life insurance policies held by Brian. The court also set aside a portion of the personal injury settlement from Amy's stroke as Amy's nonmarital property and set aside a smaller portion of that settlement as Brian's nonmarital property.

Brian appeals from the decree of dissolution here.

III. ASSIGNMENTS OF ERROR

On appeal, Brian assigns four errors: He asserts, restated, that the district court erred in calculating and dividing the marital estate; in calculating his income for child support purposes; in admitting into evidence exhibit 81, which contained documents relating to the settlement proceeds Brian and Amy received as a result of Amy's stroke; and in awarding Amy alimony in the amount of $2,000 per month for 21 years.

IV. STANDARD OF REVIEW

[1] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial court. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, and alimony. See, *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

[2] An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Adams v. Adams*, 13 Neb. App. 276, 691 N.W.2d 541 (2005).

V. ANALYSIS

1. Calculation and Division of Marital Estate

Brian first asserts that the district court abused its discretion in its calculation and division of the marital estate. Specifically, he argues that the court erred in setting aside any portion of the personal injury settlement proceeds as nonmarital property and in determining that an airboat he paid for after the parties separated was marital property. Brian also argues that the court erred in inequitably dividing the marital estate. Upon our de novo review of the record, we find that Amy failed to sufficiently demonstrate that any portion of the

settlement proceeds were nonmarital property. Accordingly, we reverse the court's categorization of these proceeds. All of the settlement proceeds should be considered marital property. We also find that there was sufficient evidence presented to demonstrate that Brian's airboat was marital property. As such, we affirm the court's categorization of the airboat as marital property. However, given our reversal of the court's exclusion of any portion of the personal injury settlement proceeds from the marital estate, we remand the matter to the district court to recalculate the value of the estate and to reconsider the division of the assets and debts.

[3,4] Before we address Brian's specific assertions with regard to the court's calculation and division of the marital estate, we briefly recount the legal principles which control our review of this issue. When there is no settlement agreement between the parties on the issue of property division, the trial court is obliged to order an equitable division of the marital estate. Neb. Rev. Stat. § 42-366(8) (Reissue 2008). The equitable division of marital property is a three-step process: The first step is to classify the parties' property as marital or nonmarital, the second step is to value the marital assets and marital liabilities of the parties, and the third step is to calculate and divide the net marital estate between the parties in accordance with statutory principles. See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties. *Nygren v. Nygren*, 14 Neb. App. 1, 704 N.W.2d 257 (2005).

(a) Settlement Proceeds

In April 2003, when she was 34 years old, Amy suffered a "massive stroke" which left her with permanent disabilities, including limited use of her left hand and left leg. Immediately after the stroke, Amy was hospitalized for 1 week and was then transferred to an inpatient rehabilitation center for 1 month. After her release, she participated in outpatient rehabilitation

for 4 years. Prior to Amy's stroke, she co-owned and operated "Amy's Salon." After the stroke, she is no longer able to work full time as a hairdresser. She does work a couple of hours per week out of a salon in the basement of the marital home and has about 10 regular clients. However, most of these clients are family and close friends, because Amy requires assistance in cutting, coloring, perming, styling, or braiding hair. Amy also requires assistance in performing basic grooming for herself and in completing household chores.

As a result of Amy's stroke, Brian and Amy initiated a lawsuit against Merck & Co., Inc. (Merck), a pharmaceutical company which distributed the anti-inflammatory drug Vioxx. Amy had used Vioxx on almost a daily basis for the 4 years prior to her stroke. Brian, Amy, and Merck ultimately settled their lawsuit after Merck agreed to pay to Brian and Amy approximately $490,000. The settlement was paid in two lump sums and was not specifically broken down so as to allocate any certain amount to Amy's pain and suffering, lost wages, or medical expenses or to Brian's derivative claims. After paying for attorney fees and costs, Brian and Amy received settlement proceeds in the amount of $330,621.40. Almost all of this money had been spent on marital expenses by the time of the dissolution proceedings. In particular, Brian and Amy spent $84,000 of the proceeds paying off the mortgage on the marital home. In addition, they spent approximately $95,000 on making improvements to the home. They also paid off credit card debt, went on family vacations, and invested in a local business referred to as "Elite Fitness."

In the decree of dissolution, the district court recognized that the agreement between Brian, Amy, and Merck "was silent on allocation of payment for Amy's pain, suffering, disfigurement, disability or loss of post-divorce earning capacity or for past wages, medical expenses and other items." However, the court found that a portion of the settlement proceeds should still be set aside as Amy's nonmarital property. The court stated:

> The settlement does not come close to compensating Amy for her future pain, suffering, disfigurement, disability. The parties agree that the settlement proceeds were used to pay off the mortgage debt and remodel the kitchen, for a total of $179,604.90. Amy should be given credit for this and should be awarded the marital residence as her sole and separate property free and clear of any interest of . . . Brian, who shall, upon entry of the Decree, execute a quitclaim deed releasing his interest in the property to Amy. When this credit is applied to the value of the property, Amy's net equity is $168,995.91.

Essentially, the court determined that $179,604.90, or 54 percent, of the property settlement proceeds were Amy's nonmarital property.

The court also found that a portion of the settlement proceeds should be set aside as Brian's nonmarital property. The court stated:

> The Court finds that Brian opened an account at Five Points Bank with approximately $20,000.00 from Amy's personal injury settlement. The account recently had a value of $4000.00 and has been diminished by Brian to approximately $600.00. He will be awarded that account as credit against his derivative or marital claim to the settlement proceeds. . . .
>
> . . . .
>
> . . . The Court finds that Brian purchased an interest in a business known as "Elite Fitness", investing approximately $37,333.33 from the proceeds of Amy's personal injury settlement. This investment is awarded to Brian as his sole and separate property free and clear of any interest of Amy and shall be applied as a credit against his derivative or marital claim to the settlement proceeds.

It is not clear from the court's statement whether it awarded Brian a total credit of $41,333.33 or $37,933.33, because it is not clear whether the court valued the bank account at $4,000

or at $600. However, for the purpose of our discussion, we will assume that the court awarded Brian a credit of $41,333.33, or 12.5 percent of the personal injury settlement proceeds.

On appeal, Brian challenges the court's categorization of any portion of the personal injury settlement proceeds as nonmarital property. He asserts that Amy failed to sufficiently prove that any of the proceeds were nonmarital property and that, without this proof, the court should have included all of the proceeds in the marital estate. Upon our review, we conclude that Brian's assertion has merit.

[5-8] The Nebraska Supreme Court has previously discussed whether the proceeds from a personal injury award should be categorized as marital or nonmarital property for property distribution purposes in *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999). In that case, the court held:

> [C]ompensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate. On the other hand, compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate as they properly replace losses of property created by the marital partnership.

Id. at 109-10, 602 N.W.2d at 663. The court went on to explain that the burden of proof to show that property is nonmarital remains with the person making the claim. *Id*.

> Thus, in those cases where the party making the claim of nonmarital property fails to prove that all or portions of an injury compensation are for purely personal losses or loss of future earning capacity, the presumption remains that the proceeds from the personal injury or workers' compensation settlement or award are marital property.

Id. at 110, 602 N.W.2d at 663.

In this case, the settlement proceeds from Merck were received in two lump-sum payments and without any specific

delineation of whether the proceeds were for Amy's pain and suffering, Amy's lost wages, Amy's medical bills, Brian's derivative claims, or some combination of these figures. Evidence presented at trial revealed that prior to Amy's stroke, she worked full time as a hairdresser at a salon she co-owned. Her annual wages for this employment totaled approximately $43,580. After Amy's stroke, she is essentially unable to work as a hairdresser. She now earns a negligible amount of money working only a few hours a week. Accordingly, it is clear that the marital estate was greatly diminished as a result of Amy's lost wages. In fact, Amy's lost wages from the time of her stroke in 2003 through the time of the parties' separation 10 years later in 2013 totaled more than $100,000 over the entirety of the settlement proceeds. In addition, it is clear that Amy incurred a great deal of medical expenses as a result of her stroke. However, there was no evidence presented to indicate whether or how much the marital estate was diminished for these medical bills or whether the parties' health insurance covered these bills.

While it is clear that Amy's stroke has left her with serious physical impairments, it is also clear that her stroke resulted in a great reduction in the value of the marital estate. The settlement proceeds received from Merck were simply not enough to cover all of the damages incurred by the parties. And, Amy simply failed to prove that any portion of the settlement proceeds were specifically allocated to her purely personal losses. In particular, Amy did not present any evidence which showed that 54 percent of the settlement proceeds were her nonmarital property. Thus, it is not clear how the district court determined that the proceeds should be broken down such that Amy received 54 percent of the proceeds as her nonmarital property; Brian received 12.5 percent of the proceeds as his nonmarital property; and the remaining 33.5 percent of the proceeds stayed in the marital estate. Without specific proof about how the settlement proceeds should be broken down, the presumption remains that all of the proceeds from the

personal injury settlement are marital property. The district court erred in arbitrarily setting aside any portion of the settlement proceeds as nonmarital property. The entirety of the proceeds should be included in the marital estate.

(b) Airboat

At trial, Amy presented evidence that a few days after the parties separated in April 2013, Brian purchased an airboat valued at approximately $15,000. Brian paid approximately half of the purchase price of the airboat, $7,750, with a check dated April 9, 2013, which was drawn from his personal checking account. It is not clear whether or how Brian paid the remaining purchase price. Amy testified that she did not know whether Brian had taken out a loan to purchase the airboat. Amy believed this airboat should be considered marital property. Brian, on the other hand, believed the airboat was his nonmarital property. He testified that while he ordered the airboat prior to the parties' separation, he did not pay for any portion of it until a few days after the date of the parties' separation. In addition, he testified that in order to pay for the airboat, he sold some stock he acquired prior to the parties' marriage.

In the decree of dissolution, the district court included the airboat in the marital estate and awarded it to Brian. On appeal, Brian asserts that the district court erred in including the airboat in the marital estate. Specifically, he argues that his testimony that he used the proceeds from the sale of stock purchased prior to the marriage proves definitively that the airboat is his nonmarital property. Upon our review, we affirm the decision of the district court to include the airboat in the marital estate.

The parties presented conflicting evidence about the purchase of the airboat. Amy presented evidence to prove that Brian used money from his personal checking account to pay for it. This account was one of the primary accounts used by the parties during the marriage, and thus, a few days after

the parties' separation, the account arguably still contained primarily marital funds. In addition, there was evidence that Brian actually ordered the airboat during the parties' marriage. Brian disputed Amy's version of how he purchased the airboat. He testified that he used nonmarital funds to buy the airboat. However, he did not provide any specific documentation to support his testimony.

[9] As we have long stated, when evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See, e.g., *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). Given the conflicting testimony about the purchase of the airboat, and given our deference to the trial court, we cannot say that the district court abused its discretion in including the airboat in the marital estate.

(c) Property Division

On appeal, Brian also contests the district court's division of the marital estate. He asserts that the court should have awarded both he and Amy 50 percent of their acquired assets and debts. We do not address Brian's assertions with regard to the court's division of the marital estate. Instead, we remand the matter to the district court to recalculate and redivide the marital estate given our conclusion that all of the proceeds from the personal injury settlement should be included in the marital estate.

2. Child Support

At trial, the parties' presented conflicting evidence about Brian's current income. Brian testified that he earns $2,500 per month as a property manager for his family's business, Marshall Enterprises. In addition, from his employment with Marshall Enterprises, he receives the use of a company truck, vehicle maintenance for the truck, vehicle insurance, the use of a cellular telephone, and health insurance. Brian's mother,

who is his employer, confirmed Brian's testimony about his monthly salary. Brian also testified that he receives additional snow removal income during the winter months. He estimated that he earns between $10,000 and $12,500 per year for snow removal. In addition, during the discovery process, Brian indicated that his monthly income totaled $3,600 per month. Brian did not specifically contradict this amount at trial.

Amy testified that she believed that Brian earned more than $3,600 per month. To support her assertion, she offered into evidence records from Brian's personal checking account from January through August 2014. These records reveal that during each of the first 8 months of 2014, Brian deposited an average of $7,441 per month into his bank account. Amy indicated that she believed that the court should add $7,400 to Brian's stated earnings of $3,600 to determine his actual monthly income. Essentially, Amy believed that Brian's monthly income totaled at least $11,000 per month. In response to Amy's opinion about his monthly income, Brian testified that he borrowed a great deal of money from his parents during the months of January through August 2014. In addition, he offered a variety of other reasons that the amount of his monthly deposits exceeded $3,600 per month, including that he deposited the rent check from the parties' rental property into the account and then paid the mortgage on that property from the account, that his mother had given him money to put toward the cost of the parties' daughter's activities, and that the bulk of his snow removal income was earned during the first part of 2014.

In the decree of dissolution, the court noted the conflict between the parties' testimony about Brian's monthly income. The court then found:

> Based upon the evidence and the conflicting nature of same . . . the Court has determined to split the difference between the suggested monthly gross incomes for Brian ($11,041.25 − $3600.00 = $7441.00 / 2 = $3720.00. $11,041.00 − $3720.00 = $7321.00) and adjust

> that difference downward slightly and Brian's monthly child support shall be recalculated using gross monthly income of $7000.00 . . . .

The court then ordered Brian to pay $935 per month in child support.

On appeal, Brian challenges the district court's calculation of his monthly income and, thus, challenges the amount of monthly child support the court awarded to Amy. Specifically, Brian alleges that the evidence presented at trial does not support the court's determination that his monthly income is $7,000 per month.

Upon our review of the record, we find that Amy's opinion about Brian's monthly income is not reasonable and is not supported by the evidence. Because her opinion about his income is not reasonable, it was not reasonable for the district court to "split the difference" between Amy's and Brian's estimation of income. Amy testified that she believed that the court should calculate Brian's income by adding his estimated monthly salary of $3,600 to his average checking account deposits for the 8 months prior to trial. However, it appears that Amy's proposed calculation of income overstates Brian's income by at least $3,600. Both Brian and Amy testified that Brian's checking account was his primary bank account. Brian testified that he deposits his salary into this account. Amy did not present any evidence to suggest that Brian did not, in fact, deposit his salary into that account. As a result, it appears that if we were to add $3,600 to Brian's monthly checking account deposits, we would be counting this amount twice. Because Amy's proposed calculation of Brian's income substantially overstates his income, we find that the court erred in relying on the calculation in its determination of Brian's actual monthly income. There is simply no evidence in the record to support Amy's assertion that Brian earns more than $11,000 per month.

Given that the court relied, in part, on Amy's erroneous calculation of Brian's monthly income to "split the difference"

and did not otherwise rely upon evidence establishing Brian's various sources of income, we find ourselves in a similar position to the court in *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994). In that case, our Supreme Court noted that it was "difficult to determine just what the trial court found with reference to the [husband's] income, but by combining the findings made and the evidence" from an earlier affidavit, along with the record from the divorce hearing, and the trial court's award, it concluded that child support "can be divined." *Id*. at 105, 511 N.W.2d at 105. The court then considered the husband's wages and in-kind benefits and modified the husband's child support from $400 per month to $427 per month. *Baratta, supra*. Like the *Baratta* court, we will consider various sources of income, as well as in-kind benefits, to determine Brian's monthly income for child support purposes.

Brian testified that he received $2,500 per month from Marshall Enterprises and that he also earned snow removal income. Brian's 2013 Schedule C shows $13,805, or $1,150 per month, as a net profit for "Brian Marshall Remodeling" (snow removal). The district court also pointed out that Brian's 2013 Schedule E showed $22,000 in "passive income"; however, our review of that schedule shows a nonpassive income of $22,000 and a passive loss of $10,966, leaving a total reported nonpassive income of $11,034 for Marshall Enterprises. However, after factoring in real estate rental losses of $1,534, Brian reported $9,500 in total Schedule E income. That is another $792 per month. If we add together Brian's salary ($2,500 per month), snow removal net income ($1,150 per month), and Schedule E income ($792 per month), we arrive at a total of $4,442 per month for Brian before consideration of in-kind benefits he derives from his family business. We consider that next.

[10] In *Baratta, supra*, our Supreme Court imputed an additional $400 to the husband's monthly income because of the rent-free apartment previously occupied by the parties

courtesy of the husband's parents. Another $50 per month was imputed as income for food he received from his parents. It is well established that the provision of in-kind benefits, from an employer or other third party, may be included in a party's income for child support purposes. *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001). See, also, *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998) (military housing benefit and subsistence allowance included as income).

In the present case, the district court found that Brian had been living rent free in one of his parent's rental properties since February 2013 (which we note was just shy of 2 years by the time the decree was entered in December 2014). The court found that the monthly rental was $1,000, but that Brian had not paid any rent to his parents. As in *Baratta, supra*, we conclude this amounts to an in-kind benefit that may be included in Brian's income for child support purposes. Adding this amount to the $4,442 in other income increases Brian's monthly income to $5,442. However, Brian's in-kind benefits went beyond free housing.

At trial, both Brian and his mother testified that Marshall Enterprises pays for his cellular telephone. And, while neither Brian nor his mother attributed a specific dollar amount to this benefit, the affidavit of financial condition submitted by Brian indicates that his monthly cellular telephone bill is $271.20. In addition, evidence presented at trial revealed that Brian's health insurance costs are also paid for. According to Brian's 2013 tax return, these costs total $1,817 per year, or about $151 per month. And, although there was conflicting evidence about whether these costs are paid for by Marshall Enterprises as an in-kind benefit for his employment or whether they are given to Brian as a gift from his parents, we find that there is sufficient evidence to warrant the inclusion of Brian's health insurance costs in the calculation of his income. Adding the amounts that Brian receives for his monthly cellular telephone bill and his health insurance costs

to the $5,442 in other income increases Brian's monthly income to $5,864.20.

We note that there is also some indication in the record that Brian has received a truck and the insurance and maintenance for that truck as an in-kind benefit for his employment with Marshall Enterprises. Again, though, there is no evidence of a specific dollar amount for this benefit. In fact, there is evidence that this benefit has no real personal value for Brian, because he testified that the truck is owned by Marshall Enterprises and that he only uses the truck for his work with Marshall Enterprises. Brian testified that he owns another truck, which is for his personal use. Brian's personal truck was apparently paid off shortly before the trial, as was Amy's personal vehicle. Despite the evidence that Brian does not own, nor did he pay for, the company truck and that both he and Amy's personal vehicles have been paid for in full, Brian lists a car payment of $993.13 on his list of monthly expenditures. It is not at all clear which vehicles this payment encompasses, but given Brian's testimony about the company truck, we do not find that we can infer that the car payment of $993.13 reported on Brian's monthly expenditures is in any way associated with his use of the company truck. And, given that there is no other evidence about any value that Brian receives from the use of the company truck, we do not include in our income calculations any amount for this in-kind benefit.

Based upon our review of all of the evidence concerning the sources of Brian's income, including his salary from Marshall Enterprises, his snow removal income, and the in-kind benefits he receives from his employment, we conclude that Brian's monthly income totals $5,864.20, and we round this amount to $6,000. Our calculation of Brian's monthly income is $1,000 less than the district court's calculation of $7,000, which we previously found to be not supported by the evidence. Given this significant alteration to Brian's monthly income, we remand the matter to the district court for a new

calculation of Brian's child support obligation, using $6,000 as his monthly income.

3. Admission of Exhibit 81

At trial, Amy offered into evidence exhibit 81, which contained various documents related to the parties' settlement agreement with Merck. These documents included the affidavit of Amy concerning her use of Vioxx and her stroke; affidavits from two doctors concerning Amy's use of Vioxx; letters from Brian and Amy's lawyer concerning Amy's medical bills, lost wages, and a doctor's opinion about the cause of Amy's stroke; a letter from Amy's rehabilitation physician about her disabilities; a copy of the "Release of All Claims" signed by Brian and Amy; and copies of the settlement checks issued to Brian and Amy from Merck. Brian objected on foundational and hearsay grounds to all of the documents in exhibit 81 except the copy of the "Release of All Claims" and the copies of the settlement checks. The district court overruled Brian's objections and received into evidence exhibit 81 in its entirety.

On appeal, Brian challenges the district court's decision to admit into evidence exhibit 81. Specifically, he alleges that exhibit 81 contains hearsay which purports to reveal the cause of Amy's stroke, Amy's disabilities as a result of the stroke, and the amount of Amy's monetary damages, and that such hearsay is inadmissible. We find Brian's assertions regarding the admissibility of exhibit 81 to be without merit.

[11] Assuming without deciding that exhibit 81 contains inadmissible hearsay with regard to the cause of Amy's stroke, Amy's disabilities as a result of the stroke, and Amy's monetary damages, this evidence is cumulative to other, unobjected to evidence presented at trial and, as a result, amounts to harmless error. Erroneous admission of evidence is 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. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

At trial, Amy repeatedly testified that her doctors had attributed her stroke to her daily use of Vioxx for the previous 4 years. Amy also testified extensively concerning her physical disabilities after her stroke, including her limited use of her left hand and left leg and various activities and chores she could not engage in because of these limitations. In addition, Amy's mother testified about Amy's physical limitations after the stroke. This evidence essentially mirrors the information presented in exhibit 81 about the cause of Amy's stroke and about her resulting disabilities. Brian did not object to any of this testimony at trial. However, on appeal, he does assert that Amy's testimony about the cause of her stroke lacked foundation and should have been excluded. Brian has not properly preserved his objection to Amy's testimony for appeal. See *Furstenfeld v. Pepin*, 23 Neb. App. 155, 869 N.W.2d 353 (2015). As has long been the case, appellate courts do not generally consider arguments and theories raised for the first time on appeal. *Id*.

During Brian's cross-examination of Amy, his counsel asked her about the amount of medical expenses and lost wages she incurred as a result of her stroke. Counsel relied on the information contained in exhibit 81 to ask Amy these questions, and Amy independently confirmed that information. Accordingly, the information contained in exhibit 81 about Amy's monetary damages is cumulative to Amy's own testimony about these figures, which testimony was prompted by Brian's questions of her. Accordingly, Brian's assertion regarding the admissibility of this information and of exhibit 81 as a whole is without merit.

4. Alimony

In the decree, the district court ordered Brian to pay Amy alimony in the amount of $2,000 per month for a period of 21 years. On appeal, Brian argues that the alimony award is an abuse of discretion. Given our conclusion that it is necessary to remand the matter to the district court to recalculate

and divide the marital estate and to recalculate Brian's current income, we also reverse the district court's decision concerning alimony.

[12,13] In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), the income and earning capacity of each party as well as the general equities of each situation. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). Section 42-365 includes the following criteria:

> [T]he circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Disparity in income or potential income may partially justify an award of alimony. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

Clearly, an award of alimony is intricately tied to the incomes and other relevant financial circumstances of each party. See § 42-365. See, also, *Marcovitz, supra*. In our analysis above, we determined that the district court erred in calculating both the marital estate and Brian's income and we remanded the matter with directions to redistribute the marital estate and to recalculate Brian's child support obligation. When the district court performs these recalculations, the court's determination concerning an appropriate award of alimony will necessarily be affected.

Thus, we also reverse the district court's award of alimony. In reversing this award, however, we specifically do not find that the district court abused its discretion in entering the award. Rather, we simply direct the district court to reconsider the issue of alimony in light of the changed circumstances

resulting from the recalculation of both the marital estate and Brian's current income.

VI. CONCLUSION

Upon our de novo review of the record, we find that the district court erred in failing to include all of the proceeds from the personal injury settlement in the marital estate and in calculating Brian's current income. As a result of these errors, we remand the matter to the district court to recalculate the value of the parties' marital estate, redistribute the assets and debts between the parties, and recalculate Brian's child support obligation. In addition, we reverse the district court's determination concerning Amy's alimony award, because the court should reconsider this award in light of any changes to the marital estate and to Brian's child support obligation. We affirm the remainder of the district court's decision.

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

Bishop, Judge, concurring in part, and in part dissenting.

I dissent from that part of the majority's opinion which reverses the district court's classification of the personal injury settlement proceeds into nonmarital and marital portions. I also dissent from the majority's reversal of the alimony award.

Regarding the settlement proceeds, the majority concludes that "Amy failed to sufficiently demonstrate that any portion of the settlement proceeds were nonmarital property" and that "[a]ll of the settlement proceeds should be considered marital property." The majority determines that the settlement proceeds ($330,621.40) were apportioned 54 percent to Amy as nonmarital and 12.5 percent to Brian as nonmarital, with the remaining 33.5 percent attributed to the marital estate. The majority then states, "Without specific proof about how the settlement proceeds should be broken down, the presumption remains that all of the proceeds from the personal injury settlement are marital property" and that the "district court

erred in arbitrarily setting aside any portion of the settlement proceeds as nonmarital property."

The majority reverses this portion of the district court's decision and remands the matter for a recalculation of the value of the marital estate and a redivision of the marital estate given its conclusion that all of the proceeds from the personal injury settlement should be included in the marital estate. I conclude that the record supports the district court's treatment of the settlement proceeds, and given our abuse of discretion standard of review, I would affirm the district court's decision on this issue.

The majority acknowledges that our Supreme Court has held that "[c]ompensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate," but that "compensation for past wages [and] medical expenses . . . should equitably be included in the marital estate as they properly replace losses of property created by the marital partnership." *Parde v. Parde*, 258 Neb. 101, 110, 602 N.W.2d 657, 663 (1999). The majority concludes, however, that "[w]ithout specific proof about how the settlement proceeds should be broken down, the presumption remains that all of the proceeds from the personal injury settlement are marital property."

It is not clear what kind of "specific proof" the majority contemplates in a situation such as this, where a personal injury settlement agreement is silent as to how the settlement amount was calculated. When the settlement agreement is silent in this regard, but there obviously has been both (1) a personal loss, such as pain, suffering, disfigurement, disability, and loss of postdivorce earning capacity (deemed nonmarital), and (2) a marital economic loss, such as wages lost during the marriage and medical expenses (deemed marital), the apportionment of nonmarital and marital amounts must be left to the discretion of the trial court based upon the evidence presented. And while determining wages lost as a result of the

injury both during the marriage and postdivorce, along with determining out-of-pocket medical expenses, are amenable to mathematical calculation, there is no formula for calculating a monetary value for the losses personal to the injured party. There is, however, in the present case, evidence of how Amy's injury has permanently impacted her in many personal ways. And while we can approximate her potential future lost wages (discussed later), there is no way to provide "specific proof" as to how her personal losses (pain, suffering, disfigurement, and disability) equate with a monetary value when the settlement agreement is silent on the matter. But that should not mean we must ignore these personal losses completely; to do so is inherently unjust.

In fact, the *Parde* court reminds us:

> In equity, there is rarely one tidy answer that fits every size and type of problem that courts are called upon to resolve. It is precisely for this reason that a principled *approach* to this issue should be consistent with the basic policy rule that the marital estate should include only property created by the marital partnership.

258 Neb. at 108, 602 N.W.2d at 662. The *Parde* court went on to say, "Compensation for purely personal losses is not in any sense a product of marital efforts." 258 Neb. at 109, 602 N.W.2d at 663. By requiring the district court to treat the settlement proceeds entirely as marital, the majority ignores the significant personal losses suffered by Amy alone, despite her testimony and the testimony of others regarding the same. Contrary to *Parde*, the majority compels the inclusion of Amy's "personal losses" into the marital estate which are "not in any sense a product of marital efforts." 258 Neb. at 109, 602 N.W.2d at 663.

When discussing the division of settlement proceeds in its 34-page decree, the district court quoted from *Parde, supra*. That quote bears repeating here:

> "'Nothing is more personal than the entirely subjective sensations of agonizing pain, mental anguish,

> embarrassment because of scarring or disfigurement, and outrage attending severe bodily injury. Mental injury, as well, has many of these characteristics. Equally personal are the effects of even mild or moderately severe injury. None of these, including the frustrations of diminution or loss of normal body functions or movements, can be sensed, or need they be borne, by anyone but the injured spouse. Why, then, should the law, seeking to be equitable, coin these factors into money to even partially benefit the uninjured and estranged spouse? . . . The only damages truly shared are those discussed earlier, the diminution of the marital estate by loss of past wages or expenditure of money for medical expenses. Any other apportionment is unfair distribution.'"

Parde v. Parde, 258 Neb. 101, 109, 602 N.W.2d 657, 662-63 (1999) (quoting Brett R. Turner, Equitable Distribution of Property § 6.18 (2d ed. 1994)). It is true that *Parde* also states that "in those cases where the party making the claim of nonmarital property fails to prove that all or portions of an injury compensation are for purely personal losses or loss of future earning capacity, the presumption remains that the proceeds . . . are marital property." 258 Neb. at 110, 602 N.W.2d at 663. However, Amy did not fail to prove that some portion of the compensation for her injury represented purely personal losses or loss of future earning capacity. As noted by the district court, the "settlement does not come close to compensating Amy for her future pain, suffering, disfigurement, disability." After setting forth the language from *Parde, supra*, block-quoted above, the district court stated:

> As was the case in *Parde*, the release that Amy and Brian signed was silent on allocation of payment for Amy's pain, suffering, disfigurement, disability or loss of post-divorce earning capacity or for past wages, medical expenses and other items that compensate for the period in issue of the marital estate. Notwithstanding, the Court, as the trier of fact and judge of the credibility of

> the witnesses, had an opportunity, over two days of trial, to not only see and hear Amy testify but could see how profoundly and permanently she has been affected and disabled by the massive stroke she sustained at such an early age, after having worked in her salon the entire day and then went home and prepared a birthday dinner for Brian, who is now seeking to receive credit for half of the personal injury settlement of $330,621.14. The Court did not need the settlement documents, Ex. 81 (sealed), to see and appreciate the serious nature of Amy's permanent injuries.

Additionally, the district court specifically set forth, in part, the following factual determinations in its decree: Amy began having lower back problems in 1997 and her father-in-law (an oral surgeon) recommended she see a neurosurgeon who had an office across from her father-in-law's office; samples of Vioxx were given to Amy through her father-in-law for years; on April 30, 2003, Amy suffered a massive stroke as a result of an occluded carotid artery; an expert determined Amy's use of Vioxx proximately contributed to her stroke; Amy and Brian made a claim against the pharmaceutical company (Merck); despite rehabilitation efforts, Amy remains with significant left-sided paralysis and has no significant functional use of her left upper extremity; the stroke eliminated the functional use of her left hand, so Amy was unable to sustain reasonable work as a hairstylist and had to give up her career and sell her salon; feeding is difficult because she is unable to cut meat or prepare foods that require two hands; dressing must be performed with one hand, so Amy must select clothes without buttons or zippers; toileting and bathing tasks must be performed with one hand and with adaptive equipment; she is unable to completely groom herself; she has "residuals of a neurogenic bladder" so she has urinary urgency and must get to a bathroom more frequently; ambulation is clumsy and adaptive—she "swings her left lower extremity forward in a circumferential pattern

and has difficulty maintaining static stance on just her left lower extremity"; she falls monthly and has musculoskeletal bruises, sprains, and strains as a result of her falls; she requires antiplatelet medication and other prescription medications; she can drive but only by using her right hand as she has no use of her left wrist and hand and has limited range of motion with her left arm; she cannot straighten her left arm; she used her mouth to close a zipper on her purse at trial; her left leg has a brace on it; and "[h]er daughter helps her with everything."

Given these factual determinations made by the district court, as supported by the record, there was no failure of proof on Amy's part in establishing how the injury has impacted her personally and no question that a substantial portion of the settlement should be allocated for her separate, nonmarital benefit. Awarding Amy slightly over one-half the proceeds for her nonmarital personal losses is further supported by consideration of her marital and postdivorce lost wages, as discussed next.

Amy's preinjury annual wages were approximately $43,580, and she was 34 years old at the time of her stroke in April 2003. The majority states:

> [I]t is clear that the marital estate was greatly diminished as a result of Amy's lost wages. In fact, Amy's lost wages from the time of her stroke in 2003 through the time of the parties' separation 10 years later in 2013 totaled more than $100,000 over the entirety of the settlement proceeds.

And although the majority acknowledges that Amy's stroke "left her with serious physical impairments," it concludes that "her stroke resulted in a great reduction in the value of the marital estate" and that the proceeds "were simply not enough to cover all of the damages incurred by the parties." While this may be true, it is also true that the proceeds were insufficient to cover the totality of Amy's losses, including her future lost wages.

Amy's future lost wages is well demonstrated by a demand letter dated September 1, 2009 (contained in exhibit 81), which reflects future lost wages of "$1,133,080.00 (26 years × $43,580.00)." In September 2009, Amy would have been 40 years old, and but for the injury, it would have been reasonable to anticipate she could have worked for another 26 years (until 2035). The total number of years from the time of injury (April 2003) until 2035 equals 32 working years affected by Amy's injury. These 32 working years of a reduced earning capacity not only "greatly diminished" the marital estate, as noted by the majority, but also diminished on a larger scale Amy's postdivorce future earnings. Since Amy filed for divorce in February 2013, about 10 years after the injury, of her 32 working years of diminished wages, the marital portion accounts for only one-third of that time (10 years), whereas, the postdivorce, nonmarital portion accounts for the other two-thirds (22 years). So even if we set aside the obvious personal losses to Amy previously discussed, her postdivorce wage-earning losses alone support the district court's apportionment of 54 percent of the settlement proceeds to Amy as her nonmarital share.

Finally, out-of-pocket medical expenses incurred during the marriage as a result of Amy's stroke could have been classified as marital property factored into the settlement proceeds. I agree with the majority that "there was no evidence presented to indicate whether or how much the marital estate was diminished for these medical bills or whether the parties' health insurance covered these bills." Accordingly, since out-of-pocket medical expenses incurred during the marriage were not raised by either party, the trial court was left with the task of apportioning the settlement proceeds between Amy's personal losses (such as pain, suffering, disfigurement, disability, and loss of postdivorce earning capacity) (deemed nonmarital) and wages lost during the marriage (deemed marital). Finding no abuse of discretion by the district court in these determinations, I would affirm all aspects of the district court's

decision pertaining to the classification, valuation, and division of property.

I also dissent with regard to the majority's reversal of the alimony award. The majority reversed the alimony award because of its remand of the matter for a recalculation of the marital estate, along with a recalculation of Brian's income for child support purposes. The majority states, "When the district court performs these recalculations, the court's determination concerning an appropriate award of alimony will necessarily be affected." Since I would affirm the district court's property award, this is not a factor that would influence the court's alimony decision. And although I agree that Brian's income was not properly calculated and his child support obligation should be remanded for recalculation, I do not agree that any adjustment made to his income must necessarily impact the court's determination of alimony.

The district court determined that Brian's monthly income was $7,000; the majority determined, and I agree, that the record supported an income attributable to Brian of approximately $6,000. While this $1,000 per month difference in income supports a recalculation of Brian's child support obligation, I do not agree that it must necessarily require a change to the $2,000 per month in alimony awarded to Amy. With an income of $6,000 per month, along with a reduced child support award on remand, an alimony award of $2,000 per month based upon the circumstances of this case is not an abuse of discretion. This is particularly so since the $935 per month child support obligation only became effective as of January 1, 2015, and would have terminated 8 months later when the minor child reached her age of majority in August 2015.

In all remaining aspects of the majority's opinion, I concur.

State of Nebraska, appellee, v. Joseph N. Rolenc, appellant.

885 N.W.2d 568

Filed August 23, 2016. No. A-15-564.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect citizens against unreasonable seizures by police officers.
4. **Constitutional Law: Search and Seizure.** It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions.
5. ____: ____. Although the Fourth Amendment protects the right to be free from unreasonable searches and seizures, it says nothing about how this right is to be enforced.
6. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The exclusionary rule is a judicially created remedy designed to safeguard against future Fourth Amendment violations by deterring police misconduct.

7. **Constitutional Law: Search and Seizure: Evidence.** The fact that a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies.
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 Lancaster County: Robert R. Otte, Judge. Affirmed.

Joseph Nigro, Lancaster County Public Defender, and Kristi Egger-Brown for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Inbody, Judge.

I. INTRODUCTION

Joseph N. Rolenc appeals his conviction for possession of methamphetamine, a Class IV felony, and the sentence imposed thereon. He contends that the district court erred in overruling his motion to suppress and in later failing to dismiss the matter at trial. He also contends that the sentence imposed upon him was excessive.

II. STATEMENT OF FACTS

At approximately 3 a.m. on March 6, 2014, Lincoln patrol officer Daniel Dufek was driving his patrol car when he passed Rolenc's vehicle. At that time of day there was not a lot of traffic on the road, so Dufek decided to maneuver his

patrol car into position so he could check the rear license plate of Rolenc's vehicle. Dufek ran the license plate number through the Lincoln Police Department's computer system and found that Rolenc was the registered owner of the vehicle. Dufek then checked Rolenc's driver's license status in the Nebraska Criminal Justice Information System (NCJIS) and found that Rolenc's driver's license was revoked. NCJIS is a compilation of information from various places including the Department of Motor Vehicles (DMV) and various courts throughout the state.

After Rolenc pulled his vehicle into a gas station where two other officers also happened to be sitting in their patrol cars, Dufek pulled into the gas station parking lot, advised the other officers of the situation, and the three officers contacted Rolenc. Dufek advised Rolenc that he was contacting him because Rolenc's license was revoked. Dufek requested Rolenc's license, registration, and insurance, but Rolenc could not provide any of those items. Rolenc advised Dufek that he believed that his license was valid and said there was a DMV error. Dufek then confirmed over the radio with a dispatcher on the police "information channel," where an individual dispatcher has access to DMV, National Crime Information Center, and NCJIS files, that Rolenc's license was revoked. Dufek explained that the information he had was showing a revoked status. Rolenc became agitated and was eventually taken into custody. Because Rolenc's vehicle was going to be towed, an inventory search was conducted of the vehicle. During the search, officers located a glass pipe with "crystal residue" in it which tested positive for methamphetamine.

In July 2014, Rolenc was charged with possession of methamphetamine, a Class IV felony. See Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2014). He filed motions to suppress regarding his arrest, the search of his vehicle, and any statements made by him to law enforcement. The hearing on the motions to suppress was held on February 19, 2015. Among

the witnesses testifying were Dufek; Lisa Wolfe, an administrative assistant with the DMV; and William Harry, Rolenc's defense counsel in another case.

Dufek testified as to the events as previously set forth. He also admitted that he did not observe Rolenc commit any traffic violations and that the only reason he stopped Rolenc was because of the information Dufek had received about the license revocation.

Wolfe testified that she is responsible for entering the court-ordered revocations of driving privileges. The forfeiture of a bond triggers a conviction for the purposes of a "point revocation." According to Wolfe, the court sends an electronic transmission to the DMV containing the conviction information, citation date, judgment date, what the citation was for, amount of the fine, code information, general court information, and bond forfeiture information. If the identifying information included in the court's electronic transmission matches the DMV's identifying information, the conviction will automatically be placed on the individual's driving record. The computer calculates whether the driver was assessed 12 or more points in a 2-year time period, and if so, the revocation process is commenced. If the identifying information provided by the court does not match the DMV's records, an abstract of conviction prints out and DMV employees manually post the conviction to the individual's driving record.

According to Wolfe, if an individual's bond is reinstated at some point after a bond forfeiture, the court sends the updated information to the DMV to remove the conviction from the driver's record, and then the driver gets the points back on his or her license; or if the bond is withdrawn, like in Rolenc's case, the court tells the DMV to withdraw the bond forfeiture, and then the DMV removes the conviction from the driver's record. In order to remove the conviction from a driver's record, the court employee has "specific directions given from their help desk that they have to send screen prints" and

indicate what the next step is, then the document needs to have the court seal and needs to be signed and dated. Wolfe is one of three people at the DMV that have the capability to delete a conviction from a driver's record.

In early 2014, Wolfe was involved in some communication with the Douglas County Court involving Rolenc's driving record and a bond forfeiture. Rolenc's bond was revoked on November 21, 2013, but judgment was not transmitted until February 21, 2014. On February 25, Rolenc's license was revoked for points and a letter was mailed notifying Rolenc of the revocation. This letter notified Rolenc that his license was revoked for 6 months beginning February 25 until August 25. The letter further stated, "Your Nebraska operating privileges will remain in a revoked status until you meet the requirements for reinstatement and *you receive a letter of reinstatement from this office*." (Emphasis supplied.)

On February 28, 2014, at 10:19 a.m., the Douglas County Court faxed a journal entry regarding the withdrawal of Rolenc's bond forfeiture to the DMV. The county court faxed the information to the DMV a second time on March 4 at 4:03 p.m. Wolfe testified that bond forfeitures have to be entered manually, that the DMV needs specific information in the proper form in order to process the bond forfeitures, and that neither of the faxes from the county court contained the information needed by the DMV to process the withdrawal of Rolenc's bond forfeiture. On March 5 at 1:54 p.m., Wolfe sent an e-mail to the Douglas County Court along with directions regarding what the DMV needed to have on the abstracts in order to withdraw bond forfeitures. About half an hour later, Wolfe received a fax from the Douglas County Court which again did not provide Wolfe with the needed information. The following day, March 6, at 1:47 p.m., Wolfe sent a second e-mail to the Douglas County Court instructing that documents need to be signed, dated, and marked with the court seal before the documents are faxed to the DMV. At 3:19 p.m., she then received another fax from the Douglas County

Court which removed Rolenc's conviction and restored the points on Rolenc's record. Wolfe then removed the point revocation from Rolenc's driving record and, on March 6, generated a notice of rescission letter which notified Rolenc that his operator's license was valid.

Wolfe admitted on cross-examination that it was important that DMV records be updated quickly so that if a person's license is wrongly suspended or revoked, the error can be corrected, but she stated that the DMV has to receive the correct information in order to make the correction. In Rolenc's case, his license was never suspended incorrectly; the revocation was based on conviction information provided by the court, there was a bond forfeiture, and the points revocation was a valid revocation. She further testified that there was no error by any DMV employee in entering any sort of information regarding Rolenc's revocation.

Harry represented Rolenc in the Douglas County Court. On March 5, 2014, Harry spoke to a Douglas County Court employee attempting to get Rolenc's driving privileges reinstated. Harry was informed that the matter was taken care of, and Harry relayed this information to Rolenc.

The district court overruled Rolenc's motions to suppress and articulated its findings from the bench. The court found there was evidence the DMV mailed Rolenc a letter of revocation under the Nebraska point system advising Rolenc that his operating privileges would remain revoked until he met the requirements of reinstatement and that Rolenc would receive a letter of reinstatement. The court further found that because Rolenc had not received a letter of reinstatement, he knew he did not have a valid operator's license.

Although the district court found that there was fault with the DMV in that the DMV "could have acted a little faster," that fault was not fatal. The court further stated that Dufek relied on information provided to him which was valid at that time, Dufek's reliance upon that information was objectively reasonable, and the application of the exclusionary rule

under the circumstances presented would not have a deterrent effect.

Finally, the court found that although he appreciated that Rolenc's attorney had talked to Rolenc and told him things were "all taken care of," Rolenc could not rely upon these representations, because the letter of revocation stated that Rolenc had to receive a letter of reinstatement of his driver's license which Rolenc had not received. Thus, the court found that Rolenc's arrest was valid, as was the inventory search of his vehicle.

A stipulated trial was held on March 18, 2015, with Rolenc preserving the issues raised in his motions to suppress. The court found Rolenc guilty of the charged offense and thereafter sentenced Rolenc to 12 to 24 months' imprisonment.

III. ASSIGNMENTS OF ERROR

Rolenc contends that the district court erred in overruling his motion to suppress evidence and in later failing to dismiss the matter at trial. He also contends that the sentence imposed was excessive.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015).

[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. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

V. ANALYSIS

1. Denial of Motion to Suppress

Rolenc contends that the district court erred in overruling his motion to suppress evidence and in later failing to dismiss the matter at trial.

(a) Relevant Law

[3,4] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect citizens against unreasonable seizures by police officers. It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). The U.S. Supreme Court has said:

> When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation. The very phrase "probable cause" confirms that the Fourth Amendment does not demand all possible precision. And whether the error can be traced to a mistake by a state actor or some other source may bear on the analysis. For purposes of deciding this case, however, we accept the parties' assumption that there was a Fourth Amendment violation. The issue is whether the exclusionary rule should be applied.

Herring v. United States, 555 U.S. 135, 139, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

Likewise, in the instant case, by centering their arguments on whether the exclusionary rule applies, both Rolenc and the State have proceeded under the assumption that there was a Fourth Amendment violation; thus, for the purposes of deciding this case, we accept this assumption and consider the issue of whether the exclusionary rule should be applied.

[5-7] Although the Fourth Amendment protects the right to be free from "'unreasonable searches and seizures,'" it says nothing about how this right is to be enforced. *Davis v. United States*, 564 U.S. 229, 231, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011). The exclusionary rule is a judicially created remedy designed to safeguard against future Fourth Amendment violations by deterring police misconduct. *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995); *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014). Thus, the fact that a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies. *Herring v. United States*, 555 U.S. at 137 ("suppression is not an automatic consequence of a Fourth Amendment violation"); *State v. Tyler*, 291 Neb. 920, 937, 870 N.W.2d 119, 132 (2015), *cert. denied* 577 U.S. 1159, 136 S. Ct. 1207, 194 L. Ed. 2d 212 (2016) ("[t]hat a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies"). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Davis v. United States*, 564 U.S. at 237.

In *Arizona v. Evans, supra*, the U.S. Supreme Court applied the good-faith exception to the exclusionary rule in a case where the police reasonably relied on erroneous information concerning an arrest warrant in a database maintained by court employees. The Court reasoned that court employees were not adjuncts to the law enforcement team, there was no evidence court employees were inclined to ignore or subvert the Fourth Amendment, and court employees had no stake in the outcome of particular criminal prosecutions; therefore, application of the exclusionary rule would have little effect on the conduct of court employees. *Arizona v. Evans, supra*.

Similarly, the Nebraska Supreme Court did not apply the exclusionary rule where an officer reasonably relied upon incorrect information from the vehicle registration information originating from a county treasurer's office because the court held that employees of the county treasurer's office fall

within the court employees exception to the exclusionary rule. *State v. Bromm*, 285 Neb. 193, 826 N.W.2d 270 (2013).

The outcome was different, however, when the erroneous information relied upon by an officer originated from employees of Nebraska's DMV. In *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006), this court held that DMV employees are adjuncts of law enforcement and that, where an arresting officer relied on erroneous information contained in the DMV records that the defendant's driver's license was impounded, the officer did not have probable cause to arrest the defendant and the good faith exception to the exclusionary rule did not apply to evidence seized as a result of an unconstitutional search. Similarly, the Nebraska Supreme Court has ruled that the good faith exception to the exclusionary rule did not apply where a dispatcher negligently entered the wrong license number into the computer, resulting in the dispatcher's providing incorrect information to an officer. *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

Four years after the Nebraska Supreme Court's decision in *State v. Allen, supra*, and 3 years after our decision in *State v. Hisey, supra*, the U.S. Supreme Court issued its decision in *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). In *Herring*, officers arrested the defendant based on a warrant listed in a neighboring county's database and a search of the defendant yielded drugs and a gun. It was later revealed that the warrant had been recalled 5 months earlier, but, due to a negligent bookkeeping error by another police employee, the information had never been entered into the database. The U.S. Supreme Court stated:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate,

> reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id., 555 U.S. at 144. The Court held that "isolated," "nonrecurring" negligence by police employees lacked the culpability required to justify the harsh sanction of exclusion. *Id.*, 555 U.S. at 137, 144. See *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011).

Two years later, in 2011, the U.S. Supreme Court in *Davis v. United States, supra*, held that when police conduct a search in objectively reasonable reliance on binding appellate precedent that is later overruled, the exclusionary rule does not apply. The Court explained that the deterrence benefits of exclusion varies with the culpability of the law enforcement conduct. *Id.* See *Herring v. United States, supra*. For example, "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis v. United States*, 564 U.S. at 238, quoting *Herring v. United States, supra*. However, "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, . . . or when their conduct involves only simple, 'isolated' negligence, . . . the '"deterrence rationale loses much of its force,"' and exclusion cannot 'pay its way.'" *Davis v. United States*, 564 U.S. at 238 (citations omitted). The Court stated that "in 27 years of practice under [the] good-faith exception, [the Court had] 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Id.*, 564 U.S. at 240.

In 2013, in *State v. Bromm*, 285 Neb. 193, 826 N.W.2d 270 (2013), the Nebraska Supreme Court acknowledged the U.S. Supreme Court's recent decisions in *Herring v. United States, supra*, and *Davis v. United States, supra*. Although the State, in *Bromm*, raised the issue of whether this court's decision in *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006), remained good law in light of the recent U.S. Supreme

Court precedent, the Nebraska Supreme Court decided the case without reaching that issue. Our holding in *Hisey* is certainly worthy of reexamination in light of the later U.S. Supreme Court decisions discussed above, and when interpreting the Fourth Amendment of the U.S. Constitution, we are bound by the final authority of the U.S. Supreme Court. See *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). Thus, in our application of the law to the instant case, we consider and apply the most recent pronouncements by the U.S. Supreme Court, as we are required to do.

(b) Application to Instant Case

In the instant case, the district court found fault with the DMV in that it could have acted "a little faster" in updating Rolenc's records. The district court also stated that the DMV

> could have picked up the paper, maybe could have acted a little faster, maybe could have done something . . . .
>
> . . . .
>
> . . . Should [the DMV] have picked up those papers and figured out something to do with them? Yes. Is it inexcusable? I probably wouldn't go that far. But it took them a while to get that organized.

Although the district court did not explicitly state that it considered the DMV's actions to be negligent, the court's comments implied negligence rather than reckless or deliberate action on the part of the DMV.

As early as 1995, in a concurrence to *Arizona v. Evans, supra*, Justice O'Connor, with whom Justice Souter and Justice Breyer joined, pointed out:

> Surely it would *not* be reasonable for the police to rely . . . on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).

Id., 514 U.S. at 17. Justice O'Connor further stated:

> In recent years, we have witnessed the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.

Id., 514 U.S. at 17-18. In a separate concurrence, Justice Souter, with whom Justice Breyer joined, acknowledged:

> [W]e do not answer another question that may reach us in due course, that is, how far, in dealing with fruits of computerized error, our very concept of deterrence by exclusion of evidence should extend to the government as a whole, not merely the police, on the ground that there would otherwise be no reasonable expectation of keeping the number of resulting false arrests within an acceptable minimum limit.

Id., 514 U.S. at 18.

And, in fact, in 2009, in *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009), the U.S. Supreme Court acknowledged that not all recordkeeping errors by the police are immune from the exclusionary rule. For example, "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation." *Herring v. United States*, 555 U.S. at 146. However, in the instant case, there was no evidence that the delay in updating Rolenc's DMV record had happened at any other time; no evidence that the delay was the result of deliberate, reckless, or grossly negligent conduct; and no evidence that it was the result of recurring or systemic negligence. Thus, in light of U.S. Supreme Court precedent that "the deterrent effect of suppression must be substantial and outweigh any harm to

the justice system," in cases such as the instant case where the mistakes made by the adjuncts of police are the "result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements," the marginal benefits that might be gained from suppressing the evidence obtained do not justify the substantial costs of exclusion. See *id.*, 555 U.S. at 147.

Further, application of the exclusionary rule could not be expected to alter the behavior of the police officer in the instant case.

> "'[W]here the officer's conduct is objectively reasonable, "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty."' . . ."

Arizona v. Evans, 514 U.S. 1, 11-12, 115 S. Ct. 1185, 121 L. Ed. 2d 34 (1995).

Thus, we find that because there was no evidence that the delay in updating Rolenc's DMV record was the result of deliberate, reckless, or grossly negligent conduct or was the result of recurring or systemic negligence and because the marginal benefits that might be gained from suppressing the evidence obtained do not justify the substantial costs of exclusion, we affirm the order of the district court denying Rolenc's motion to suppress.

2. Excessive Sentence

Rolenc's second assignment of error is that the sentence imposed upon him was excessive. Rolenc argues that he should have been either given a shorter term of imprisonment or sentenced to a term of probation.

[8,9] 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. *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015). 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*.

Rolenc was convicted of possession of methamphetamine, a Class IV felony. See § 28-416(3). Rolenc's sentence of 12 to 24 months' imprisonment is within the statutory sentencing range for Class IV felonies, which are punishable by up to 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014).

At the time of the preparation of the presentence investigation report, Rolenc was 40 years old, divorced, and with two dependents. Rolenc has a substantial adult criminal history including convictions for stealing money or goods, trespassing, negligent driving, resisting arrest, possession of marijuana (1 ounce or less), possession of drug paraphernalia, operating a vehicle without a license, driving under suspension, theft by receiving stolen property, flight to avoid arrest, hindering arrest, attempted theft by receiving stolen property, disturbing the peace, third degree assault on an officer, issuing a bad check, attempting to issue a bad check, child abuse, and burglary.

Based upon the facts, the sentence imposed is well within the statutory sentencing range, and considering Rolenc's substantial criminal history, we cannot say that the sentence imposed was excessive.

VI. CONCLUSION

In sum, having considered and rejected Rolenc's assignments of error, his conviction and sentence are affirmed.

Affirmed.

K & H Hideaway, LLC, appellee, v. Rodney M. Cheloha, appellant.

885 N.W.2d 760

Filed August 30, 2016. No. A-15-275.

1. **Easements: Adverse Possession: Equity: Jurisdiction: Appeal and Error.** A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court and, on appeal to this court, is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court will consider that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Easements: Adverse Possession: Proof.** A claim for prescriptive easement requires that all the elements of such adverse use be clearly, convincingly, and satisfactorily established.
3. **Easements: Words and Phrases.** An easement is an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.
4. **Easements.** A claimant may acquire an easement through prescription.
5. **Easements: Adverse Possession.** The use and enjoyment that will establish an easement through prescription are substantially the same in quality and characteristics as the adverse possession that will give title to real estate, but there are some differences between the two doctrines.
6. **Easements.** The law treats a claim of prescriptive right with disfavor. The reasons are obvious—to allow a person to acquire prescriptive rights over the lands of another is a harsh result for the burdened landowner. And further, a prescriptive easement essentially rewards a trespasser, and grants the trespasser the right to use another's land without compensation.
7. **Easements: Proof: Time.** A party claiming a prescriptive easement must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.

8. **Easements: Adverse Possession: Words and Phrases.** The word "exclusive" in reference to a prescriptive easement does not mean that there must be use only by one person, but, rather, means that the use cannot be dependent upon a similar right in others.
9. ____: ____: ____. A use is continuous and uninterrupted if it is established that the easement was used whenever there was any necessity to do so and with such frequency that the owner of the servient estate would have been apprised of the right being claimed.
10. **Easements: Presumptions: Proof: Time.** Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period, adverseness is presumed. At that point, the landowner must present evidence showing that the use was permissive.
11. **Easements: Presumptions.** When a claimant uses a neighbor's driveway or roadway without interfering with the owner's use or the driveway itself, the use is to be presumed permissive. Of course, this rule merely creates a presumption.
12. **Evidence: Appeal and Error.** When credible evidence is in conflict on material issues of fact, the appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
13. **Easements: Proof.** The party asserting a prescriptive right must also clearly establish the nature and scope of the easement.
14. **Easements.** The extent and nature of an easement are determined from the use made of the property during the prescriptive period.
15. ____. The law requires that the easement must be clearly definable and precisely measured.

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

David A. Domina, of Domina Law Group, P.C., L.L.O., and Mark M. Sipple, of Sipple, Hansen, Emerson, Schumacher & Klutman, for appellant.

George H. Moyer, of Moyer & Moyer, for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Pirtle, Judge.

INTRODUCTION

Rodney M. Cheloha appeals from an order of the district court for Platte County granting K & H Hideaway, LLC

(K&H), a prescriptive easement across Cheloha's property and enjoining Cheloha from interfering with K&H's use of the prescriptive easement. Based on the reasons that follow, we affirm.

BACKGROUND

In May 2013, K&H brought an action against Cheloha, Paul Donoghue, and Donoghue's wife, seeking the establishment of a prescriptive easement over a private road located on land owned by Cheloha. K&H also sought injunctive relief enjoining Cheloha from interfering with K&H's use of the easement. Trial was held on multiple days in 2014. A summary of the evidence is as follows:

In 2012, K&H acquired a 7-acre tract of land in Platte County, Nebraska. The triangular tract of land is bordered by the Loup River on the north. Cheloha owns property to the east and southeast of the 7-acre tract. Cheloha's parents owned the property prior to Cheloha. Donoghue owns property adjacent to and located south of the tract's southern boundary. There is a cabin located on K&H's property, and the property is primarily used for recreational purposes, although approximately 4 acres of the tract consists of a meadow that provides an annual hay crop.

K&H's property is landlocked and is not accessible by a public road. Until October 2012, the 7-acre tract was accessed by way of a private road extending north along the section line separating Cheloha's property on the east from the Donoghue property on the west. Although Donoghue and his deceased wife were originally named as defendants in this case, they were dismissed when it was determined that the disputed private road lies east of the section line and is located entirely on Cheloha's property.

Evidence was offered to show the historical ownership of the 7-acre tract. The property was owned by John Bredehoft as early as 1901 and was transferred to Theodore Bredehoft in 1945. It stayed in the Bredehoft family until 1986, when

it was conveyed to Robert Grimes. After his death in 2005, the property was inherited by Keith Grimes (Grimes). In February 2006, Grimes executed a warranty deed conveying the property to himself and his friend, Harlan Siefken, as joint tenants. Upon the death of Grimes in August 2009, Siefken, as surviving joint tenant, took ownership of the property. Siefken sold and conveyed title to the property to K&H by deed dated September 18, 2012.

As far back as the witnesses could remember—at least since 1956—the 7-acre tract was always accessed by way of the private road along the east side of the section line separating the Cheloha and Donoghue properties. The road was described as a fairly well maintained and graded gravel drive approximately 15 feet in width. The disputed road runs north, approximately 1,300 feet, to a drive that enters the K&H property. The disputed road extends further north beyond the K&H drive to a drive which extends on Cheloha's property.

The disputed road is well-defined and is bounded on the west by a boundary fence between the Cheloha and Donoghue properties. It is bounded on the east by rows of crops during the growing season, and an area with a Quonset and machine shed that has living quarters. As the disputed road extends north beyond the Quonset and machine shed, it is bounded on the east by a fence until it reaches the drive to the K&H property.

According to Donoghue, there had been a gate at the south end of the disputed road since 1956, preventing the general public from freely accessing it. Siefken testified that a gate with a padlock was there since at least 1977.

Until K&H acquired ownership of the 7-acre tract, its predecessors and the Cheloha family were on friendly terms. The Bredehofts and the Chelohas were friends, as well as the Donoghues. The Grimes family was also "neighborly" with the others. Grimes' father, although never an owner of the 7-acre tract, hunted and fished there often and was on friendly terms with everyone. Siefken also was on good terms

with the Chelohas. However, when K&H acquired ownership of the 7-acre tract, things changed. Cheloha became openly hostile to the members of K&H and Siefken, and he engaged in conduct making it difficult for them to access the 7-acre tract.

On October 4, 2012, Cheloha's attorney sent a letter to K&H's predecessor in title, Siefken, notifying him that access to the 7-acre tract would no longer be available by way of the road along the section line separating Cheloha's property from the Donoghue property, but, rather, access would be moved to an alternative route located on the east side of Cheloha's property. Cheloha testified that he did not want K&H using the disputed road because after it agreed to buy the property, the amount of traffic on the road significantly increased.

There was also evidence to indicate that Cheloha was upset when Siefken sold the property to K&H. Cheloha thought he would inherit the 7-acre tract from Grimes. There was evidence that Grimes made a will in which he left the property to Cheloha. However, when Grimes died, he and Siefken owned the property as joint tenants. Siefken gave Cheloha the opportunity to buy the property with K&H, but he declined. Cheloha also testified that in August 2012, he offered to buy the property from Siefken, but Siefken would not accept his offer.

Following trial, the court granted K&H "a private prescriptive easement along, over and upon the disputed road such as to enable it ingress and egress to its property, which prescriptive easement is identified and described in Ex. 30." The trial court also ordered that Cheloha was permanently enjoined from interfering with K&H's use of the prescriptive easement.

ASSIGNMENTS OF ERROR

Cheloha assigns that the trial court erred in (1) employing a confused, incorrect standard of proof; (2) granting K&H a prescriptive easement and enjoining Cheloha from denying K&H use of the contested roadway; (3) misapplying binding

precedent, including *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012), and deciding the case incorrectly as a result; and (4) granting an easement without delineated usage terms and on terms so vague as to be unenforceable.

STANDARD OF REVIEW

[1] A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court and, on appeal to this court, is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another. *Teadtke v. Havranek*, 279 Neb. 284, 777 N.W.2d 810 (2010).

ANALYSIS

Standard of Proof.

We first address Cheloha's assignment that the trial court erred in "employ[ing] a confused, incorrect standard of proof." In its analysis, the trial court found that K&H "clearly, convincingly and satisfactorily" established the elements necessary to prove a prescriptive easement. In the factual background section of the trial court's order, it stated that "[t]he greater weight of the evidence demonstrates that Cheloha became angered when Siefken sold the property to [K&H]." Cheloha argues, based on the references above, that the court was confused about which standard of proof applied.

[2] A claim for prescriptive easement requires that all the elements of such adverse use be clearly, convincingly, and satisfactorily established. See *Fyfe v. Tabor Turnpost*, 22 Neb. App. 711, 860 N.W.2d 415 (2015). The court found that all the elements of prescriptive use were established by clear, convincing, and satisfactory evidence. Its use of the "greater weight of the evidence" language was used only in reference to the evidence about Cheloha's being angry about Siefken's selling the property. The court found the evidence

that Cheloha was angry when Siefken sold the property to be more credible than the evidence that he was not angry. The court was not applying "greater weight of the evidence" as a burden of proof. We find no merit to Cheloha's assignment of error that the court was confused or used an incorrect burden of proof.

Prescriptive Easement and Injunctive Relief.

Cheloha next assigns that the trial court erred in granting K&H a prescriptive easement and enjoining Cheloha from denying K&H use of the contested roadway. Cheloha argues that K&H failed to prove the elements required for a prescriptive easement by clear and convincing evidence.

[3-5] An easement is "'[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.'" *Feloney v. Baye*, 283 Neb. 972, 976, 815 N.W.2d 160, 164 (2012), quoting Black's Law Dictionary 585-86 (9th ed. 2009). Nebraska case law recognizes that a claimant may acquire an easement through prescription. *Feloney v. Baye, supra.* The use and enjoyment that will establish an easement through prescription are substantially the same in quality and characteristics as the adverse possession that will give title to real estate, but there are some differences between the two doctrines. *Id.*

[6] Nebraska case law has previously noted that the law treats a claim of prescriptive right with disfavor. *Feloney v. Baye, supra.* The reasons are obvious—to allow a person to acquire prescriptive rights over the lands of another is a harsh result for the burdened landowner. *Id.* And further, a prescriptive easement essentially rewards a trespasser, and grants the trespasser the right to use another's land without compensation. *Id.*

[7] In prescriptive easement cases, the Nebraska Supreme Court has held that a party claiming a prescriptive easement

must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. See *id.*

In order for K&H to prove a prescriptive easement, it had to establish each of the elements by clear, convincing, and satisfactory evidence. See *Fyfe v. Tabor Turnpost*, 22 Neb. App. 711, 860 N.W.2d 415 (2015).

[8] The word "exclusive" in reference to a prescriptive easement does not mean that there must be use only by one person, but, rather, means that the use cannot be dependent upon a similar right in others. *Teadtke v. Havranek*, 279 Neb. 284, 777 N.W.2d 810 (2010). There was no evidence that K&H's use of the property was dependent on a similar right in others.

[9] A use is continuous and uninterrupted if it is established that the easement was used whenever there was any necessity to do so and with such frequency that the owner of the servient estate would have been apprised of the right being claimed. *Fyfe v. Tabor Turnpost, supra*. There is no dispute that K&H and its predecessors have used the disputed road to access the 7-acre tract in a continuous and uninterrupted manner for far longer than the necessary 10-year prescriptive period. Since at least 1956, the Bredehoft family, the Grimes family, and thereafter Siefken used the disputed road openly and on a continuous and uninterrupted basis. Cheloha admits that K&H met the element requiring proof of continuous, uninterrupted use for 10 years by "tacking" the years of use by K&H's predecessors. Brief for appellant at 27. K&H's use of the road constitutes continuous and uninterrupted use for the prescriptive period, as well as open and notorious conduct, as the use was within plain view of Cheloha.

[10,11] Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period, adverseness is presumed. *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012). At that point, the landowner must present evidence showing that the use was permissive. *Id.* But this rule

is not without exceptions. In certain factual situations, the Nebraska Supreme Court has applied a presumption of permissiveness. *Id.* In *Feloney v. Baye, supra*, the court held that when a claimant uses a neighbor's driveway or roadway without interfering with the owner's use or the driveway itself, the use is to be presumed permissive. Of course, this rule merely creates a presumption. And a claimant can rebut the presumption by showing the claimant is making the claim as of right. *Id.*

Cheloha primarily argues that K&H's predecessors use of the road was permissive and that K&H did not present evidence to show the use was adverse and under a claim of right. He separately assigns that the trial court misapplied *Feloney v. Baye, supra*, and, as a result, incorrectly decided this case. Specifically, Cheloha argues that the court failed to apply the essential teaching of *Feloney*, i.e., that the elements of a prescriptive easement cannot be established where the use of one's property over the years has occurred permissively. He admits that the facts in *Feloney* are different from the facts in the present case, but contends that is not grounds for a legal distinction and the law in *Feloney* is applicable.

In *Feloney v. Baye, supra*, the plaintiff sought the establishment of a prescriptive easement on the defendant's driveway for ingress and egress. The parties' residences were separated by a narrow alley that left inadequate room for the plaintiff to negotiate a necessary sharp turn to access his garage without swinging across a portion of the defendant's driveway. The court affirmed the trial court's order granting summary judgment in favor of the defendant, albeit on a different presumption of permissiveness, finding that the plaintiff's use of the defendant's driveway was presumptively permissive and that the plaintiff did not present any evidence which would create a question of fact as to that question.

In the present case, the trial court set out the established principles of prescriptive easements as set forth in *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012). The trial

court also summarized the facts in *Feloney* and noted that the facts presented in *Feloney* are greatly dissimilar to the facts in the present case. However, it stated, "Assuming the rule of presumptive permissiveness announced in *Feloney* is equally applicable to rural and urban property, the question becomes whether [K&H] offered sufficient evidence to rebut it." Following its conclusion that the elements for a prescriptive easement were met, the court found that any presumption of permissiveness was rebutted by K&H. Thus, the court applied the holding in *Feloney*, but came to a different conclusion based on the facts and evidence presented. We conclude there is no merit to Cheloha's assignment that the trial court misapplied *Feloney* in deciding this case.

We further agree with the trial court that K&H, unlike the plaintiff in the *Feloney* case, presented evidence to show that its use of the disputed road was under a claim of right, which was sufficient to overcome the presumption of permissiveness. For decades, and at the very least since Donoghue's father moved to his property in 1956, the 7-acre tract was always accessed by using the disputed road. The disputed road provided the only means of access from the public road to the 7-acre tract. The Bredehoft family, the Grimes family, and Siefken all used the road without any dispute, and with the knowledge and acquiescence of Cheloha or his father. The evidence shows that permission to use the road was never sought from Cheloha and that permission was never given. Siefken testified that he never asked Cheloha or his father for permission to use the road.

[12] Access to the road was gated and locked. This was to prevent the general public from accessing the property. There was testimony from different witnesses about various locks that were on the gate and where they originated from. In particular, there was conflicting evidence about the source of a distinctive heart-shaped brass padlock. Siefken testified that Grimes put the lock on, whereas Cheloha testified that the power company placed the lock there and had an easement to

transmission lines on the property. The trial court determined that it could be circumstantially inferred that the padlock came from the Grimes family. The specific type of lock was used by a public power company on its substations and gates in the 1930's and 1940's. Grimes' father was chief of stores for the power company and had access to the locks. When credible evidence is in conflict on material issues of fact, the appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Homestead Estates Homeowners Assn. v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009). We give such deference to the trial court here and conclude that the Grimes family provided the heart-shaped lock to secure the gate and provided a key to Cheloha's father.

After Siefken acquired sole ownership of the 7-acre tract in 2009, he changed the lock and placed a combination lock on the gate. He did this with Cheloha's knowledge, and both he and Cheloha knew the combination to the lock.

There was also evidence in regard to the maintenance of the disputed road. The Cheloha family primarily maintained the road, but there was evidence that Siefken and Grimes helped maintain the road over the years. Siefken testified that although the Cheloha family always graded the road, he and Grimes hauled rock and filled potholes about six or seven times. Further, after a flood damaged the road in the spring of 2007, Grimes sent Cheloha a check for $300 to help pay for expenses incurred in repairing the road.

Siefken testified that before Cheloha began building a structure on his land next to the road, he asked Siefken and Grimes if he could tear down the road a bit, and Siefken and Grimes gave him permission. Cheloha's request for permission to alter the road indicates that Cheloha acknowledged that Siefken and Grimes possessed an interest in the road. Siefken also testified that after Cheloha tore down the road, he and Grimes hauled gravel to the site to repair it. Cheloha admitted this was true.

The evidence also shows that Cheloha became upset when Siefken sold the property to K&H. Cheloha thought he would inherit the 7-acre tract from Grimes. There was evidence that Grimes made a will in which he left the property to Cheloha, but Siefken and Grimes owned the property as joint tenants at the time of Grimes' death. Although Siefken offered to let Cheloha buy the property with K&H, Cheloha declined. After the property was sold to K&H, use of the disputed road to access the property became a contested matter. After the conflict between K&H and Cheloha arose, Cheloha informed K&H that he did not have to provide it anything but a "goat path" to access the property. As the trial court found, if K&H and its predecessors in title had no right to use the disputed road, and if its use was completely permissive, then providing it an alternative route, even a "goat path," would have been unnecessary. Cheloha's belief that he had to provide K&H some way to access its property shows an acknowledgment that K&H and its predecessors had an interest in the disputed road.

In summary, the disputed road has been gated and locked as far back as witnesses could remember. For years, the gate was secured by a lock provided by the Grimes family and later changed to a combination lock provided by Siefken. Siefken and Grimes also helped maintain the road over the years. This evidence, along with the continuous use of the road by K&H's predecessors without seeking permission, made the Chelohas aware of K&H's claimed right to use the road to access its property. Cheloha acknowledged this claim of right when he asked Siefken's and Grimes' permission to tear down the road and when he told K&H that all he had to provide it was a "goat path" to access the property.

We conclude that K&H has shown by clear and convincing evidence that its use of the road at issue was exclusive, adverse, under the claim of right, continuous and uninterrupted, and open and notorious for the required 10-year prescriptive period. Therefore, K&H met its burden to establish a prescriptive easement.

Granting Easement Without Delineated Usage Terms.

Finally, Cheloha assigns that the trial court erred in granting an easement without delineated usage terms and on terms so vague as to be unenforceable. The court granted K&H "a private prescriptive easement along, over and upon the disputed road such as to enable it full ingress and egress to and from its property, which prescriptive easement is identified and described in Ex. 30." Exhibit 30 is a topographic survey of the road in question and of the surrounding property. Cheloha does not contend that the legal description adopted by the court is deficient. Rather, Cheloha contends that the court should have defined the scope and extent of the easement in regard to terms of usage. He contends that the court left to speculation, guess, and conjecture when, how often, and for what purposes K&H could use the easement.

[13-15] In addition to satisfying the necessary requirements to establish a prescriptive easement, the party asserting a prescriptive right must also clearly establish the nature and scope of the easement. *Fyfe v. Tabor Turnpost*, 22 Neb. App. 711, 860 N.W.2d 415 (2015). The extent and nature of an easement are determined from the use made of the property during the prescriptive period. *Id.* The law requires that the easement must be clearly definable and precisely measured. *Id.*

Cheloha argues that the court failed to define the nature and scope of the easement. He also contends that there is insufficient evidence to define the easement scope because the evidence of use prior to K&H's ownership was permissive and limited to occasional use, which is different from the "parade of four-wheelers, river toys, campers, and traffic that K&H invited to its riverside parcel." Brief for appellant at 33.

The trial court granted K&H an easement "to enable it full ingress and egress to and from its property." Although this may seem vague, it is clear that K&H is allowed to use the road to access its property, regardless of the purpose. The property historically has been used for recreational purposes,

but also has a meadow that provides an annual hay crop. The extent and nature of an easement are determined from the use made of the property during the prescriptive period. *Fyfe v. Tabor Turnpost, supra.* Thus, the easement gives K&H use of the road to drive vehicles, campers, four-wheelers, and other vehicles to its property, as well as to get equipment to the property necessary to harvest the hay crop. We find no merit to Cheloha's final assignment of error.

CONCLUSION

We conclude that the trial court did not err in granting K&H a prescriptive easement across Cheloha's property or in enjoining Cheloha from interfering with K&H's use of the prescriptive easement. The judgment of the trial court is affirmed.

Affirmed.

State of Nebraska, appellee, v. Dee Anne Liner, appellant.

886 N.W.2d 311

Filed September 13, 2016. Nos. A-16-278, A-16-279.

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. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** An ineffective assistance of counsel claim is raised on direct appeal when allegations of deficient performance are made with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.
5. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the appellate brief in order to be considered by an appellate court.
6. ____. A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.
7. **Pleas.** After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.

8. **Effectiveness of Counsel: Proof: Appeal and Error.** General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to preserve the issue for later review.
9. **Effectiveness of Counsel.** Where the record refutes a claim of ineffective assistance of counsel, no recovery may be had.
10. **Pleas: Effectiveness of Counsel.** When a court accepts a defendant's plea of guilty or no contest, the defendant is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.
11. **Pleas.** A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily.
12. **Criminal Law: Intent.** A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof.
13. **Theft: Value of Goods: Words and Phrases.** Value to be proved concerning a theft is market value at the time and place where the property was criminally appropriated.
14. **Effectiveness of Counsel.** Defense counsel cannot be ineffective for failing to raise an objection or argument that has no merit.
15. **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.
16. ____. 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.
17. **Criminal Law: Controlled Substances: Intent.** Unless an exception applies, a person is guilty of a Class II felony if he or she knowingly or intentionally manufactures, distributes, delivers, dispenses, or possesses with intent to manufacture, distribute, deliver, or dispense a Schedule I, II, or III controlled substance which is an exceptionally hazardous drug.
18. **Plea Bargains: Sentences: Appeal and Error.** When a charge has been misclassified as part of a plea bargain and the only assignment of error is that the sentence was excessive, appellate analysis is limited to examining the excessiveness.

Appeal from the District Court for Buffalo County: John P. Icenogle, Judge, Retired. Affirmed.

Tana M. Fye, Deputy Buffalo County Public Defender, of Fye Law Office, for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Moore, Chief Judge, and Inbody and Riedmann, Judges.

Riedmann, Judge.

INTRODUCTION

Dee Anne Liner has appealed her convictions and sentences in two unrelated cases. Because of the similarity between the records, issues, and arguments presented in the two cases, we consolidate them for purposes of resolving her appeals.

In November 2015, Liner pled no contest to charges of possession of methamphetamine with intent to distribute and theft by unlawful taking. The district court for Buffalo County, Nebraska, found her guilty of both charges and sentenced her to 18 months' to 12 years' imprisonment for the methamphetamine conviction and 9 months' imprisonment for the theft conviction, with the sentences to run concurrently. Liner now appeals her convictions and sentences. Following our review of the record, we affirm the convictions and sentences of the district court.

BACKGROUND

According to the factual basis provided by the State, on October 23, 2013, officers of the Kearney Police Department served a search warrant on Liner's residence in Kearney, Buffalo County, Nebraska. Officers located a quantity of methamphetamine in Liner's bedroom. The officers also located scales and packaging materials for methamphetamine. After being read her *Miranda* rights, Liner consented to an interview in which she admitted to participating in the distribution of methamphetamine.

On December 6, 2013, law enforcement officers in Kearney received a report that a citizen had left a wallet containing

$560 on the counter of a bank and that when he returned shortly thereafter, the wallet was gone. Surveillance video showed that Liner picked up the wallet and left the bank with it. Law enforcement contacted Liner regarding the theft, but she denied any involvement. Surveillance video from the law enforcement center later showed Liner dropping the wallet off in the lobby and then leaving the law enforcement center.

Liner was initially charged with possession of a controlled substance with intent to distribute under Neb. Rev. Stat. § 28-416(1)(a) and (10) (Cum. Supp. 2014), a Class II felony. She was separately charged with theft by unlawful taking of more than $500, a Class IV felony, under Neb. Rev. Stat. § 28-518 (Cum. Supp. 2014). Pursuant to a plea agreement, the State filed an amended information reducing Liner's charge of possession of methamphetamine with intent to distribute from a Class II felony to a Class III felony. As part of the agreement, Liner agreed to plead no contest to both the theft charge and the amended methamphetamine charge.

ASSIGNMENTS OF ERROR

Liner assigns in both cases, restated and reordered, that counsel was ineffective in (1) not informing her that she could move to withdraw her plea prior to sentencing, (2) not fully investigating the State's evidence and her possible defenses, and (3) threatening and coercing her into the plea agreement. She also claims that her sentences were excessive.

In addition, as to the theft conviction, Liner assigns that counsel was ineffective in failing to object to the insufficient factual basis and that there was insufficient evidence to convict her of the theft charge.

STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

[2,3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Carngbe*, 288 Neb. 347, 847 N.W.2d 302 (2014).

ANALYSIS

Ineffective Assistance of Counsel.

Liner's first three assignments of error and corresponding arguments are identical in the briefs submitted for each case. For the following reasons, we find that these claims were insufficiently stated to be addressed.

[4] An ineffective assistance of counsel claim is raised on direct appeal when allegations of deficient performance are made with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court. *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

[5,6] An alleged error must be both specifically assigned and specifically argued in the appellate brief in order to be considered by an appellate court. *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014). A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered. *Id.* A claim insufficiently stated is no different than a claim not stated at all. *Id.* Therefore, if insufficiently stated, an assignment of error and accompanying argument will not prevent the procedural bar accompanying the failure to raise all known or apparent claims of ineffective assistance of trial counsel. *Id.*

We examine the sufficiency of each of Liner's claims of ineffective assistance of counsel below.

Failure to Inform Liner of Availability of Motion to Withdraw Plea.

Liner first assigns that her counsel was ineffective in failing to inform her of her ability to file a motion to withdraw her plea before sentencing.

[7] After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered. *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015). The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *Id.*

[8] General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to preserve the issue for later review. See *State v. Ash, supra*. In *Ash*, the defendant argued that his counsel was ineffective for failing to file a motion to suppress any of the State's evidence. The defendant did not state the legal basis for filing such a motion nor what evidence should have been suppressed. The Nebraska Supreme Court held that the defendant had not sufficiently raised a claim for ineffective assistance of counsel.

In the cases before us, Liner's briefs contain no articulation of the legal basis upon which she would have moved to withdraw her pleas. Instead, each brief contains only an overview of the legal standard for ineffective assistance of counsel and a restatement of the assertion in the assignment of error that "counsel failed and/or refused to inform [Liner] of the option to move the court to withdraw her plea prior to the entry of sentencing." Given that Liner does not specify the legal grounds for withdrawing her plea, nor give any indication that she in fact wanted to withdraw her plea, this assignment of error is not properly raised in this appeal. See *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

Failure to Investigate Evidence or Defenses.

Liner next assigns that her counsel was ineffective because he did not "fully investigate the State's evidence and [Liner's] possible defenses." Liner also fails to properly raise this issue because it is not sufficiently specific.

Conclusory and general allegations that counsel is ineffective are not sufficient to preserve an ineffective assistance of counsel claim for postconviction review. See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014). In *Abdullah*, the defendant argued that his counsel was ineffective in failing to call "'at least two witnesses that [the defendant] informed would be beneficial to his case.'" 289 Neb. at 126-27, 853 N.W.2d at 863. The Nebraska Supreme Court found that this broad placeholder language would not allow a postconviction court to determine whether the specific actions complained of were the same actions raised in the direct appeal. See *id.* Accordingly, the defendant's complaint that his counsel failed to call unspecified witnesses was insufficient to raise his claim of ineffective assistance of counsel.

In the case before us, Liner's argument of ineffectiveness is even broader than the one discussed above from *State v. Abdullah, supra*. Although the defendant in *Abdullah* specified that counsel was ineffective for failing to call certain witnesses, Liner makes no specification here as to what evidence counsel should have investigated or what potential defenses she believes were available to her. This argument was not sufficiently raised in this appeal.

Counsel Coerced/Threatened Liner Into Plea Agreement.

Liner next assigns that her counsel was ineffective in coercing or threatening her to accept the plea bargain. Liner's briefs contain no information regarding what coercive action or threats were made. Accordingly, this general assertion is not properly raised. See *State v. Abdullah, supra*.

[9] Additionally, the record affirmatively demonstrates that Liner was not coerced or threatened into accepting the plea bargain given her testimony to that effect during the plea hearing. Where the record refutes a claim of ineffective assistance of counsel, no recovery may be had. See *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

Insufficient Factual Basis.

[10,11] Liner assigns that the district court erred in accepting her plea for her theft by unlawful taking charge because the factual basis provided was insufficient to support her conviction. When a court accepts a defendant's plea of guilty or no contest, the defendant is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel. *State v. Wilkinson*, 293 Neb. 876, 881 N.W.2d 850 (2016). A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily. *Id.*

[12] A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof. Neb. Rev. Stat. § 28-511 (Reissue 2008). Theft constitutes a Class IV felony when the value of the thing involved is $500 or more, but not over $1,500. § 28-518.

[13] Value to be proved concerning a theft is market value at the time and place where the property was criminally appropriated. *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002). The Nebraska Supreme Court has recognized that absent evidence to the contrary, cash may be accorded its face value in grading a theft. See *State v. Redding*, 213 Neb. 887, 893, 331 N.W.2d 811, 814 (1983) ("[i]t would be ludicrous to argue that $12,000 in cash is not a thing of value of 'over one thousand dollars'"). At the plea hearing, the State articulated that the stolen wallet contained $560 in cash. This demonstrates that when Liner took the wallet and its contents, she

took a thing worth more than $500. Therefore, this assignment of error is without merit.

Ineffectiveness in Failing to Object to Insufficient Factual Basis.

[14] Liner next assigns that her trial counsel was ineffective in failing to object to the insufficient factual basis of her theft charge. Defense counsel cannot be ineffective for failing to raise an objection or argument that has no merit. See *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). Because we determined above that there is no merit to Liner's contention that the factual basis was insufficient, counsel was not ineffective in failing to raise this argument.

Excessive Sentences.

Liner finally argues that her sentences were excessive because the court did not adequately consider her mental health and her need for treatment. We disagree.

[15,16] 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. *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015). 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.* An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *Id.*

The court received a presentence investigation in this case prior to sentencing. The presentence investigation reveals prior convictions for possession of a controlled substance and forgery. Liner also has numerous prior arrests including thefts,

assaults, traffic offenses, and drug and alcohol offenses. She has also successfully completed a drug court program. The presentence investigation placed Liner in the "very high risk/needs range." At the sentencing hearing, the district court heard comments from both counsel and Liner discussing Liner's struggles with poor mental health and addiction.

For theft by unlawful taking, Liner was sentenced to 9 months' imprisonment, to run concurrently with her other sentence. Theft by unlawful taking of an item valued between $500 and $1,500 is a Class IV felony. See § 28-518. A Class IV felony is punishable by up to 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014). Liner's sentence of 9 months' imprisonment is therefore within the statutory limits. Following our review of the record, we find that the district court did not abuse its discretion when imposing this sentence.

For possession of methamphetamine with intent to distribute, the district court sentenced Liner to 18 months' to 12 years' imprisonment. We note that in the amended information and during the plea hearing, Liner was informed that she was being charged with a Class III felony for possession of methamphetamine with intent to distribute. It appears that this classification was contrary to the law; Nebraska statutes as they existed at the time of the crime identify possession of methamphetamine with the intent to distribute as a Class II felony.

[17] Under § 28-416, it is unlawful for a person to knowingly or intentionally manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance. Unless an exception applies, a person is guilty of a Class II felony if he or she violates this law with respect to a Schedule I, II, or III controlled substance which is an exceptionally hazardous drug. See § 28-416(2)(a). A person violating this subsection is guilty of only a Class III felony if the charges relate to a scheduled controlled substance that is not an exceptionally hazardous drug. § 28-416(2)(b).

Methamphetamine is a Schedule II controlled substance. Neb. Rev. Stat. § 28-405 (Supp. 2013). Methamphetamine is statutorily defined as an "[e]xceptionally hazardous drug." Neb. Rev. Stat. § 28-401(28) (Supp. 2013). Therefore, the Nebraska statutes as they existed at the time of this crime delineate that possession of methamphetamine with intent to distribute is a Class II felony, unless the penalty is enhanced due to the quantity of methamphetamine, an issue not present in this case. See §§ 28-401, 28-405, and 28-416.

Pursuant to a plea agreement, the State filed an amended information which removed the words an "[e]xceptionally hazardous drug" and changed the felony classification from a Class II felony to a Class III felony. However, § 28-401(28) statutorily defines methamphetamine as an "[e]xceptionally hazardous drug." Therefore, methamphetamine is an exceptionally hazardous drug as a matter of law and to treat it otherwise by simply deleting the words "[e]xceptionally hazardous drug" from the information runs contrary to law. Because the amended information still charges Liner with possession of methamphetamine with an intent to distribute, this charge constitutes a Class II felony and Liner's conviction was misclassified.

It therefore appears that the parties and the court labored under a mutual mistake of law during the plea bargaining and the court proceedings, and treated Liner's offense as a Class III felony when legally it should have been a Class II felony. Plea bargaining is an established part of the criminal justice system and reducing Liner's methamphetamine charge from a Class II to Class III felony could have been properly executed; however, removing the words an "[e]xceptionally hazardous drug" did not have the intended legal effect.

[18] Liner did not raise the misclassification of the methamphetamine charge in her appeal, nor did the State file a complimentary error proceeding pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008). The only assigned error before us is whether Liner's sentence for this conviction is excessive.

The Nebraska Supreme Court has previously held that when a charge has been misclassified as part of a plea bargain and the only assignment of error is that the sentence was excessive, appellate analysis is limited to examining the excessiveness. See *State v. Alba*, 270 Neb. 656, 707 N.W.2d 402 (2005).

Focusing on the error assigned, a mistaken classification of Liner's conviction in Liner's favor does not make her sentence excessive. Additionally, Liner's sentence would be a lawful sentence for either a Class II or a Class III felony. A Class III felony is punishable by up to 20 years' imprisonment, a $25,000 fine, or both. § 28-105. A Class II felony is punishable by 1 to 50 years' imprisonment. *Id.* Therefore, while we note the misclassification of Liner's sentence, we disregard it for purposes of determining whether that sentence is excessive. Liner's sentence is within statutory limits under either classification and is not excessive given Liner's background, criminal record, and motivation, as well as the nature of the offense. Therefore, the district court did not abuse its discretion in imposing this sentence.

CONCLUSION

Following our review of the record, we find Liner's assignments of error to be without merit and affirm the convictions and sentences imposed by the district court.

Affirmed.

David Robert Burcham, appellee, v. Linda Jean Burcham, appellant.

886 N.W.2d 536

Filed September 27, 2016. No. A-15-814.

1. **Divorce: Child Custody.** When custody of minor children is an issue in a proceeding to dissolve the marriage of the children's parents, custody is determined by parental fitness and the children's best interests.
2. **Child Custody.** When both parents are found to be fit, the inquiry for the court on the issue of custody is the best interests of the children.
3. **Parent and Child.** The best interests of a child require a parenting arrangement for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress.
4. ____. The best interests of a child also require that the child's families and those serving in parenting roles remain appropriately active and involved in parenting with safe, appropriate, continuing quality contact between children and their families when they have shown the ability to act in the best interests of the child and have shared in the responsibilities of raising the child.
5. **Divorce: Child Custody: Public Policy.** It is sound public policy to keep children together when possible, but considerations of public policy do not, in all cases, prevent the splitting of the custody of the children when a marriage is dissolved; rather, the ultimate standard is the best interests of the children.
6. **Child Support.** The paramount concern and question in determining child support is the best interests of the child.
7. **Rules of the Supreme Court: Child Support: Presumptions.** In general, child support payments should be set according to the Nebraska Child Support Guidelines, adopted by the Nebraska Supreme Court, which are presumed to be in the best interests of the child.
8. **Child Support.** In calculating child support, the court must consider the total monthly income, defined as income of both parties derived from all sources.

9. **Child Support: Presumptions.** All income from employment must be included in the initial child support calculation, which then becomes a rebuttable presumption of appropriate support.
10. **Child Support.** Copies of at least 2 years' tax returns, financial statements, and current wage stubs should be furnished to the court for purposes of determining the parents' income in order to calculate child support.
11. ____. Income derived from farming is subject to fluctuations. The use of income averaging when dealing with farm income has been approved for purposes of calculating child support.
12. **Divorce: Appeal and Error.** In a de novo review of a judgment in marriage dissolution proceedings, when the evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
13. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
14. **Appeal and Error.** Generally, a party cannot complain of error which the party has invited the court to commit.
15. **Divorce: Minors: Stipulations.** Parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement.
16. **Parent and Child: Social Security.** Social Security benefits paid to children as a result of their parents' employment are not a mere gratuity from the federal government but have been earned through the parent's payment of Social Security taxes.
17. **Parent and Child: Child Support: Social Security.** A request to apply Social Security benefits received as a result of a parent's employment to the parent's child support obligation is merely a request to identify the source of payment, and a Social Security benefit can serve as a substitute source of income.
18. ____: ____: ____. Social Security benefits received on behalf of a parent's employment may be used to offset a portion of child support costs, but it is not appropriate to offset child support costs where the Social Security benefits are received due to the disability of the child and therefore intended to mitigate the additional costs accompanying disabilities.
19. ____: ____: ____. Social Security disability benefits paid on behalf of a parent's disability can be considered income to the parent for child support purposes, because the benefits are received in lieu of the parent's income.

20. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
21. **Divorce: Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
22. ____: ____. Property which one party brings into the marriage is generally excluded from the marital estate.
23. **Divorce: Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding.
24. **Divorce: Property Division.** An exception to the general rule that property owned prior to the marriage is excluded from the marital estate exists where both of the spouses have contributed to the improvement or operation of the nonmarital property or where the spouse not owning the nonmarital property has significantly cared for the property during the marriage.
25. ____: ____. When applying the exception to the general rule regarding premarital property, evidence of the value of the contributions and evidence that the contributions were significant are generally required.
26. ____: ____. Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance.
27. ____: ____. Setting aside nonmarital property is simple if the spouse possesses the original asset, but can be problematic if the original asset no longer exists.
28. ____: ____. Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse.
29. ____: ____. If the separate property remains segregated or is traceable into its product, commingling does not occur.
30. **Property Division: Proof.** The burden of proof rests with the party claiming that property is nonmarital.
31. **Property Division.** Marital debt is defined as a debt incurred during the marriage and before the date of separation, by either spouse or both spouses, for the joint benefit of the parties.
32. **Divorce: Attorney Fees: Appeal and Error.** In a dissolution of marriage case, an award of attorney fees is discretionary, is reviewed de

novo on the record, and will be affirmed in the absence of an abuse of discretion.

33. **Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and general equities of the case.
34. **Divorce: Attorney Fees.** Attorney fees incurred by the parties during the pendency of dissolution proceedings do not constitute marital debt.

Appeal from the District Court for Dixon County: Paul J. Vaughan, Judge. Affirmed in part, and in part reversed and remanded with directions.

Alice S. Horneber, of Horneber Law Firm, P.C., for appellant.

Nancy R. Shannon, of Cordell Law, L.L.P., for appellee.

Inbody, Riedmann, and Bishop, Judges.

Riedmann, Judge.

INTRODUCTION

Linda Jean Burcham appeals from the order of the Dixon County District Court which dissolved her marriage to David Robert Burcham, divided the marital property, awarded custody of the parties' minor children, and calculated child support. For the reasons explained below, we reverse the child support calculation and remand the cause with directions to the district court to recalculate child support excluding the adoption subsidy the parties receive on behalf of their adopted children. We otherwise affirm.

BACKGROUND

Linda and David were married in 2001, and David filed for dissolution of the marriage in November 2013. During the marriage, the parties adopted three siblings: a daughter, H.B., born in 1997; and two sons, A.B., born in 1999, and Z.B., born in 2001. Initially during the dissolution proceedings,

the parties shared temporary joint legal and physical custody of the children, following a "week on, week off" schedule; however, in October 2014, the court modified the temporary order and placed physical custody of H.B. with Linda and physical custody of A.B. and Z.B. with David. Linda received parenting time with the boys every other weekend, and David received parenting time with H.B. on alternating weekends but only upon the agreement of Linda, David, and H.B.

When Linda and David first married, they lived in a house David owned prior to the marriage. In 2003, they built the marital residence, located in Newcastle, Nebraska, on 45 acres of land that David had purchased in 1996. David worked at a telephone company throughout the marriage and earned additional income from farming. Linda worked full time during the marriage until reducing her schedule to 80 percent after the children were adopted. During that time, she was primarily responsible for the care of the children. After nearly 8 years, she resumed full-time employment.

All three of the children have special needs. H.B.'s mental health presented the greatest challenge for Linda and David. H.B. was admitted to a mental health facility on two occasions in 2012; the first stay was for 2 weeks and the second stay was for 6 weeks. She was admitted again in March 2013 after cutting herself with a knife. In September 2014, H.B. attempted suicide by overdosing on various pills. Linda took H.B. to the emergency room, and she was admitted to the mental health facility where she remained for 6 to 8 weeks.

Linda testified at trial that she never had any concerns that H.B. would harm A.B. or Z.B., but she acknowledged that an admission report from the mental health facility dated March 5, 2013, indicated that Linda reported finding a graphic drawing H.B. made depicting her assaulting her brothers, that Linda expressed concern about the disappearance of two family cats, that Linda and David expressed concern about H.B.'s safety upon returning home and the safety of other family members, and that Linda reported that

H.B. appears to want to hurt the ones who love her the most. At trial, David testified that he does have concerns about the boys' safety around H.B.

The evidence also established that the Department of Health and Human Services substantiated a report of David's physically abusing H.B. in October 2013. H.B. was observed with a bruise on her face from being "smacked" by David after an argument. Although David was allowed visits with H.B. during the pendency of the dissolution proceedings, H.B. had not spent any nights with David after December 2013, and David did not communicate to Linda a desire to spend any time with H.B. Throughout the case, H.B. continued to attend therapy sessions with a counselor and began seeing a psychiatrist at the end of 2014. According to Linda, H.B. responded very well to new medications, and she noticed a significant improvement in H.B.'s depression.

A.B., who was 15 years old at the time of trial, has been diagnosed with mild mental retardation and has "IEPs at school." He also has a hearing delay. Nevertheless, he participates in football, basketball, and track and is involved in 4-H activities. David described A.B. as "a very happy-go-lucky kid" and acknowledged that he will always need some kind of assistance and guidance. He also said that A.B. is his "right-hand man" and wants to help David with everything. A.B. testified that he enjoys living with David because that way they get to spend more time together. He would like to continue living with David and seeing Linda on the weekends but said that he would like to see H.B. more often. He said that he, H.B., and Z.B. get along well and have a good time together.

Z.B. was 13 years old at the time of trial. He has been diagnosed with "ADHD" and has "IEPs" at school as well. Nevertheless, like A.B., he also participates in football, basketball, and track at school and is involved in 4-H activities. He testified that he enjoys living with David because he can stay in one place instead of moving around so much.

Because of the children's special needs, the parties receive an adoption subsidy of $1,300 per month from the State of Kansas, the state from which the children were adopted. Linda requested that the court return to the joint physical custody arrangement it initially ordered utilizing the week on, week off schedule. She believed it was important for the children to remain together because she and David adopted them as a sibling group so they should remain a sibling group. David testified, however, that he did not believe Linda and he could communicate well enough to share joint physical custody. He believed that splitting the children up was in their best interests because the boys were thriving and comfortable living with him and because there are issues with H.B. that place the boys at risk. He did not believe sharing custody of the boys worked well for them, and now that they have more structure and stability, their grades and behavior have improved.

The district court entered the decree dissolving Linda and David's marriage on August 5, 2015. The court found it was in the best interests of the children that David have legal custody and primary physical custody of A.B. and Z.B. and that Linda have legal custody and primary physical custody of H.B. Linda was awarded visitation with the boys every other weekend.

Linda was also ordered to pay $379 per month in child support for three children, $790 per month for two children, and $588 per month for one child. In calculating the parties' incomes for child support purposes, the court utilized the parties' incomes from their employment and added $200 per month in farming income for David. The court also assigned the adoption subsidy to the parent with custody of the child, meaning David received the subsidy for the boys and Linda received the subsidy for H.B.

The court valued and divided the parties' property utilizing their joint property statement. Ultimately, Linda was ordered to make an equalization payment of $16,829 to David in monthly installments of $500. Greater details regarding the

court's classification, valuation, and division of property will be provided in the analysis section below as needed to address Linda's arguments on appeal. Each party was ordered to pay his or her own attorney fees. Linda has now appealed to this court.

ASSIGNMENTS OF ERROR

Linda assigns that the district court erred in (1) its award of custody and visitation of A.B. and Z.B.; (2) its award of child support and dependency exemptions; (3) its division of property, award of the equalization payment, and division of responsibility for outstanding obligations; and (4) its allocation of attorney fees.

STANDARD OF REVIEW

An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, and alimony. *Id*.

In a dissolution of marriage case, an award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000).

ANALYSIS

Custody and Visitation.

Linda argues that the district court erred in awarding custody of A.B. and Z.B. to David. We find no abuse of discretion in the custody order.

[1,2] When custody of minor children is an issue in a proceeding to dissolve the marriage of the children's parents, custody is determined by parental fitness and the children's best interests. See, *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007); *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d

444 (2009); Neb. Rev. Stat. § 42-364(2) (Cum. Supp. 2014). When both parents are found to be fit, the inquiry for the court is the best interests of the children. *Maska v. Maska, supra*. Because the district court found that Linda and David were both fit parents, a finding that Linda does not challenge, we consider the children's best interests.

[3,4] The best interests of a child require a parenting arrangement "for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress." Neb. Rev. Stat. § 43-2923(1) (Cum. Supp. 2014). The best interests of a child also require that

> the child's families and those serving in parenting roles remain appropriately active and involved in parenting with safe, appropriate, continuing quality contact between children and their families when they have shown the ability to act in the best interests of the child and have shared in the responsibilities of raising the child.

§ 43-2923(3). Section 43-2923(6) further provides:

> In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the foregoing factors and:
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child;
>
> (d) Credible evidence of abuse inflicted on any family or household member[;] and
>
> (e) Credible evidence of child abuse or neglect or domestic partner abuse.

[5] Both parties submitted evidence at trial regarding custody of A.B. and Z.B. Custody of H.B. was not at issue; the parties agreed that it was in her best interests to reside with Linda. Linda claimed that awarding her custody was in the boys' best interests because she had always been their primary caregiver and it would allow them to maintain their close relationship with H.B. Although the Supreme Court has acknowledged that it is sound public policy to keep children together when possible, considerations of public policy do not, in all cases, prevent the splitting of the custody of the children when a marriage is dissolved; rather, the ultimate standard is the best interests of the children. *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

We understand Linda's desire to keep all three siblings together, particularly her plea at trial that because she and David adopted the children as a sibling group, they deserve to remain a sibling group. We appreciate the district court's concern regarding the safety of the boys due to concerns about H.B.'s mental health but also consider Linda's testimony that H.B.'s medication has resulted in significant improvement in her depression symptoms. We also recognize the evidence at trial establishing that the children are close to one another and "bicker" as normal siblings do, and A.B.'s testimony that seeing H.B. every other weekend was not enough time and that he wished he had more contact with his sister.

Although separating the children may not be the ideal situation, ultimately the record supports the conclusion that it is in the boys' best interests to be placed with David. Both boys testified that they did not like the week on, week off joint custody arrangement and liked living with David. They indicated they enjoyed living at the marital residence because of the animals and the farming activities they did with David. David opined that the joint custody arrangement did not work for the boys; however, they were thriving and comfortable living with him, and their behavior and grades had improved as a result of having more structure and stability. Based on

the record before us, we cannot find that the district court abused its discretion in awarding custody of A.B. and Z.B. to David.

In the alternative, Linda argues that the district court should have awarded joint legal and physical custody of A.B. and Z.B., returning to the alternating weekly schedule. As explained above, both boys indicated a desire to primarily reside with David, and David testified that allowing the boys to have a primary residence worked better for them and has improved their behavior and grades. We therefore find no abuse of discretion in the parenting time schedule.

Child Support Calculation.

Linda asserts that the district court erred in its calculation of child support in two respects. First, she claims that the court's calculation of David's income is incorrect because the court should have utilized the parties' 2012 joint tax return to determine the income he earns from farming. In addition, Linda argues that the court improperly treated the adoption subsidy as income rather than using it to offset any child support obligation owed. We find no abuse of discretion in the calculation of David's farming income. However, although we do not agree that the amount of child support owed should be offset by the adoption subsidy, we agree with Linda that the court's treatment of the subsidy as income was error.

[6,7] The paramount concern and question in determining child support is the best interests of the child. See *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009). In general, child support payments should be set according to the Nebraska Child Support Guidelines, adopted by the Nebraska Supreme Court, which are presumed to be in the best interests of the child. See *id.*

[8,9] In calculating child support, the court must consider the total monthly income, defined as income of both parties derived from all sources. Neb. Ct. R. § 4-204 (rev. 2016). Thus, all income from employment must be included in the

initial calculation, which then becomes a rebuttable presumption of appropriate support. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

In the present case, the district court calculated David's monthly income by utilizing the income he earns from the telephone company and adding $200 for farming income. Linda claims that David's farming income should have been established using the parties' 2012 joint tax return, which indicated the yearly farming income was $19,388.

[10,11] The Nebraska Child Support Guidelines provide that copies of at least 2 years' tax returns, financial statements, and current wage stubs should be furnished to the court for purposes of determining the parents' income in order to calculate child support. § 4-204. Nebraska courts have recognized that income derived from farming is subject to fluctuations. See, *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007); *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012); *Willcock v. Willcock*, 12 Neb. App. 422, 675 N.W.2d 721 (2004). Thus, the use of income averaging when dealing with farm income has been approved for purposes of calculating child support. Specifically, the Nebraska Child Support Guidelines provide that in the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent. See Neb. Ct. R. ch. 4, art. 2, worksheet 1, fn.5 (rev. 2015). In *Gress v. Gress, supra*, the Supreme Court discussed at length the number of years that a court should use when averaging income pursuant to the Nebraska Child Support Guidelines and concluded that a 3-year average tended to be the most common approach in cases where a parent's income fluctuates.

In the present case, however, the only evidence provided to establish David's farming income was the 2012 tax return. Linda testified that their farming income fluctuated and that some years it was higher than the earnings in 2012. The district court made a factual finding that the income David earned in

2012 from farming did not accurately represent a "typical" year and, therefore, did not utilize that figure to calculate David's total monthly income.

[12,13] In our de novo review of a judgment in marriage dissolution proceedings, when the evidence is in conflict, we consider, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Catlett v. Catlett*, 23 Neb. App. 136, 869 N.W.2d 368 (2015). Thus, we give weight to the fact that the district court found the 2012 tax return was not an accurate representation of David's farming income. Unfortunately, while there is no dispute that David earns some amount of income from farming, the parties failed to elicit any testimony which would allow the district court, and this court, to determine an appropriate or average income. Moreover, Linda did not request all exhibits offered and received at trial in her praecipe for the bill of exceptions; therefore, the record on appeal does not contain all of the exhibits received into evidence at trial. We are unable to determine whether any exhibits offered and received at trial would support Linda's argument that the court should have used a higher farming income. As a result of her failure to present a record which would support her argument, we can find no abuse of discretion. As a general proposition, it is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors. *Centurion Stone of Neb. v. Whelan*, 286 Neb. 150, 835 N.W.2d 62 (2013). We therefore cannot find that the district court abused its discretion in setting David's farm income at $200 per month.

[14,15] Linda also asserts that the district court erred in considering the adoption subsidy as income for purposes of calculating child support. She argues that the subsidy is similar in nature to the payment of a Social Security benefit and that therefore, it should be considered an offset to any child support owed. At the outset, we recognize that although Linda now

claims the district court's inclusion of the adoption subsidy as income was error, the proposed child support worksheet she submitted to the court at trial also treated the subsidy as income. Generally, a party cannot complain of error which the party has invited the court to commit. *McDonald v. McDonald*, 21 Neb. App. 535, 840 N.W.2d 573 (2013). However, parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement, *id.*, because the paramount concern and question in determining child support is the best interests of the child, see *id*. We therefore address this argument in order to determine whether the child support ordered is consistent with the best interests of the children.

The issue of how adoption subsidies should be treated with regard to an award of child support is one of first impression in this jurisdiction. Linda relies on *Johnson v. Johnson*, 290 Neb. 838, 862 N.W.2d 740 (2015), to support her argument in favor of offsetting any child support obligation by the amount of the subsidy. Her reliance on *Johnson* is misplaced, however. The children in *Johnson* received Social Security disability payments as a result of their father's status as a retired taxpayer, and the issue on appeal was whether the father should have been given credit against his child support obligation for the Social Security benefits which were paid to his children. The appeal was taken from a modification action, and the benefits had not been disclosed to the court at the time of the divorce proceedings. Therefore, the Supreme Court affirmed the trial court's treatment of the Social Security payments as a gratuity and declined to give the father child support credit for the benefits paid to his children.

This court has also addressed the treatment of Social Security benefits. See *Ward v. Ward*, 7 Neb. App. 821, 585 N.W.2d 551 (1998). In *Ward*, a child began receiving Social Security benefits after her mother passed away. The child's father remarried, and his second wife adopted the child. When the father and his second wife divorced, at issue was whether the Social Security

payments should offset some of the money each parent owed in child support. We held that the benefits should offset child support and reduced the amount of each parent's obligation by a proportion of the Social Security payment equal to that parent's share of the child support needs.

[16,17] In *Johnson* and *Ward*, the children were receiving Social Security benefits as a result of their parents' employment. The Supreme Court in *Johnson* observed that Social Security benefits in those instances are not a mere gratuity from the federal government but have been earned through the parent's payment of Social Security taxes. The Supreme Court reiterated that a request to apply Social Security benefits to a child support obligation in those circumstances is merely a request to identify the source of payment, and a Social Security benefit can serve as a substitute source of income. See *Johnson v. Johnson, supra*.

The Supreme Court reached a different conclusion, however, in *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007). There, the parties' youngest child received Social Security benefits as a result of having Down syndrome. When calculating the father's child support obligation, the trial court disregarded the Social Security benefits, and the father challenged that decision on appeal. In support of his argument that his child support obligation should be reduced in light of the Social Security benefits, the father cited to *Ward v. Ward, supra*. The Supreme Court found *Ward* distinguishable in part because of the basis for the Social Security benefits, stating:

> [I]t is well established that children with actual disabilities like Down syndrome have special needs above and beyond the needs of most children. All children have support needs, but special-needs children require additional financial support to overcome developmental, cognitive, or physiological problems. With this in mind, the federal government provides Social Security to such children with the intent that it will "supplement other income, not substitute for it." In contrast, the money allocated to

> the youngest child under the [Nebraska Child Support Guidelines] is meant to provide for the basic needs all children have. To construe one source of money as satisfying both needs would leave either his basic or his special needs unfulfilled.

Gress v. Gress, 274 Neb. at 700, 743 N.W.2d at 79.

[18] The *Gress* court also recognized that unlike a child with a disability, a child who loses a parent at a young age does not necessarily have special needs that will lead to increased support costs, and in that context, Social Security benefits are intended to account for the fact that the child has lost a source of support for his or her basic needs. The court found that using Social Security benefits to offset a portion of child support costs is not necessarily a problem under the circumstances presented by *Ward*, but it was not appropriate to offset child support costs where, as in *Gress*, the Social Security benefits are intended to mitigate the additional costs that accompany disabilities. The *Gress* court therefore held that the district court did not abuse its discretion when it disregarded the Social Security benefits for purposes of calculating child support.

Stated another way, Social Security benefits paid to a child as a result of the disability or death of a parent are distinguishable from those benefits paid as a result of the child's disability. Social Security benefits may be used to offset a parent's payment of child support under the Nebraska Child Support Guidelines to provide for the child's basic needs, because the benefits are intended to replace the parent's income source. However, Social Security benefits may not be used to offset a child support obligation for a child with special needs, because the benefits are intended to supplement the parent's income and mitigate the increased costs associated with supporting a special needs child.

The question of whether the adoption subsidy in the present case should offset Linda's child support obligation is resolved by determining whether the subsidy constitutes a substitute for

an income source or whether it is intended as a supplement to income. Courts in other jurisdictions have concluded that the purpose of an adoption subsidy is to serve as a supplement to income, not as a replacement for a parent's income, and that those payments therefore do not offset or otherwise serve as a credit against a parent's child support obligation. See, *In re Marriage of Thomas*, 49 Kan. App. 2d 952, 318 P.3d 672 (2014); *W.R. v. C.R.*, 75 So. 3d 159 (Ala. Civ. App. 2011); *Gambill v. Gambill*, 137 P.3d 685 (Okla. Civ. App. 2006); *In re Marriage of Bolding-Roberts*, 113 P.3d 1265 (Colo. App. 2005); *Strandberg v. Strandberg*, 664 N.W.2d 887 (Minn. App. 2003); *Hamblen v. Hamblen*, 203 Ariz. 342, 54 P.3d 371 (Ariz. App. 2002).

In the instant case, the children receive the adoption subsidy because of their special needs. Thus, the subsidy is not intended to replace a source of income in order to provide for the children's basic needs; rather, it is provided to alleviate the additional costs of the children's special needs. As the Arizona Court of Appeals observed in *Hamblen v. Hamblen, supra*, it would be inappropriate to adjust a child's entitlement to financial support because the government has elected to subsidize the increased financial commitment that a special needs child imposes on the parents. The court further observed that the subsidy is but an addition to a parent's obligation of financial support and that if it were credited against the parent's child support obligation, it would, in effect, eliminate the supplementary effect of the subsidy. Accordingly, Linda's child support obligation should not be offset by the amount of the adoption subsidy.

We recognize, as David argues, that the Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, the court must consider the total monthly income, defined as the income of both parties derived from all sources, except all means-tested public assistance benefits. See § 4-204. However, we do not agree that the adoption subsidy is considered income of the parents.

[19] Social Security disability benefits paid to a mother and her child as a result of the mother's disability have been included in the mother's income calculation because, as recognized above, such Social Security benefits are received in lieu of the parent's income. See *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001). Other jurisdictions have determined, however, that adoption subsidies should not be included in the calculation of the parents' income for child support purposes because the subsidy is not income to the parent; rather it belongs to the child. See, *Strandberg v. Strandberg, supra*; *Hamblen v. Hamblen, supra*; *County of Ramsey v. Wilson*, 526 N.W.2d 384 (Minn. App. 1995); *A.E. v. J.I.E.*, 179 Misc. 2d 663, 686 N.Y.S.2d 613 (N.Y. Sup. 1999). In *Hamblen*, the Arizona Court of Appeals observed that "the United States Department of Health and Human Services explicitly states in its Child Welfare Policy Manual" that "'[f]oster and adoptive parents are not recipients of Federal foster care and adoption assistance payments; rather, foster care and adoption assistance payments are made on the child's behalf to meet his or her needs.'" 203 Ariz. at 345, 54 P.3d at 374.

As a result, we find that the district court erred in treating the adoption subsidy as income for the purposes of calculating child support. We also reject Linda's assertion that she is entitled to an offset of the child support obligation she owes to David, because the adoption subsidies are intended to assist Linda and David with the increased costs associated with raising children with special needs above and beyond the amount of basic support contemplated by the Nebraska Child Support Guidelines. We therefore reverse the child support calculation and remand the cause with directions to the district court to recalculate child support excluding the adoption subsidy. Based on our affirmance of the custody award, David is entitled to the adoption subsidy for A.B. and Z.B., and Linda is entitled to the subsidy for H.B.

[20] Linda also assigns error with respect to the dependency exemptions the district court awarded, but she does not argue

this error. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015). We therefore do not address this argument.

Property Division.

Linda assigns error with respect to various aspects of the district court's classification, valuation, and division of the parties' property. We address her arguments individually below.

[21] Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Plog v. Plog*, 20 Neb. App. 383, 824 N.W.2d 749 (2012).

[22,23] Linda first challenges the division of three retirement accounts she claims were her premarital property. The accounts are individually identified on the joint property statement. Property which one party brings into the marriage is generally excluded from the marital estate. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding. *Id.*

Linda testified that the accounts were established prior to the marriage and contained premarital funds. There was no evidence presented, however, as to whether she contributed any funds to the accounts during the marriage. Thus, we are unable to discern whether the balances of the accounts as of the time the parties separated contained only premarital funds or a combination of marital and premarital funds. The district court apparently faced the same difficulty, stating in the decree that because neither party made any clear record regarding

the premarital values of the retirement accounts, it divided the accounts equally between the parties. Therefore, Linda has not met her burden of proving the funds are nonmarital, and we find no merit to this argument.

Linda next challenges the district court's decision to give David a credit of $21,000 for proceeds from the sale of his premarital home. She claims there was no evidence that he used any of those proceeds toward the marital home, and even if there were, she contributed to increasing the value of David's premarital home.

The parties lived in David's premarital home for the first few years of their marriage. Linda testified that during that time, they made minor repairs to the home such as painting, fixing a stairwell, repairing some plaster, and replacing some carpet. Linda was asked whether her assistance in improving the property had anything to do with the sale price of the home when it was sold, and she indicated that it did. The home was sold for $37,000 in 2003, and David testified that $21,000 of the proceeds from the sale went directly into the marital residence. Thus, we disagree with Linda's contention that there was no evidence presented to establish that any of the proceeds from the sale were put toward the marital residence.

[24] In the alternative, Linda argues that the court should have applied the exception to the general principle set out in *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982). The *Van Newkirk* exception applies where both of the spouses have contributed to the improvement or operation of nonmarital property or where the spouse not owning the nonmarital property has significantly cared for the property during the marriage. See *Van Newkirk v. Van Newkirk, supra*.

[25] When applying the *Van Newkirk* exception, evidence of the value of the contributions and evidence that the contributions were significant are generally required. *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). In *Tyler*, the wife brought a home from a prior marriage into the marriage. The husband and the wife lived in the wife's house, sold it,

and purchased another, and then another, and finally a fourth home which became the focus of the appeal. This court, in a memorandum opinion, modified the divorce decree to require the wife to pay the husband half of the equity in the final home owned by the parties, and the Supreme Court reversed. The *Tyler* court said that each time the *Van Newkirk* exception had been applied, the Supreme Court "has required evidence of the value of the contributions and evidence that the contributions were significant." 253 Neb. at 213, 570 N.W.2d at 320. The court in *Tyler* then recited an extensive list of items which the evidence suggested the husband did to the home to improve it, such as building a deck, carpeting and painting the family room, replacing kitchen countertops, and installing four ceiling fans. However, the *Tyler* court observed that the husband failed to produce any evidence indicating the value of these contributions and that he failed to demonstrate "the significance of the aforementioned contributions." 253 Neb. at 214, 570 N.W.2d at 320.

In the present case, based on our de novo review of the record, we find that Linda failed to establish the monetary value of her contributions to the home and demonstrate that her contributions were significant. Even if Linda's work improved the home's value, she failed to attribute the increase in value to substantial contributions she made because she did not do the work alone. Accordingly, we conclude that the district court did not abuse its discretion in awarding David a $21,000 credit for his premarital property.

Linda next asserts that the district court erred in failing to classify livestock included on the joint property statement as a marital asset. The joint property statement lists eight feeder calves and eight pairs of cows and calves; David indicated that neither he nor Linda was the owner of the cows, whereas Linda assigned a total value to them of $28,800. At trial, David's mother was asked about the cows and calves listed on the property statement, and she testified that she and her husband owned them as of November 2013. David confirmed

his mother's testimony that his parents owned that particular livestock.

Linda notes that the parties claimed five stock cows on their 2012 joint tax return; through October 2012, she and David insured $14,000 worth of stock cows; and as of June 2013, they insured six head of stock cows and six head of stock calves. Thus, she argues, they clearly have cattle as marital assets, and the court should have entered a value of $28,800 and assigned the value to David.

We understand Linda's argument that at least as late as June 2013, the parties themselves acknowledged through their insurance policy that they owned cattle. However, there was no evidence offered at trial that as of the date of separation, the cows and calves listed on the property statement belonged to Linda and David, particularly when the only testimony at trial was from David and his mother that the parties were not the owners of the livestock listed on the property statement. We therefore cannot find that the district court abused its discretion in failing to classify the livestock as a marital asset.

Next, Linda contends that the district court erred in classifying and valuing a savings account held at a credit union. The court placed a value of $7,850 on the account, classified it as a marital asset, and awarded it to Linda. Linda claims the account was her premarital property and had a balance of only "$0.07" at the time of separation. Brief for appellant at 34. She asserts that "David's own Exhibit 52 confirms that the account [should be] valued at $0.07." *Id.* However, exhibit 52 is not contained in our record on appeal, so we are unable to verify Linda's claim. We also note that David testified that the first date of business for the account was in January 2013, testimony which appears to refute Linda's claim that she owned the account prior to the marriage. Further, on the parties' joint property statement David placed a value of $7,850 on the savings account, a value which was accepted by the district court. Again, we reiterate that it is Linda's burden, as the appellant, to supply a record that supports her

assignments of error. See *Centurion Stone of Neb. v. Whelan*, 286 Neb. 150, 835 N.W.2d 62 (2013). Because of her decision to request only certain exhibits in her praecipe for the bill of exceptions, we cannot find on the record before us that the district court's valuation and classification of the account was an abuse of discretion.

Finally, Linda asserts two claims with respect to the marital residence. She first argues that the court's valuation of the property was erroneous. The district court accepted David's value of $129,980 for the home and found that David was entitled to a credit of $21,000 for his premarital contribution; thus, the court's final valuation of the residence was $108,980. Linda claims the correct value was $330,000, a sum which includes the residence, the 45 acres of land upon which the home sits, and the other structures on the land. The court, however, determined that the 45 acres of land was David's premarital property because he purchased it prior to the marriage. Thus, the question is whether the district court properly classified the 45 acres of land as premarital property or whether the true value of the marital residence should include the value of the land as well.

[26-30] Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance. *Id*. Setting aside nonmarital property is simple if the spouse possesses the original asset, but can be problematic if the original asset no longer exists. *Id*. Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse. *Id*. If the separate property remains segregated or is traceable into its product, commingling does not occur. *Id*. The burden of proof rests with the party claiming that property is nonmarital. *Id*.

The parties agree that David purchased the land in 1996, which was prior to the marriage, and the land retained its

original form when the parties separated. David secured a loan to fund the purchase and continued to make payments on the loan until 2003. David testified that he applied $16,000 of proceeds from the sale of his premarital residence to pay off the loan on the land. To the contrary, Linda testified that the remaining balance on the loan was wrapped into the mortgage they secured on the marital residence. The trial court apparently found David's testimony more credible than Linda's, a finding to which we afford weight in our de novo review. See *Catlett v. Catlett*, 23 Neb. App. 136, 869 N.W.2d 368 (2015). Thus, David met his burden of proving the property was nonmarital.

There is some evidence establishing that David used marital funds between 2001 and 2003 to make the loan payments for the land. However, there was no evidence as to the amount of money used, and therefore, we cannot find that the district court abused its discretion in classifying the 45 acres of land as David's premarital property. Accordingly, the proper value of the marital residence includes the home only, and not the land upon which it sits.

Linda also claims that the court erred in dividing the residence's unpaid property taxes from 2012 and 2013 equally between the parties. She argues that as of December 10, 2013, the parties stipulated that David have "exclusive use" of the marital residence, and thus, he was obligated to pay the costs associated with maintaining the residence. Brief for appellant at 36. Despite Linda's claim, the temporary stipulation signed by the parties provided that Linda receive exclusive use of the parties' residence from December 9, 2013, at 7 p.m. until April 1, 2014, or such time she notified David otherwise. The evidence reveals, however, that Linda chose not to reside there after being granted exclusive possession due to safety concerns.

[31] Regardless, the property taxes for 2012 and 2013 were incurred during the marriage, and Linda resided in the house during 2012 and the majority of 2013. Marital debt is

defined as a debt incurred during the marriage and before the date of separation, by either spouse or both spouses, for the joint benefit of the parties. *Finley-Swanson v. Swanson*, 20 Neb. App. 316, 823 N.W.2d 697 (2012). The parties remained together and lived jointly in the home until separating in the fall of 2013. Accordingly, we find no abuse of discretion in the court's treatment of the tax obligation as a marital debt and dividing it equally between the parties.

Finally, Linda asks that we order the marital residence to be sold and the proceeds split between the parties. We decline to do so. The district court properly classified the residence as marital property and awarded it to David. We have rejected all of Linda's arguments as to the court's division of property either because we find the district court's decision was not an abuse of discretion or because she failed to produce a record sufficient for our review to support her arguments. Accordingly, we affirm the classification, valuation, and division of property, including the equalization payment, in its entirety.

Attorney Fees.

[32,33] Linda argues that the district court erred in failing to award her attorney fees. In a dissolution of marriage case, an award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000). The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and general equities of the case. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

[34] Linda requested that her attorney fees of $20,000 be considered a marital liability and considered as a reduction in the amount of net marital assets awarded to her. As noted

above, a marital debt is one incurred during the marriage and before the date of separation for the joint benefit of the parties. See *Finley-Swanson v. Swanson, supra*. In *Finley-Swanson*, we held that the attorney fees incurred by the parties during the pendency of the dissolution proceedings did not constitute a marital debt because they were incurred after the parties were estranged and the wife filed the complaint for dissolution of marriage and that thus, they were clearly not for the parties' joint benefit.

The same is true in the present case. The attorney fees Linda owes were incurred after she and David had separated and were not for their joint benefit. Therefore, they were properly treated as Linda's separate obligation.

In our de novo review, we have considered the general equities of the case as well as the other relevant factors. This case involved multiple contested issues, including custody of A.B. and Z.B., child support, alimony, and property division. Linda asserts that she incurred additional fees as a direct result of David's actions, but the district court found, and we agree, that it appears "both of the parties litigated the issues with a high degree of contentiousness." We therefore find no abuse of discretion in denying Linda's request for attorney fees and ordering each party to pay its respective fees.

CONCLUSION

We conclude that the district court erred in treating the adoption subsidy as income for the purposes of calculating child support. We therefore reverse that portion of the decree and remand the cause with directions to the district court to recalculate child support without considering the adoption subsidy. The decree is otherwise affirmed.

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

Nicole K. Thompson, appellee, v.
Justin D. Thompson, appellant.
887 N.W.2d 52

Filed October 25, 2016. No. A-15-708.

1. **Child Custody: Appeal and Error.** Child custody determinations, and parenting time determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
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. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
5. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
6. **Visitation.** The trial court has discretion to set a reasonable parenting time schedule.
7. ____. The determination of the reasonableness of a parenting plan is to be made on a case-by-case basis.
8. ____. Parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent.

9. ____. The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights.
10. **Visitation: Courts.** District courts are not statutorily required to grant equal parenting time if such is not in the child's best interests.
11. **Parent and Child.** The best interests of a child require that the child's family remain appropriately active and involved in parenting with safe, appropriate, continuing quality contact between the child and the child's family when they have shown the ability to act in the best interests of the child and have shared in the responsibilities of raising the child.

Appeal from the District Court for Lincoln County: Donald E. Rowlands, Judge. Affirmed in part, and in part reversed and remanded with directions.

James C. Bocott, of Law Office of James C. Bocott, P.C., L.L.O., for appellant.

Kim M. Seacrest, of Seacrest Law Office, for appellee.

Inbody, Riedmann, and Bishop, Judges.

Riedmann, Judge.

INTRODUCTION

Justin D. Thompson appeals from the order of the district court for Lincoln County which dissolved his marriage to Nicole K. Thompson, divided the marital property, and awarded custody and parenting time of their minor child. We find that the parenting time awarded to Justin was an abuse of discretion; therefore, we reverse that portion of the decree and remand the cause for formulation of a new parenting plan.

BACKGROUND

Justin and Nicole were married in 2007, and their child was born in 2011. The parties separated in August 2013, and Nicole filed for dissolution of the marriage. Each party requested custody of the minor child. In a temporary order, the district court awarded custody of the child to Nicole and granted Justin parenting time every other weekend.

Trial was held in May 2015. Relevant to this appeal, evidence was presented as to the strengths and weaknesses of

Justin and Nicole relating to their fitness for custody of the child. Nicole works at an urgent care center Monday through Friday from approximately 8 a.m. until 5 p.m., but she has some flexibility in her hours. Nicole usually drops the child off at daycare and picks her up after work.

Justin is a firefighter who typically works 24 hours on, 24 hours off until he has worked for 5 days, and then he has 6 consecutive days off. Thus, instead of sending the minor child to daycare when Nicole is working but Justin is not, Justin requested he receive parenting time during his days off. This was the arrangement the parties utilized during the marriage, where Justin or his mother would watch the child while Nicole was working.

Nicole acknowledged that Justin and the child have always had a close relationship. Nonetheless, she requested that he continue to receive parenting time every other weekend in order to maintain the schedule imposed in the temporary order, which Nicole believed was working well for the child. She did not believe that allowing the child to be with Justin on his days off would work well for the child.

Justin and Nicole communicate through text messages, and Nicole testified that their communication is "very, very sparse." They do not speak in person, and the exchange of the minor child is facilitated by the paternal grandparents pursuant to the temporary order. Nicole said she and Justin do not parent together at all, and when asked whether joint custody should be considered, she stated, "Not at all." She said that any kind of joint parenting would be "[v]ery unrealistic" at this point and would "[a]bsolutely" affect the child because she and Justin are unable to communicate about simple things. Rather than their communication improving after their separation, it deteriorated to the point where Nicole said there is virtually no communication between them.

Nicole testified about some of Justin's behaviors during the marriage. She described experiencing some physical and verbal abuse, including an incident where he struck her. She claimed he drank to excess, which exacerbated his anger.

There was an incident in July 2014 where Justin had been drinking alcohol, "got his pistol out of the gun safe," and threatened to commit suicide. Justin admitted to suffering emotional issues during the years prior to trial, including being suicidal at times. After the July 2014 incident, he completed an outpatient mental health program, and according to Justin, he has not had any additional mental health issues or thoughts of suicide since then.

The child's daycare provider testified and described several instances where Justin would show up at her home and act inappropriately, including times when he would become very emotional and cry, which would upset the minor child. Although Nicole timely pays her portion of the child's daycare expenses, the provider continuously had problems with Justin's portion. There have been times when Nicole had to pay Justin's share of the expenses to avoid losing the child's position in daycare. Justin remained behind on his payments as of the time of trial. Justin described his difficulty in budgeting for his monthly expenses, but admitted to traveling on numerous occasions in 2014 and 2015, including an overnight trip to a concert in Wyoming, a ski trip to Colorado, a trip to Florida, and a trip to a concert in Omaha, Nebraska.

During Justin's testimony, he offered an exhibit, marked as exhibit 22, into evidence. Exhibit 22 was described as a memorandum order from "this [c]ourt" that counsel shared with Justin and that Justin understood to be the standard parenting time schedule utilized by the trial court. Nicole objected to allowing exhibit 22 into evidence, arguing that it had no purpose, did not apply to the present case, and was outdated because it had been modified since its original creation in 1999. The objection was sustained.

The dissolution decree was filed on May 27, 2015. The district court found that each party was a fit and proper person to have the care, custody, and control of the minor child. After observing the demeanor of each of the witnesses and considering all of the evidence, the court found that the best interests

of the minor child would be served by placing her custody with Nicole subject to the right of reasonable parenting time with Justin.

The district court determined that the parties equally coparented the child until they separated, at which time Nicole became the primary parent, and found the evidence was "crystal clear" that Nicole has properly cared for the child and is a loving mother who puts the child's welfare above all other matters. The court acknowledged that Justin is an "excellent father" who desires to spend as much time as possible with the child. The court also noted, however, several negative factors about Justin that were revealed during trial, including his contemplation of suicide, the incident of domestic assault against Nicole, his failure to promptly pay daycare expenses while taking extended vacations, and his emotional displays at the daycare provider's residence. The court summed up the evidence by concluding that Nicole's emotional stability is substantially greater than Justin's.

The court observed that it is "unfortunate" that Justin and Nicole "have virtually no communication with each other" and found that although some type of joint custody arrangement might have been an "optimum situation" if the parties had a better relationship with each other, joint custody was "obviously not feasible at the present time." Therefore, the court ordered parenting time for Justin every other weekend from Friday at 6 p.m. to Sunday at 6 p.m. and two holidays per year. Justin timely appeals to this court.

ASSIGNMENTS OF ERROR

Justin assigns that the district court erred in (1) refusing to admit exhibit 22 into evidence, (2) finding that the court-ordered parenting plan was in the best interests of the child, and (3) finding that the standard visitation schedule was in the best interests of the child and improperly shifting the burden of proof to him to prove that the standard schedule is not in the best interests of the child.

STANDARD OF REVIEW

[1,2] Child custody determinations, and parenting time determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id*.

ANALYSIS

Exhibit 22.

Justin argues that the district court erred in sustaining Nicole's objection to exhibit 22 and refusing to receive it into evidence. We disagree.

[3-5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013). 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*. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 2008).

In the present case, the factual determination to be made by the district court was which custody and parenting time arrangement was in the best interests of the parties' minor child. During direct examination, Justin's attorney sought to introduce exhibit 22 into evidence through Justin. The purpose

of the offer was apparently to show that the court utilizes a standard parenting plan that provides for parenting time every other weekend from Friday to Sunday with alternating time on four holidays and 6 weeks of summer parenting time. Justin was allowed to testify as to the content of the standard parenting plan and state his opinion that such a plan was not in the best interests of his child. The court sustained Nicole's relevancy objection on the basis that the exhibit was not the current version of the court's standard plan.

The focus of Justin's testimony was to support his request for custody of the child or, in the alternative, more parenting time than he received in the temporary order. Nothing about an outdated standard parenting time schedule tends to prove that awarding Justin custody or additional parenting time would be in the best interests of this child.

Although the fact that the court will utilize a standard plan could generally support Justin's argument on appeal that the court does not tailor its parenting plans to the specificities of each case, from an evidentiary standpoint, the exhibit does not tend to make the existence of a fact of consequence any more or less probable. In other words, exhibit 22 does nothing to prove or disprove that Justin should be awarded custody or, in the alternative, more parenting time. As a result, the district court did not abuse its discretion in sustaining Nicole's objection and refusing to admit exhibit 22 into evidence.

Court-Ordered Parenting Plan.

Justin claims that the district court abused its discretion in finding that the court-ordered parenting plan was in the child's best interests. We agree, and therefore, we reverse this portion of the decree and remand the cause to the district court to create a parenting plan that takes into consideration Justin's availability to parent his child.

[6-9] The trial court has discretion to set a reasonable parenting time schedule. See *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). The determination of reasonableness is to be made on a case-by-case basis. *Id*. Parenting

time relates to continuing and fostering the normal parental relationship of the noncustodial parent. See, *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001); *Walters v. Walters*, 12 Neb. App. 340, 673 N.W.2d 585 (2004). The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights. *Id*. The best interests inquiry has its foundation in both statutory and case law.

Neb. Rev. Stat. § 43-2923(6) (Cum. Supp. 2014) provides that in determining custody and parenting arrangements:

> [T]he court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of . . . :
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning; [and]
>
> (c) The general health, welfare, and social behavior of the minor child.

[10] In addition to these factors, the Nebraska Supreme Court has previously held that in determining a child's best interests, courts

> "'may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of

> chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.'"

Davidson v. Davidson, 254 Neb. 357, 368, 576 N.W.2d 779, 785 (1998). The relevant Nebraska statutes do not require a district court to grant equal parenting time if such is not in the child's best interests. See *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009).

In the present case, the district court made detailed factual findings in its order, concluding that although Justin and Nicole are both fit and proper parents, placing custody with Nicole subject to Justin's parenting time was in the child's best interests. The court characterized Justin as an "excellent father" who "clearly . . . desires to spend as much time as possible with his minor child."

However, under the parenting plan the district court created, Justin received parenting time with the minor child only 4 days per month. We find that arrangement constitutes an abuse of discretion when considering the evidence presented at trial. Importantly, the parties shared parenting responsibilities when they were married, with Justin taking care of the child on his days off while Nicole was working. Additionally, Justin has an atypical work schedule which allows him approximately 20 days off per month, time he could be spending with the child. Nicole provided no justification for limiting Justin's parenting time to every other weekend except for maintaining the arrangement provided in the temporary parenting plan. In other words, Nicole expressed no concern about the child spending additional time with Justin. The district court found Justin to be an "excellent father," and despite acknowledging some of Justin's shortcomings, the court appeared to favor a joint custody arrangement but for the parties' communication issues. Thus, the decision to award Justin such limited parenting time appears not to be based upon Justin's behaviors, but, rather, solely on the parties' inability to communicate with each other.

[11] The best interests of a child require that the child's family remain appropriately active and involved in parenting with safe, appropriate, continuing quality contact between the child and her family when they have shown the ability to act in the best interests of the child and have shared in the responsibilities of raising the child. See § 43-2923. Based on the facts of this case, we find that allowing Justin parenting time only every other weekend constitutes an abuse of the trial court's discretion. We therefore reverse the parenting plan and remand the cause for creation of a new parenting plan that is tailored for the best interests of this child.

Because we find that the parenting plan ordered by the district court is not in the child's best interests and we remand the cause to the district court with directions to devise a parenting plan that takes into consideration Justin's available parenting days, we need not address Justin's assignment of error regarding whether the district court erroneously shifted the burden to him to prove its standard visitation schedule was not in the child's best interests.

CONCLUSION

We conclude that the district court did not abuse its discretion in sustaining the objection to exhibit 22. However, awarding Justin only two weekends of parenting time per month under the parenting plan was an abuse of discretion. We therefore reverse that portion of the decree and remand the cause for formulation of a new parenting plan taking into consideration Justin's available parenting days.

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

In re Trust Created by Phyllis L. Haberman. George Haberman, appellant, v. Mary Lou Haberman et al., appellees.

886 N.W.2d 829

Filed November 1, 2016. No. A-15-811.

1. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.
2. **Trusts.** Under Neb. Rev. Stat. § 30-3855(a) (Cum. Supp. 2014), while a trust is revocable, rights of the beneficiaries are subject to the control of the settlor.
3. ____. The settlor of a written revocable trust may revoke or amend the trust by substantial compliance with a method provided in the terms of the trust.
4. ____. The amendment of a revocable trust terminating a beneficiary's interest in the trust property invalidates any earlier agreements that the beneficiary may have entered into with respect to the beneficiary's interest in the trust corpus.
5. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the 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.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the County Court for Adams County: Robert A. Ide, Judge, Retired. Affirmed.

David V. Drew, of Drew Law Firm, P.C., L.L.O., for appellant.

Daniel E. Klaus, Rembolt Ludtke, L.L.P., for appellees.

Moore, Chief Judge, and Inbody and Pirtle, Judges.

Per Curiam.

INTRODUCTION

This case concerns the disposition of the property contained in the Phyllis L. Haberman Revocable Trust following the death of the trust's settlor, Phyllis L. Haberman. George Haberman, one of Phyllis' sons, contends that he is entitled to a portion of the trust property despite an amendment to the trust excluding George as a beneficiary. George argues that an earlier agreement between himself, the trust, and his siblings—Phillip Haberman, Rex S. Haberman II, and Mary Lou Haberman—should govern the current disposition of the trust corpus. Upon our review, we affirm the county court's decision holding that George is not entitled to a portion of the trust property.

BACKGROUND

Phyllis created the revocable trust at issue in this case in 1996. The trust corpus consisted primarily of land interests held by the family company, R and P Limited Partnership (R and P), and additional property which was separately owned by Phyllis and her spouse.

The 1996 trust agreement named as its beneficiaries Phyllis; Phyllis' four children—George, Phillip, Rex, and Mary Lou; and Phyllis' husband who predeceased her and who is not a part of the present dispute. The trust provided that upon the death of Phyllis and her spouse, George, Phillip, and Mary Lou would each receive equal shares of R and P, and Rex would receive parcels of real estate located in Kimball County, Nebraska. Any remaining trust assets were to be equally divided among the four siblings.

The declaration of trust document also provided that the trust could be amended or revoked as follows:

> GRANTOR specifically reserves the following rights during [her] lifetime:

> . . . To remove the TRUSTEE and appoint a successor and to modify or alter this Declaration of Trust in whole or in part by an instrument in writing signed by GRANTOR and delivered to the TRUSTEE or to revoke this trust agreement in whole or in part by similar writing . . . .

It appears that following the creation of the trust, Phyllis initially made two different amendments to the trust. These first two amendments do not appear in the record before us and are not at issue in this appeal.

In 2005, following an incident in which Phyllis attempted suicide, Mary Lou was appointed as the guardian and conservator for Phyllis. Mary Lou testified that the conservatorship was terminated in August 2007. It appears that the guardianship lasted until Phyllis' death.

On February 17, 2006, R and P was merged into a newly created company, Roses and Wheat, L.L.C. At trial, the attorney who represented Phyllis, her husband, and the family's business entities testified that he recommended the merger of R and P into Roses and Wheat because the limited liability corporation provided a better format to administer the business. Roses and Wheat acquired all the assets previously held by R and P. Phyllis' trust, Phyllis' husband's trust, and the four siblings were listed as Roses and Wheat's managers.

Also on February 17, 2006, various members of the Haberman family executed a document entitled "Agreement Among Parties," which George now contends governs the disposition of the trust property. The agreement among parties stated that it was made by and between Roses and Wheat, Phyllis' husband's trust, the four siblings, and "the Phyllis L. Haberman Revocable Trust, Phyllis Haberman, Trustee (by Mary Lou Haberman)." The agreement among parties stated, in relevant part, as follows:

> WHEREAS, upon the death of Phyllis L. Haberman, three of her children, namely Mary Lou Haberman, George Haberman, and Phillip Haberman, are to receive

equal interests in ROSES AND WHEAT, L.L.C. representing approximately seventy five percent (75%) of the value of the real estate held by [Phyllis' trust and her spouse's trust]. Phyllis L. Haberman's other child, Rex Haberman II, upon the death of Phyllis L. Haberman, is to receive a specific bequest of land held by [Phyllis' trust and her spouse's trust]. Land to be received by Rex Haberman II represents approximately twenty-five percent (25%) of the value of the real estate held by [Phyllis' trust and her spouse's trust].

WHEREAS, the parties to this instrument desire an orderly distribution of the real estate upon the death of Phyllis L. Haberman.

WHEREAS, the parties desire that upon the death of Phyllis L. Haberman, that instead of Rex Haberman II receiving a specific bequest of land from [Phyllis' trust and her spouse's trust], that the land he is to receive be transferred to ROSES AND WHEAT, L.L.C. during Phyllis L. Haberman's life and that upon Phyllis L. Haberman's death, Rex Haberman II receive a twenty-five [percent] (25%) ownership interest in ROSES AND WHEAT, L.L.C. rather than receive his specific bequest.

THEREFORE, IT IS HEREBY AGREED BY THE PARTIES:

1. That the parcels of land specifically devised to Rex Haberman, II under [Phyllis' trust and her spouse's trust] be transferred to Roses and Wheat, LLC, during the life of Phyllis L. Haberman.

2. That in consideration of the transfer in paragraph (1), Rex Haberman, II shall receive a twenty-five percent (25%) ownership interest in Roses and Wheat, L.L.C., upon the death of Phyllis L. Haberman. This 25% ownership interest is to be received in lieu of the specific devises Rex Haberman, II was to receive under [Phyllis' trust and her spouse's trust].

3. That after the death of Phyllis L. Haberman and the settlement of her estate, the ownership interests of Roses and Wheat, LLC, shall be as follows:

25% Mary Lou Haberman
25% George C. Haberman
25% Phil[l]ip J. Haberman
25% Rex S. Haberman II

The agreement was signed by the four siblings individually and by Mary Lou as "Guardian and Conservator of Phyllis."

On October 30, 2006, Phyllis executed a third amendment to her trust. By this time, the property that had been held outside of R and P had been transferred to Roses and Wheat such that Roses and Wheat held all of Phyllis and her spouse's real estate interests. The third amendment provided that upon Phyllis' death, Phyllis' membership interest in Roses and Wheat was to be distributed equally to each of her four children so that each of them would acquire a 25-percent interest in Roses and Wheat.

Starting in late 2006, there began to be increasing tension between George and his family. At the time, George had been working for Phillip, but claimed that Phillip had not paid him. George filed a complaint with Wyoming's department of labor against Phillip. During the dispute with Phillip, George misrepresented to his family that he had received calls from the Internal Revenue Service regarding Phillip's business practices. George eventually withdrew the labor complaint against Phillip.

George also became involved in a dispute with the family's farm manager regarding an unreported oil spill on property owned by Roses and Wheat. George reported Roses and Wheat to the Nebraska Department of Environmental Quality. As a result, the company was forced to incur the expense of paying for an investigation, which ultimately determined that no further action needed to be taken.

Eventually, Phillip, Rex, and Mary Lou, as managers of Roses and Wheat, voted to exclude George from a management

role in the company. Following his exclusion from Roses and Wheat's management, George undertook a number of unilateral actions to the company's detriment, including contacting the company's tenants regarding their leases and selling grain owned by the company without authorization. George also filed with the Counsel for Discipline of the Nebraska Supreme Court a complaint against the company's longtime attorney. The Counsel for Discipline found the complaint against the attorney to be unfounded and took no further action. Eventually, Mary Lou, acting as Phyllis' guardian, was granted a temporary restraining order preventing George from further interfering with Roses and Wheat's business.

The evidence at trial demonstrated that Phyllis was troubled by the discord between her children. For example, with respect to the dispute between George and Phillip over wages, Phyllis wrote to George in 2007, "Please George for your sake and my sake and our families please stop all actions that will lead to a life of long time consequences. . . . You and Phillip may not agree as to what happened but both need to forget and forgive so that life can go on peacefully." In an e-mail to all four of her children around the same time, Phyllis wrote, "Where did it all start, when did it start. Each one says the other is at fault so I wonder what it must be like to be in a family where they all get along. Heaven knows !!" Lastly, in a 2008 e-mail from Phyllis to George, Phyllis expressed her unhappiness at George's reporting the oil spill and urged him to withdraw the complaint, writing, "The philosophy . . . that this needed to be reported could result in bankruptcy."

In May 2010, Phyllis amended her trust for a fourth time. The fourth amendment stated:

> Upon GRANTOR'S death and after the payment of taxes and expenses, the TRUSTEE shall manage and distribute the assets of this Trust as follows:
>
> A. After my death, the Trustee shall distribute all of my membership interest in Roses and Wheat, L.L.C., to three of my four children, PHILLIP HABERMAN,

> REX HABERMAN II, and MARY LOU HABERMAN, in amounts so that after the distribution of this Trust and [my spouse's trust], PHILLIP, REX, and MARY LOU's individual membership interests in Roses and Wheat, L.L.C., are equal.
>
> B. After my death, the Trustee shall divide the remaining trust assets and distribute the same to three of my four children, PHILLIP HABERMAN, REX HABERMAN II, and MARY LOU HABERMAN, equally, share and share alike.
>
> C. For reasons that are personal to me, I intentionally omit my son, GEORGE HABERMAN and his issue from this Trust. Unless this Trust is subsequently amended by me, neither GEORGE HABERMAN nor his issue shall receive any distributions from this Trust.

At trial, George contested the validity of the fourth amendment to the trust due to his mother's mental state. However, the county court determined that Phyllis was of sound mind and was not influenced by any other parties at the time she made the fourth amendment to the trust. On appeal, George no longer argues that the fourth amendment is invalid.

Phyllis passed away in May 2011 and was survived by her four children. Phillip, Rex, and Mary Lou filed a petition requesting instructions on how the trust assets should be distributed. George answered the petition and joined in the request for instructions, contending that the fourth amendment to the trust was invalid and that under the agreement among parties, he should receive a 25-percent interest in Roses and Wheat.

Following a 2-day trial, the county court determined that the trust should be distributed in accordance with the fourth amendment and that George was not entitled to a portion of the trust property. The court first determined that Phyllis possessed testamentary capacity and was not subject to undue influence at the time she made the fourth amendment. The court next found that the agreement among parties was invalid

because it was not signed by Phyllis personally, but, rather, by Mary Lou as Phyllis' guardian and conservator. The court also concluded that Phyllis retained and exercised her right to modify the trust and that enforcing the agreement to distribute the trust property in a manner other than that prescribed by the fourth amendment would be against public policy. Finally, the county court determined that George was also barred from recovery by the doctrine of unclean hands because he had interfered with Roses and Wheat's business.

George appeals.

ASSIGNMENTS OF ERROR

George argues, restated, that the county court erred in (1) finding that the agreement among parties was not enforceable, (2) analyzing the agreement among parties as a trust amendment and not a separate contract, (3) finding the agreement among parties was void as against public policy, and (4) finding George was barred from relief by the doctrine of unclean hands.

STANDARD OF REVIEW

[1] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

ANALYSIS

George's first three assignments of error relate to the agreement among parties. George argues that the agreement among parties constitutes a separate, enforceable contract that determines how the siblings are currently required to divide the trust corpus following Phyllis' death. George argues that, pursuant to the agreement among parties, he is entitled to a 25-percent interest in Roses and Wheat. We disagree that the agreement among parties controls and requires that George receive a 25-percent interest in the company. Regardless of

any previous agreements the beneficiaries may have made, Phyllis exercised her continued control over the trust when she amended it to remove George as a beneficiary. The fourth amendment, not the agreement among parties, therefore governs the disposition of the trust property, and George's assignments of error are without merit.

[2,3] Critical to our analysis is Neb. Rev. Stat. § 30-3855(a) (Cum. Supp. 2014). Under § 30-3855(a), while a trust is revocable, rights of the beneficiaries are subject to the control of the settlor. See *Manon v. Orr*, 289 Neb. 484, 856 N.W.2d 106 (2014). The settlor of a written revocable trust may revoke or amend the trust by substantial compliance with a method provided in the terms of the trust. Neb. Rev. Stat. § 30-3854(c)(1) (Reissue 2008).

Here, Phyllis exercised her control as settlor and amended her trust—for a fourth time—in May 2010. In compliance with the terms of the original trust, the fourth amendment was made in writing, was signed, and appears to have been delivered to the trustee. Accordingly, the fourth amendment substantially complied with the terms of the original trust and was therefore an effective means for Phyllis to modify the trust to remove George as a beneficiary. See § 30-3854(c)(1).

George argues that the agreement among parties constitutes an enforceable contract separate from the trust. As an initial matter, it is questionable whether the agreement among parties would have been enforceable at the time it was created, because the beneficiaries' property interests were speculative at that time. In *Manon v. Orr, supra*, the beneficiaries of a revocable trust sought to impose a constructive trust on trust assets the settlor had sold. The court characterized the plaintiffs as "contingent beneficiaries of the trust" who had "no real interest in the cause of action or a legal or equitable right, title, or interest in the subject matter of the controversy." *Id.* at 488, 856 N.W.2d at 109. The court concluded that such a "mere expectancy" was insufficient to confer standing on the beneficiaries. *Id.*

Similarly to the plaintiffs in *Manon*, the Haberman siblings were contingent beneficiaries of Phyllis' revocable trust at the time of the agreement among parties. Therefore, they possessed a "mere expectancy" and had no "equitable right, title, or interest" in the trust property which George contends they contracted to dispose of. See *id.*

It does not appear that Nebraska courts have addressed the question of whether contingent beneficiaries of a revocable trust can assign their expectancy interest in the trust corpus while the trust remains revocable. However, we need not decide whether the agreement among parties was a valid, enforceable contract at the time it was created, because the fourth amendment negated any prior property interest George may have had in the trust assets. Under § 30-3855(a), the rights of the beneficiaries of a revocable trust are subject to the continued control of the settlor. Phyllis exercised this control when she undertook the fourth amendment removing George as a beneficiary.

[4] Accordingly, regardless of the interest George held in the trust corpus prior to 2010, the fourth amendment unambiguously deprived George of any right to the property in question. Any earlier agreement George entered into with respect to his interest in the trust corpus was invalidated by the subsequent amendment to the trust terminating his interest in the trust property. See, e.g., *Sgambelluri v. Nelson*, 480 F.2d 619 (9th Cir. 1973) (holding that where son purported to assign expectancy interest in his father's estate to third party, assignment failed to mature into enforceable right when son inherited nothing from his father's estate).

[5] Although our reasoning differs from that of the county court, the trial court did not err in finding that George is not entitled to a portion of the trust corpus. Where the record adequately demonstrates that the decision of the 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. *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

[6] Having determined that George is not entitled to any portion of the trust assets under the fourth amendment to the trust, we need not address whether George would also be barred from recovery by the doctrine of unclean hands. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *In re Interest of Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011).

CONCLUSION

We conclude that Phyllis removed George as a trust beneficiary when she undertook the fourth amendment to the trust. Any prior interest George held in the trust corpus was terminated at that time. Accordingly, we affirm the holding of the county court that George is not entitled to any portion of the trust property.

Affirmed.

Tyler F., appellant, v. Sara P., appellee.

Geoffrey V., as next friend of J.F., a minor child, appellee and cross-appellant, v. Sara P., appellee and cross-appellee, and Tyler F., appellant and cross-appellee.

888 N.W.2d 537

Filed November 15, 2016. Nos. A-16-104, A-16-105.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
2. **Paternity: Limitations of Actions.** A civil proceeding to establish the paternity of a child may be instituted by (1) the mother or alleged father of such child, either during pregnancy or within 4 years after the child's birth, or (2) the guardian or next friend of such child or the State, either during pregnancy or within 18 years after the child's birth.
3. **Paternity: Guardians and Conservators: Words and Phrases.** In the context of a paternity action, a next friend is one who, in the absence of a guardian, acts for the benefit of an infant or minor child.
4. **Actions: Parent and Child: Guardians and Conservators.** Actions brought by the next friend of the child are causes of action that seek to establish the child's rights rather than those of the parent.
5. **Guardians and Conservators.** It is generally recognized that a next friend must have a significant relationship with the real party in interest, such that the next friend is an appropriate alter ego for the party who is not able to litigate in his or her own right.
6. **Paternity: Guardians and Conservators.** When a child is residing with its natural guardian, there is no legal basis, reason, or cause for a next friend to institute a paternity action on the child's behalf.
7. **Actions: Pleadings: Parties.** The character in which one is a party to a suit, and the capacity in which a party sues, is determined from the allegations of the pleadings and not from the caption alone.

8. **Courts: Actions: Parties: Complaints: Pleadings: Records.** If the capacity in which a party sues is doubtful, a court may examine the complaint, the pleadings as a whole, and even the entire record.
9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeals from the District Court for Lancaster County: Steven D. Burns, Judge. Reversed and remanded with directions.

Andrea Finegan McChesney, of McChesney & Farrell Law, and Joshua M. Livingston, Senior Certified Law Student, for appellant.

Joel Bacon and Tara L. Gardner, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee Geoffrey V.

Inbody, Riedmann, and Bishop, Judges.

Riedmann, Judge.

INTRODUCTION

This case presents consolidated appeals from two paternity actions involving the same minor child, J.F., and his mother, Sara P. Tyler F. is the legal father of J.F., and Geoffrey V. is the biological father. Sara was not married to either father. The district court consolidated the cases for trial, and after finding that Geoffrey had standing to raise claims as "next friend" of J.F., the court determined the issues of custody, parenting time, and child support by considering the interests of Tyler, Geoffrey, and Sara. Tyler appeals the court's order, and Geoffrey cross-appeals. We reverse the judgment and remand the cause as explained below.

BACKGROUND

Sara gave birth to J.F. in August 2008. She continually represented to Tyler that he was the father of J.F., and Tyler signed an acknowledgment of paternity at the hospital when J.F. was born and is listed as the father on the birth

certificate. Sara and Tyler shared parenting of J.F., despite not maintaining a romantic relationship, even through Sara's move to Oklahoma in September 2013. In late summer 2014, Sara indicated to Tyler that she wanted J.F. to stay with her and attend kindergarten in Oklahoma. As a result, on August 8, Tyler filed a complaint to establish his paternity of J.F., custody, and parenting time. In Sara's answer, she claimed for the first time that Tyler was not J.F.'s biological father. Subsequent genetic testing proved that Geoffrey, not Tyler, was the biological father.

On December 23, 2014, Geoffrey filed a motion to intervene in Tyler's paternity case. The court denied the motion, finding that the 4-year statute of limitations provided in Neb. Rev. Stat. § 43-1411(1) (Reissue 2008) prohibited Geoffrey's action and that he had not established he had standing to intervene. The following day, Geoffrey commenced a separate action, filing the complaint as "next friend" of J.F. to establish his paternity, custody, and visitation of J.F.

After consolidating Tyler's case and Geoffrey's case and holding a trial, the district court entered an order on January 6, 2016. Pertinent to this appeal, the court determined that Geoffrey had standing to act in the capacity of next friend of J.F., that Tyler is the father of J.F. by reason of the acknowledgment of paternity, and that Geoffrey is the father of J.F. by reason of biological testing. The court therefore considered the rights and interests of Tyler, Geoffrey, and Sara in making custody, parenting time, and child support determinations. Ultimately, the court awarded legal and physical custody of J.F. to Tyler, subject to visitation with Sara and Geoffrey, until December 31, 2016, at which time all three parties were awarded joint legal and physical custody. The court also calculated child support by considering the incomes of Tyler, Geoffrey, and Sara and ordered Geoffrey and Sara to pay child support until December 31, 2016, when all support obligations were to cease. Tyler timely appeals to this court, and Geoffrey cross-appeals.

ASSIGNMENTS OF ERROR

On appeal, Tyler assigns, restated, that the district court erred in finding that Geoffrey had standing to bring his claim as next friend of J.F. and in deviating from the child support guidelines in setting child support.

On cross-appeal, Geoffrey assigns that the court erred in concluding he had not raised a claim in his individual capacity and, to the extent the court concluded that Tyler's paternity acknowledgment had to be set aside before determining that Geoffrey had paternity, that it erred in evaluating the material mistake of fact question from Sara's perspective.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *Bryan M. v. Anne B.*, 292 Neb. 725, 874 N.W.2d 824 (2016).

ANALYSIS

Tyler argues that the district court erred in finding that Geoffrey had standing to bring his claim as next friend of J.F. under § 43-1411. We agree and therefore reverse the district court's order and remand the cause for further proceedings as explained in detail below.

[2] In relevant part, § 43-1411 provides that a civil proceeding to establish the paternity of a child may be instituted by (1) the mother or alleged father of such child, either during pregnancy or within 4 years after the child's birth, or (2) the guardian or next friend of such child or the State, either during pregnancy or within 18 years after the child's birth. Thus, a parent's right to initiate paternity actions under § 43-1411 is barred after 4 years, but actions brought by a guardian or next friend on behalf of children born out of wedlock may be brought within 18 years after the child's birth.

[3-5] In the context of a paternity action, a next friend is one who, in the absence of a guardian, acts for the benefit of an infant or minor child. *Bryan M. v. Anne B., supra*. Actions

brought by the next friend of the child are causes of action that seek to establish the child's rights rather than those of the parent. *Id*. It is generally recognized that a next friend must have a significant relationship with the real party in interest, such that the next friend is an appropriate alter ego for the party who is not able to litigate in his or her own right. *Id*.

During the pendency of this appeal, the Nebraska Supreme Court released its opinion in *Bryan M. v. Anne B., supra*. In that case, the Supreme Court affirmed the trial court's determination that a biological father was barred from bringing a paternity action as his child's next friend under § 43-1411(2) when the father failed to show that the child was without a guardian because the child was living with his biological mother. The same is true in the present case. Geoffrey lacks standing to raise any claims on J.F.'s behalf because J.F. is in the custody of his biological mother and legal father and thus is not without a guardian.

Geoffrey argues that *Bryan M. v. Anne B., supra*, bars a biological father from proceeding as a child's next friend only if the sole basis for the father's claim is an attempt to create an emotional bond between himself and the child. He maintains that *Bryan M.* left the door open for biological fathers to pursue a next friend claim when the purpose of the paternity action is not only to establish an "emotional link" on behalf of the child, but also to create a "legally binding [support] obligation" for the child. Brief for appellee Geoffrey at 14.

[6] The Nebraska Supreme Court has unequivocally stated on two occasions that when a child is residing with its natural guardian, there is no legal basis, reason, or cause for a next friend to institute a paternity action on the child's behalf. See, *Bryan M. v. Anne B.*, 292 Neb. 725, 874 N.W.2d 824 (2016); *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000). In *Bryan M.*, as here, the child was residing with his biological mother and legal father, who were providing financial support for the child. As such, because the child is not without a guardian, the biological father may not bring a paternity action

as a next friend. Whether *Bryan M.* leaves the door open for a next friend claim in a different context is a question we leave for another day, because J.F. is not without a guardian, and thus, *Bryan M.* controls the disposition of Geoffrey's next friend claims.

We therefore conclude that the district court erred in finding that Geoffrey had standing to proceed as J.F.'s next friend. We therefore next consider Geoffrey's argument on cross-appeal in which he asserts he also brought his paternity action in his individual capacity.

On cross-appeal, Geoffrey claims the court erroneously determined that he had not raised a claim in his individual capacity. He argues that the court recognized his individual claim in its "ultimate judgment" by "specifically invok[ing] Geoffrey's personal parental rights." Brief for appellee Geoffrey on cross-appeal at 26. We agree that the trial court's order addresses the paternity complaint as having been filed as next friend of J.F.; however, the trial court did not address whether it was also filed by Geoffrey in his individual capacity. We therefore reverse, and remand for this determination.

[7,8] The character in which one is a party to a suit, and the capacity in which a party sues, is determined from the allegations of the pleadings and not from the caption alone. *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015). If the capacity in which a party sues is doubtful, a court may examine the complaint, the pleadings as a whole, and even the entire record. *Id.* Thus, although Geoffrey's caption in the paternity action indicates he is filing the complaint as J.F.'s next friend, consideration is to be given to the entire record, including the allegations of the complaint which merely seek establishment of paternity under § 43-1411 without specifying either subsection (1) or (2).

If the court determines Geoffrey was seeking paternity in his own behalf, then the district court is ordered to determine, based upon the evidence in the record, whether Geoffrey is barred by the statute of limitations from establishing paternity

as the court decided in its January 12, 2015, order denying intervention; whether Tyler waived the statute of limitations defense as the court decided in its January 6, 2016, order; or whether the statute of limitations is tolled.

[9] Based on our disposition of the above assignments of error, we need not address the remaining errors raised on appeal or cross-appeal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016).

CONCLUSION

We conclude that the district court erred in finding that Geoffrey had standing to raise claims as next friend of J.F. We reverse the order and remand the cause for consideration of the issue of whether Geoffrey's complaint was filed in his own behalf. If the court determines it was so filed, it is to consider the effect, if any, of the statute of limitations which may, in turn, require reconsideration of the issues of custody, parenting time, and child support.

Reversed and remanded with directions.

State of Nebraska, appellee, v.
Mitchell Q. Wynne, appellant.
887 N.W.2d 515

Filed November 22, 2016. No. A-15-840.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court, and an appellate court will not disturb the ruling on appeal in the absence of an abuse of discretion.
5. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
6. ____: ____. The relevant question when an appellate court reviews a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
7. **Rules of Evidence: Telecommunications.** 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.

8. **Rules of Evidence.** Authentication or identification of evidence is a condition precedent to its admission and is satisfied by evidence sufficient to prove that the evidence is what the proponent claims.
9. **Rules of Evidence: Identification Procedures.** Neb. Rev. Stat. § 27-901(1) (Reissue 2008) does not impose a high hurdle for authentication or identification.
10. **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.
11. **Rules of Evidence.** If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of Neb. Rev. Stat. § 27-901(1) (Reissue 2008).
12. **Hearsay.** A statement is not hearsay if the proponent offers it to show its impact on the listener and the listener's knowledge, belief, response, or state of mind after hearing the statement is relevant to an issue in the case.
13. **Trial: Prosecuting Attorneys: Appeal and Error.** When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct.
14. **Trial: Prosecuting Attorneys: Juries.** A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.
15. **Trial: Prosecuting Attorneys: Appeal and Error.** If an appellate court concludes that a prosecutor's acts were misconduct, the court next considers whether the misconduct prejudiced the defendant's right to a fair trial.
16. **Trial: Prosecuting Attorneys: Due Process.** Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.
17. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
18. **Trial: Prosecuting Attorneys: Evidence.** A prosecutor must base his or her argument on the evidence introduced at trial rather than on matters not in evidence.
19. **Trial: Evidence.** A fact finder can rely only on evidence actually offered and admitted at trial and is not permitted to rely on matters not in evidence.
20. **Juries: Jury Instructions.** The purpose of jury instructions is to ensure decisions that are consistent with the evidence and the law, to

inform the jury clearly and succinctly of the role it is to play and the decisions it must make, and to assist and guide the jury in understanding the case and considering testimony.

21. **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.
22. **Trial: Prosecuting Attorneys: Appeal and Error.** In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.

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

Thomas C. Riley, Douglas County Public Defender, for appellant.

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

Moore, Chief Judge, and Pirtle, Judge, and McCormack, Retired Justice.

Moore, Chief Judge.

I. INTRODUCTION

Mitchell Q. Wynne appeals from his convictions in the district court for Douglas County following a jury trial for first degree murder and use of a deadly weapon (firearm) to commit a felony. On appeal, Wynne challenges the admission of a series of text messages into evidence, the denial of his motion for mistrial based on the prosecutor's comments during closing argument, and the sufficiency of the evidence to sustain the murder conviction. For the reasons set forth herein, we affirm.

II. BACKGROUND

1. Charges

On January 29, 2014, the State filed an information in the district court, charging Wynne with one count of first degree murder, in violation of Neb. Rev. Stat. § 28-303(1) or (2) (Reissue 2008), a Class IA felony, and one count of use of a deadly weapon (firearm) to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Cum. Supp. 2014), a Class IC felony. Specifically, the State alleged that on July 14, 2013, Wynne killed Darnell Haynes either purposely and with deliberate and premeditated malice or during the perpetration of or attempt to perpetrate a robbery, and that Wynne used a firearm to commit a felony.

2. Jury Trial

A jury trial was held on March 30 through April 3 and April 6 through 9, 2015. The record on appeal consists of over 2,000 pages of transcribed testimony and argument (1,360 pages of which contain the transcribed testimony of the State's 34 trial witnesses) and nearly 200 exhibits. We have reviewed this extensive record in its entirety and summarize those portions relevant to Wynne's arguments on appeal.

(a) Evidence About Wynne

At the time of the offense, Wynne was 17 years old and had just finished his junior year of high school. He resided in Omaha, Nebraska, with his parents and younger siblings; he also had an older brother. Wynne's mother testified that Wynne sometimes wore his hair in "single braids" and that it was "possible" he was wearing his hair that way during the summer of 2013. Wynne also had a girlfriend at that time.

Wynne's mother testified that on the morning of Sunday, July 14, 2013, she went to church with Wynne and his younger siblings. They left church around 12:15 or 12:20 p.m. and drove straight home. Wynne's mother testified that Wynne usually went to his girlfriend's house after lunch and that she

thought she drove him there on July 14 sometime between 1 and 2:30 p.m. When asked about the distance between Wynne's residence and the location of the murder, she testified that it was "maybe a six- or seven-minute drive" but might take an hour to walk. Wynne's girlfriend lived three blocks from Wynne's residence. When Wynne's mother dropped him off, Wynne's girlfriend was not home, but his mother testified that he went into the house to wait for her. Wynne's mother was uncertain when exactly she saw Wynne next, but she testified that he usually came home for dinner, which they eat sometime between 5 and 7 p.m. She did recall watching the news with him "later on," probably at 10 p.m., and seeing a news story about Haynes' death that evening, which was the first time she "knew anything about that happening." She also thought Wynne's girlfriend came back to the house with him and watched the news with them. Wynne's mother testified that she did not know Haynes or Haynes' mother, and she was not aware that Wynne ever had an acquaintance with or anything to do with Haynes. While watching the news story, she recalled that she and Wynne had seen Haynes and his vehicle (depicted in the news story) at a stoplight earlier in the day on their way home from church.

Wynne's girlfriend also provided a timeline for events occurring on July 14, 2013. That summer, she was working at a fast-food restaurant, and she testified that one of her parents picked her up from work around 3:20 or 3:30 p.m. on the day in question. They drove straight home, and on the way, they drove by a crime scene. She observed a red Jeep with "the passenger's side door open with white sheets hanging up" at the scene, but she did not recognize the vehicle. When she arrived at her house, her cousin and Wynne were there. When asked about the distance between her house and the location of the murder, Wynne's girlfriend testified that it was about a 10- or 15-minute drive and would be a "long walk." According to Wynne's girlfriend, after she returned home from work, she "sat around and watched movies" with Wynne and her

cousin and ate dinner around 5:30 or 6 p.m. She testified that her mother took her and Wynne to his house around 8 p.m. She recalled watching the 10 p.m. news with Wynne and his mother before her mother picked her up again around midnight. Wynne's girlfriend did not know Haynes and testified that she never knew Wynne to "hang out" with Haynes.

(b) Evidence About Haynes

In July 2013, Haynes was 29 years old, and he lived in Omaha with his mother, his mother's husband, his brother, and two other children. Haynes, who was unemployed and receiving disability payments for epilepsy, supplemented his income by selling marijuana. That summer, Haynes regularly drove a red Jeep Cherokee (Jeep) owned by his mother. His mother testified that he washed the Jeep regularly and had probably washed it within the week prior to his murder. Haynes' mother did not know Wynne and had never seen Wynne at her residence or in the Jeep.

Haynes' mother provided testimony about his whereabouts in the hours preceding his murder. Haynes spent the night of July 13, 2013, away from home. He returned briefly the next day around 11 a.m. before leaving again. When Haynes returned again around 2 p.m. on July 14, his son and his son's mother were there for a visit. About 30 to 40 minutes later, Haynes told his mother that he was going to "make a run" and that he would "be right back" before he left in the Jeep. A "little after" 3 p.m., Haynes' brother told Haynes' mother that he had received a telephone call indicating that Haynes' vehicle had been located and that Haynes may have been shot.

(c) Murder

At approximately 3:10 p.m. on July 14, 2013, Haynes was shot and killed in his Jeep, which was parked outside of a beauty supply store located at a particular intersection in Omaha. The beauty supply store was surrounded by several other business spaces, including a vacant one physically

connected to the east side of the beauty supply store, a fast-food restaurant located across the street west of the beauty supply store, and an automotive repair business and used car lot across the street north and east of the beauty supply store. There is a large parking lot on the north side of the beauty supply store and the vacant business space. The automotive business across the street was equipped with four exterior surveillance cameras, one of which was pointed in the direction of the beauty supply store parking lot. We have set forth an account of the murder, compiled primarily from surveillance video from the automotive repair business (taking into consideration testimony indicating that the time reflected on the video is 4 minutes 17 seconds ahead of "atomic time") and the testimony of a witness who was in the drive-through at the fast-food restaurant when the murder occurred. The witness in the drive-through was not able to discern facial features; nor is it possible to discern facial features from the surveillance video footage.

Shortly after 3 p.m., Haynes parked the Jeep in front of the beauty supply store, leaving the engine running. At approximately 3:08 p.m., two black men approached from the east, crossed the street curving along the northeast corner of the parking lot, and entered the parking lot near the vacant business space. The first man was wearing a white T-shirt and tan cargo shorts and had "cornrows or braids" in his hair. As the first man began walking across the parking lot toward the beauty supply store, the second man, trailing several feet behind, approached the garages attached to the vacant business space. The first man stopped briefly and looked back at the second man before continuing across the parking lot to the beauty supply store. The second man began walking slowly along the garages toward the beauty supply store.

At approximately 3:09 p.m., the first man walked around the back end of the Jeep and approached the front passenger-side door. Within a minute, he fired two shots, one of which struck Haynes in the forehead. The witness in the fast-food

drive-through heard the gunshots and immediately looked to her left toward the beauty supply store parking lot. She observed Haynes fall toward the open passenger-side door. She further observed the first man, who was standing outside the door, reach into the Jeep and then take off running. He fell to the ground behind the Jeep, but he rose quickly and continued running east toward the garages. The second man began running, and the two men ran around the corner by the eastern edge of the vacant business space and disappeared from view.

(d) Evidence at Scene

Emergency personnel arrived on the scene on July 14, 2013, at approximately 3:22 p.m., followed by law enforcement at 3:23 p.m. They found Haynes lying face down across the front seat of the Jeep with his feet by the driver's-side door and his upper body slumped over the outer edge of the passenger's seat. There was a large amount of blood on the ground below his head, and small clumps of marijuana were found on the back of his T-shirt just below his neck and near his left armpit. His wallet was on the driver's seat and his cell phone was in the center console. Haynes did not have a pulse and was pronounced dead at the scene.

A search of the area surrounding the Jeep revealed (1) two .380-caliber shell casings (later determined to have been fired from the same gun) on the ground outside the passenger-side door, (2) several small clumps of marijuana on the ground outside the Jeep (both on the passenger's side and behind the Jeep), and (3) two small clumps of marijuana on the ground in front of the vacant business space (one clump near the beauty supply store and the other clump farther east, near the garages). No additional evidence was collected at the scene.

(e) Autopsy and DNA Evidence

On July 15, 2013, Dr. Robert Bowen performed an autopsy on Haynes' body. Bowen observed a single gunshot wound on

the right side of Haynes' forehead. The condition of the wound indicated to Bowen that Haynes had been shot at very close range. Bowen retrieved a bullet from "just beneath [Haynes'] left ear" and concluded that Haynes died from the gunshot wound to the head.

At the time of the autopsy, a crime laboratory technician collected Haynes' personal effects. Thirty-five dollars in cash was recovered from Haynes' clothing. The technician also collected DNA swabs taken from Haynes' fingernails. Subsequent tests performed on the DNA swabs disclosed a mixture of DNA belonging to two or more people. Wynne could not be excluded as a contributor to the DNA mixture on either swab. However, the DNA profiles generated from the swabs were fairly common. For Wynne, the probability that a random individual's DNA profile matched the DNA profile in question from the left-hand swab was 1 in 848 for Caucasians, 1 in 1,540 for African-Americans, and 1 in 791 for American Hispanics. And, the probability that Wynne expressed the same DNA profile as the profile in question from the right-hand swab was 1 in 36 for Caucasians, 1 in 61 for African-Americans, and 1 in 71 for American Hispanics.

(f) Additional Evidence and Fingerprints From Jeep

The Jeep was towed to the police impound lot for further processing. Two baggies of marijuana and a white pill containing cocaine HCL were found lying on the center console next to the gearshift. Crime laboratory technicians lifted fingerprints from the exterior of the Jeep and kept 11 prints they determined were "identifiable." Eight of those prints belonged to five of Haynes' friends, four of whom had recently been inside the Jeep. Of the remaining three prints, two were not identified, while the third print, found on the rear passenger-side door, matched Wynne's left palm.

Considerable time was spent at trial exploring the methods by which fingerprint evidence is collected and analyzed, the

qualifications of the individuals who collected and analyzed the prints in this case, and the mishandling of fingerprint evidence (unassociated with the evidence in this case) in 2012 by Omaha Police Department crime laboratory employees. We have thoroughly reviewed this evidence, but for the sake of brevity, we note only the following: In September 2012, an Omaha Police Department crime laboratory employee misidentified a fingerprint. Two other employees who reviewed the work in 2012 verified her identification of the print at that time. The print was not removed from a database used by the laboratory as it should have been. In March 2014, another crime laboratory employee ran a "reverse search," which revealed the misidentification, which misidentification was verified by several other crime laboratory employees. The employees involved in the 2012 misidentification were suspended from casework for about 6 months after the discovery of the misidentification, took additional formal training in fingerprint identification, and were subject to additional monitoring after returning to identification work. The crime laboratory manager also initiated an audit of other fingerprint identifications performed by the individuals involved in the misidentification, which audit did not reveal any other misidentifications. The crime laboratory is not accredited by the American Society of Crime Lab Directors, an entity that accredits laboratories "overall" and in "varying concentration areas," but the entire police department, including the laboratory, is accredited by the Commission on Accreditation for Law Enforcement Agencies, although that accreditation is not specific to "specialties in the crime lab." The International Association for Identification is an accrediting body that certifies individuals in various aspects of forensic science including the area of fingerprint comparison. One crime laboratory employee was certified by that association in the area of fingerprint comparison at the time the misidentification was discovered, but no crime laboratory employees were certified in that area in 2012.

The fingerprint identifications resulting from the evaluations performed by the Omaha Police Department crime laboratory employees of the 11 prints at issue in this case were each verified by another technician in the Omaha laboratory. The identification of Wynne's print was also verified by a Lincoln Police Department employee who is a certified latent print examiner. We note that the Omaha crime laboratory employee who verified the identification of Wynne's print was one of the individuals involved in the 2012 misidentification. She is the only certified print examiner in the Omaha laboratory and became certified after the 2012 misidentification but prior to both its discovery and her verification of Wynne's print. After the 2012 misidentification was discovered, the employee notified the International Association for Identification, but the 2012 misidentification did not affect her certification status.

(g) Admission of Telephone Records

Certain exhibits were admitted into evidence at trial which showed details of contacts between the cell phone with the telephone number attributed at trial to Wynne and Haynes' cell phone found in his Jeep after his murder. Some of these exhibits also reflect contacts between Wynne's cell phone and the telephones being used by some of his family members and his girlfriend during July 2013. Given the focus of Wynne's assignments of error on appeal, we discuss the admission into evidence of only two of those exhibits: exhibit 178, a table containing incoming, outgoing, and missed calls exchanged by Haynes' cell phone and Wynne's cell phone and by Haynes' cell phone and a third telephone between July 10 and 14; and exhibit 179, a table containing incoming and outgoing text messages (including the actual content of the text messages) exchanged by Haynes' cell phone and Wynne's cell phone on July 14 between 12:35 and 12:43 p.m. Exhibit 179 reflects a series of text messages in which the user of Wynne's cell phone agreed to purchase marijuana from

Haynes. Exhibit 178 shows, among other things, that several calls were exchanged by Wynne's cell phone and Haynes' cell phone between 2:48 and 3:09 p.m. on July 14, shortly before Haynes was murdered.

When the State first offered exhibits 178 and 179, Wynne objected to both exhibits on authentication and hearsay grounds. The district court overruled Wynne's objections as to exhibit 178 and received that exhibit into evidence, but the court sustained Wynne's hearsay objection as to exhibit 179. Wynne also argued that there was not sufficient evidence to indicate that he was the author of the text messages contained within exhibit 179. With respect to exhibit 179, the court noted that nothing in the content of the text messages identified Wynne specifically or anyone else as "the maker of those text messages" and noted further that the fact that text messages were sent from Wynne's cell phone was not sufficient to show Wynne actually authored the messages. The court ruled that the fact that text messages were sent from the cell phone previously identified as belonging to Wynne to the cell phone belonging to Haynes was admissible, but that based on the evidence at that point in the trial, the content of the text messages was not admissible.

Subsequently, the State offered testimony from a police officer which showed that in the days and hours before Haynes was murdered, Wynne's cell phone was in contact with the telephones of several of his family members and his girlfriend, as well as the telephone of a person unidentified at trial who also called Haynes shortly before he was murdered. The State again offered exhibit 179 with the text message content into evidence, and Wynne renewed his prior objections. The district court sustained Wynne's objections, but it agreed to hear additional argument from the parties. After the jury was released for the day, the court heard further argument with respect to the admissibility of the text message content.

Finally, the district court ruled as follows:

> I never like — these close calls that are significant are difficult, but I re-looked at a number of cases, and, really — although authentication and — really, all that they have to authenticate is that this — the authentication goes to whether or not it's actually the [d]efendant that made — that sent the text messages or whether there is a likelihood that it wasn't the [d]efendant.
>
> The case law is pretty clear across the board, and I looked at the federal cases that have established this, that the government only needs to make a prima facie showing of authenticity by a — and it's merely by a preponderance of the evidence, and there [are] cases that indicate that it can be proved by circumstantial evidence involving the timing of the receipt and the transmission of the text messages. I think that because of the burden that the government has, that [it] merely only need[s] to make a prima facie showing, because of the fact that subsequent to this morning, when all we had, I think, was [Wynne's] association with that number, I think now there is enough evidence for the government to meet [its] preponderance of the evidence and prima facie showing of authenticity based on the facts and circumstances surrounding the timing of the transmission and receipt of the text messages, and so I'm going to allow Exhibit 179 into evidence.

(h) Details of Telephone Records

Wynne's father had an account with a cell phone service provider, and Wynne's mother testified that in July 2013, Wynne was using a cell phone with a phone number assigned to that account; we have referred to that cell phone in this opinion as "Wynne's cell phone." She also identified the cell phone numbers being used by herself, Wynne's father, and Wynne's older brother. Wynne's girlfriend identified her home telephone number on the record and testified that she sometimes called Wynne from that number. Several of the telephone

record exhibits admitted into evidence were highlighted with different colors used to represent contacts between Wynne's cell phone and the telephones used by other individuals as well as contacts between Haynes' cell phone and the telephones used by other individuals. On those exhibits, a telephone number is highlighted in gray, and we will refer to it in this opinion as "the gray number." The user or owner of the telephone associated with the gray number was not identified in the evidence presented to the jury at trial.

Police extracted data from Haynes' cell phone, which disclosed several contacts between Wynne's and Haynes' cell phones on July 14, 2013. At 12:33 p.m., a call was made from Wynne's cell phone to Haynes. At 12:35 p.m., Haynes sent a text message to Wynne's cell phone stating, "I got Dro." The reply from Wynne's cell phone at 12:37 p.m. stated, "Ight koo.. Im bouta run ta da bank den im get some of both.. U gon look out.?" At 12:39 p.m., Haynes sent a text to Wynne's cell phone stating, "call me," and the reply from Wynne's cell phone at 12:42 p.m. stated, "Ight." We note testimony in the record indicating that "dro" is a slang term for "hydroponic marijuana." Calls from Wynne's cell phone were logged by Haynes' cell phone at 2:48 p.m. as "[m]issed" and at 2:49 p.m. as "[i]ncoming." Additional calls were exchanged by the two cell phones between 3:02 and 3:05 p.m. Between 3:06 and 3:08 p.m., Haynes' cell phone logged two incoming calls from the gray number. Haynes' cell phone logged an outgoing call to Wynne's cell phone at 3:08 p.m. As noted above, Haynes was murdered at approximately 3:10 p.m.

A review of the subpoenaed records for Wynne's cell phone confirms the text and call contacts between Wynne's cell phone and Haynes on July 14, 2013, although there are some discrepancies in the various telephone record exhibits as to the exact contact times and number of contacts made depending on which "target number" was used to generate the exhibits. The police officer who testified about these exhibits was unable to explain these discrepancies, as he was "not a data

person or records keeper for [the cell phone provider used by Wynne and Haynes].” In addition to the contacts between the two cell phones on July 14, the records for Wynne’s cell phone showed that calls were placed from Wynne’s cell phone to Haynes on July 10 and 13. Wynne’s cell phone had several contacts with the gray number on July 14, including texts before and calls both before and after the initial contact with Haynes. Wynne’s cell phone also received calls from the gray number on June 1 and 29 and sent a text message to it on July 13. Finally, although several calls and text messages were sent from Wynne’s cell phone to various people on July 14, including Wynne’s girlfriend, father, and older brother, all outgoing communications from Wynne’s cell phone had ceased by 3:04 p.m. Wynne’s mother testified that Wynne’s cell phone was reported “lost,” but she did not specify when this occurred. Wynne’s girlfriend recalled learning at some point that Wynne had lost his cell phone, but she did not recall the date. Wynne’s cell phone number was “deactivated” on July 31.

(i) Search Warrant and Arrest

On November 11, 2013, a search warrant for Wynne’s residence was executed by law enforcement looking for firearms and cell phones. As of the date of trial, neither Wynne’s cell phone nor the gun used to shoot Haynes had been found. Wynne was arrested on December 20.

(j) Motion for Mistrial

During the State’s initial closing argument, the prosecutor stated:

> And why was it the officers felt they needed to talk to this . . . number later determined to be the phone number of . . . Wynne . . . ? Because you can see — we will go in reverse chronological order — the 14th day of July, 2013, at 3:08:29 p.m., . . . Haynes’ phone placed a call to the . . . Wynne number.

> If we think about that, 3:08:29, if the murder occurred just immediately before 3:10 p.m., this outgoing phone call placed by [Haynes] to [Wynne's] number was placed within a minute, minute and a half of . . . Haynes' murder. But that's not the only call.
>
> As we continue, you will see that there are — prior to that . . . Haynes had received two other incoming phone calls from a number we don't have a name to associate it with, [the gray number]. There was never an outgoing call from . . . Haynes' phone to that number. Just two incoming calls. And in terms of that number, the [gray number], you'll see in the later records that that's the number highlighted in gray.

The State discussed the sequence of the contacts between the various telephone numbers, including the gray number, at length during its initial closing argument and made two more references to the gray number. First, the prosecutor stated: "Of significance here is now, once again, we start seeing that gray number. What's the gray number again? That's the number we don't know, that's the number that contacted [Haynes], and, once again, that's the number that's also contacting and being contacted by [Wynne] from his phone." Later, the prosecutor stated: "This is one of those cases where you don't have an eyewitness saying, 'This is the person who did it,' you don't have a co-[d]efendant because we have never been able to identify that person in the gray number in terms of the evidence you heard throughout this trial."

Wynne did not object to the prosecutor's comments at the time they were made, but following the State's closing argument and prior to his own closing argument, Wynne made an oral motion for mistrial based on prosecutorial misconduct. Wynne argued that the State's assertion that it was unable to identify the user of the gray number was false because the police had previously identified an individual as the user of that number, a fact recently confirmed by that individual during a police interview. The district court received into

evidence two exhibits offered by Wynne in support of his motion: (1) e-mail correspondence regarding a police interview of the individual on April 3, 2015, and (2) a supplemental police report showing police awareness of the individual's association with the gray number. The State argued that its assertions with respect to the gray number were not false because the prosecutor had specified that the user of the gray number was unknown "based upon the evidence in this case." The State argued further that "to the extent that there is a concern," the prosecutor's cocounsel would "clear that up in rebuttal."

The district court overruled Wynne's motion, but it agreed to revisit the issue after transcription of the closing arguments. The court provided a limiting instruction to the jury prior to Wynne's closing argument, stating:

> Ladies and Gentlemen, I do want to instruct you. Arguments of counsel are not evidence. Comments of counsel regarding what evidence may or may not exist is not evidence. Reference[s] to evidence the State may or may not possess that was not put before you are to be disregarded completely.

During Wynne's closing argument, his attorney made the following reference to the prosecutor's statements about the gray number:

> So because their scientific evidence is so lacking, we are left with the prosecutors putting together a story about what these known [telephone] contacts mean, what the content of them is, even though [the prosecutor] has, other than these several texts, absolutely no evidence, zero, to support his statements. He paints this picture about here's what happened. You know, [Wynne and the other individual shown in the surveillance video] said they were going to do a robbery with this phone number that there is no evidence to support who it is.

Finally, during the State's rebuttal closing argument, the prosecutor's cocounsel stated:

> I want to clarify something that [the prosecutor] might have misstated in his closing argument about whether there was evidence as to who that gray . . . number was [attributable to]. I just want to clarify that in this trial you heard no evidence about whose number that was.
>
> But the point of all of those phone numbers — and I'm not going to spend a great deal of time talking about the phone numbers because I think [the prosecutor] went through it enough. The point is that that was . . . Wynne's phone. He was talking and texting to all of these people who are close to him, all of these people who are close to him and . . . Haynes at the time of [Haynes'] death.

3. Convictions

On April 9, 2015, the jury found Wynne guilty on both counts of the information. The district court accepted the jury's verdicts and entered judgment accordingly.

4. Motion for New Trial

Wynne filed a motion for new trial, alleging, among other things, that the district court erred by denying his motion for mistrial based on the prosecutor's prejudicial misconduct during closing arguments and by overruling his objections to the admission into evidence of the content of the text messages extracted from Haynes' cell phone. On June 23, 2013, the district court entered an order overruling Wynne's motion.

5. Sentencing

On August 27, 2015, the district court entered an order sentencing Wynne to 40 to 100 years' imprisonment for first degree murder and to a consecutive sentence of 10 to 20 years' imprisonment for use of a deadly weapon (firearm) to commit a felony. The court gave Wynne 544 days' credit for time served.

III. ASSIGNMENTS OF ERROR

Wynne asserts that the district court erred in admitting the text messages into evidence and in denying his motion for mistrial based on prosecutorial misconduct during the State's closing argument. Wynne also asserts that the evidence was insufficient to sustain his conviction for first degree murder on either of the State's alternate theories.

IV. STANDARD OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016). When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *State v. Edwards*, 294 Neb. 1, 880 N.W.2d 642 (2016).

[4] The decision whether to grant a motion for mistrial is within the discretion of the trial court, and an appellate court will not disturb the ruling on appeal in the absence of an abuse of discretion. See *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009).

[5,6] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Jenkins*, 294 Neb. 475, 883 N.W.2d 351 (2016). The relevant question when an appellate court reviews a sufficiency of the evidence claim is whether, after viewing

the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

V. ANALYSIS

1. Admission of Text Messages

Wynne asserts that the district court erred in admitting exhibit 179, a series of text messages, into evidence over his objections. We first address whether there was sufficient foundation for the admissibility of the text messages and then whether they were inadmissible hearsay.

(a) Foundation

[7] 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. *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016).

[8-11] Authentication or identification of evidence is a condition precedent to its admission and is satisfied by evidence sufficient to prove that the evidence is what the proponent claims. *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016). Neb. Rev. Stat. § 27-901(1) (Reissue 2008) does not impose a high hurdle for authentication or identification. *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014). A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity. *Id.* If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of § 27-901(1). *State v. Elseman, supra.*

Wynne does not argue that the text messages detailed in exhibit 179 were not accurately transcribed from Haynes' cell phone. In our review, we find the testimony of the police officer who extracted this data from Haynes' cell phone sufficient to authenticate the messages as set forth in exhibit

179 as accurate transcriptions of the messages from Haynes' cell phone.

At trial and on appeal, Wynne's primary argument is that there was not sufficient foundation to show that he was the person who sent the text messages attributed to him. He argues that there was no direct evidence presented to show who actually authored the messages attributed to him or who was in possession of the cell phones at the time the messages were sent and received. He notes that while the cell phone from which the messages were extracted was found in the Jeep next to Haynes following his death, the cell phone attributed to Wynne was never recovered, and thus, no data was extracted from it. He also notes that the number of the cell phone attributed to him was assigned to his father's cell phone service provider account and argues that there is no evidence to show that he was the sole user of the cell phone. Finally, he argues that there is nothing in the content of the text messages that identifies him as the author.

The Nebraska Supreme Court recently addressed the foundation for admissibility of text messages in *State v. Henry, supra*. In that case, the defendant argued that there was insufficient foundation that he authored the text messages attributed to him, noting the lack of evidence that he was the record owner of the cell phone in question and the presence of evidence that the cell phone was found in the post office box of another individual who claimed ownership. He also noted that through "'text spoofing,'" a text message can be made to appear to have been sent from a telephone number other than the number from which it was actually sent. *Id.* at 868, 875 N.W.2d at 399. In addressing these arguments, the Supreme Court stated:

> In similar cases, testimony concerning context or familiarity with the manner of communication of the purported sender is sufficient foundation for the identity of the sender of the message. Such testimony is typically in combination with testimony that the cell

> phone number belonged to or was regularly utilized by the alleged sender. The proponent of the 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.

Id. at 868, 875 N.W.2d at 400. In finding sufficient foundation for the admission of the text messages, the Supreme Court in *State v. Henry* noted testimony establishing the defendant as a regular user of the cell phone, testimony that the defendant answered the cell phone at the number in question when a witness called it, and testimony connecting the defendant with the messages based on the witness' familiarity with their context and the way the defendant spoke.

In this case, the evidence showed that Wynne used his cell phone, with the number assigned to an account belonging to Wynne's father, during July 2013. There was also evidence to show that in the days and hours prior to Haynes' murder, there was contact between the cell phone attributed to Wynne and the telephone numbers of various family members and also Wynne's girlfriend. And, there is no evidence in the record to suggest that anyone other than Wynne was using the cell phone in question at the time of Haynes' murder. The content of the text messages, which arranged a drug transaction, and the sequence of subsequent call contacts between the cell phone attributed to Wynne and Haynes' cell phone are also consistent with the timeline established for the murder. All outgoing contacts by the cell phone attributed to Wynne ceased just shortly before the murder occurred. The district court did not abuse its discretion in overruling Wynne's objections with respect to his authorship of the text messages attributed to him.

(b) Hearsay

[12] Wynne also objected to exhibit 179 on the basis of hearsay, although he does not separately argue this claim in his brief on appeal, and as noted above, the focus of his

arguments at trial was that the evidence was insufficient to show he was the person who sent the text messages. In arguing his objections to the district court, Wynne's trial counsel conceded that if there were sufficient evidence to indicate that Wynne was the author of the messages attributed to him, they would not be hearsay. We agree. As discussed above, there was sufficient evidence to establish that Wynne authored the text messages attributed to him. Because those text messages were his own statements, they were not hearsay. See, Neb. Rev. Stat. § 27-801(4)(b)(i) (Reissue 2008); *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016) (finding that defendant's text messages offered against him were statements of party opponent and not hearsay). Nor were text messages attributed to Haynes hearsay. Those messages were offered to show their effect on Wynne, i.e., how he responded to the proposed drug transaction. A statement is not hearsay if the proponent offers it to show its impact on the listener and the listener's knowledge, belief, response, or state of mind after hearing the statement is relevant to an issue in the case. *State v. Poe*, 292 Neb. 60, 870 N.W.2d 779 (2015). To the extent that Wynne claims the district court improperly overruled his hearsay objection to exhibit 179, that claim is without merit.

2. Motion for Mistrial

Wynne asserts that the district court erred in denying his motion for mistrial based on prosecutorial misconduct during the State's closing argument. He argues that the prosecutor's comments about not knowing whom the gray number belonged to were false and misleading. Wynne further argues that the State's rebuttal argument did not clear up the error and was further misleading in that the State misstated the gray number and went on to speak about Wynne's cell phone without clarifying that the "phone [the prosecutor] was referencing was not the 'unknown' phone . . . ." Brief for appellant at 24. Wynne argues that this statement led to the inference that the

unknown telephone was connected to him or was otherwise unimportant to the investigation.

[13-17] When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct. *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016). A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct. *Id.* If an appellate court concludes that a prosecutor's acts were misconduct, the court next considers whether the misconduct prejudiced the defendant's right to a fair trial. *Id.* Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process. *Id.* Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole. *Id*.

In *State v. McSwine, supra*, the Nebraska Supreme Court reversed a decision by this court, finding that the prosecutor's comments during closing and rebuttal argument did not constitute prosecutorial misconduct and that the defendant was not prejudiced by the prosecutor's comments. In that case, the comments at issue related to the defense at trial that certain text messages did not refer to the crimes charged but related to an earlier incident of trespassing by the defendant. Specifically, the prosecutor observed that there was no evidence "'at all,'" other than the defendant's testimony, about the earlier incident. *Id.* at 575, 873 N.W.2d at 413. The defendant did not object to the comments at the time. During deliberations, the jury inquired about the prosecutor's comments, was instructed that it had all of the evidence it would receive, and was directed to the jury instruction stating that statements, arguments, and questions of the lawyers were not evidence. The defendant did not challenge the prosecutor's comments as misleading until his motion for new trial, at which time he offered police reports about the trespass incident into evidence. On appeal, this court concluded that the comments were misleading, reasoning that the prosecutor did

not limit the term "evidence" in his comments to the evidence presented at trial and that the comments suggested that there was no evidence at all to support the defendant's testimony about the trespass incident. See *State v. McSwine*, 22 Neb. App. 791, 860 N.W.2d 776 (2015), *reversed* 292 Neb. 565, 873 N.W.2d 405 (2016). On further review, the Nebraska Supreme Court disagreed.

[18,19] First, the Nebraska Supreme Court observed that while there were police reports about the trespass incident and the State was aware of these reports, the reports were not offered at trial. The Supreme Court concluded that the jury was not misled or unduly influenced by the prosecutor's comments, because the jury was "well instructed as to what 'evidence' was within the context of th[e] trial" and it was undisputed that no evidence was presented at trial to corroborate the defendant's testimony about the trespass incident. *State v. McSwine*, 292 Neb. at 576, 873 N.W.2d at 414. The Supreme Court observed that a prosecutor must base his or her argument on the evidence introduced at trial rather than on matters not in evidence. *Id.* Further, a fact finder can rely only on evidence actually offered and admitted at trial and is not permitted to rely on matters not in evidence. *Id.* Accordingly, the Supreme Court concluded that the comments were not misconduct, but went on to conclude that even if the statements were prejudicial, they were not so prejudicial as to violate the defendant's due process rights.

(a) Statements Were Not Misconduct

In this case, unlike in *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016), the prosecutor did qualify his statements about the gray number. Although he initially stated that the gray number was "the number we don't know," he went on to state, "[W]e have never been able to identify that person in the gray number in terms of the evidence you heard throughout this trial." During rebuttal argument, the prosecutor's cocounsel clarified that the jury heard no evidence "in

this trial" about "whose number [the gray number] was." Although Wynne presented evidence to the district court during argument on his motion for mistrial, indicating that the gray number was associated with a known individual and that the State was aware of this connection, it is undisputed that no evidence of the connection was presented to the jury at trial.

During the rebuttal argument by the prosecutor's cocounsel, she misstated one digit in the prefix of the gray number, an error easy enough to make given the plethora of telephone numbers discussed at trial, but not one unduly misleading, given that she correctly stated the final four digits of the gray number. After commenting that there was no evidence at trial as to the user of the gray number, the cocounsel continued her rebuttal argument and went on to discuss Wynne's cell phone without explicitly stating that she was changing topics and was now discussing a different cell phone, the one with the telephone number attributed to Wynne at trial. We do not read this lack of transition as "an adroit attempt to confuse the jury by lumping all the last calls to [Haynes'] phone as coming from [Wynne's] phone." See brief for appellant at 24. When the cocounsel's remarks are read as a whole, it is clear that she was no longer discussing the gray number. And in the context of the entire trial, in which all of the various telephone numbers were addressed at length, we do not believe the jury was misled or unduly influenced by the cocounsel's lack of a segue between one portion of her rebuttal and the next. We also note that Wynne did not object to these particular remarks or renew his motion for mistrial. Further, most of Wynne's argument at the hearing on his motion for new trial was addressed to the district court's admission of the content of the text messages. His brief argument about the prosecutorial misconduct issue focused on the statements made by the prosecutor during the State's initial closing argument.

Like the jury in *State v. McSwine*, 292 Neb. at 576, 873 N.W.2d at 414, the jury in this case was "well instructed" as

to what was evidence in the context of the trial and was specifically instructed that "'[s]tatements, arguments and questions'" of the lawyers are not evidence. After the State's initial closing argument and prior to Wynne's closing argument, the district court instructed the jury that arguments of counsel are not evidence and that comments of counsel regarding what evidence may or may not exist are not evidence. And, during formal jury instructions, the jury was informed of its duty to decide the facts and informed that in doing so, it must "rely solely upon the evidence in this trial and that general knowledge that everyone has." The jury was further instructed that the evidence from which it was to find the facts consisted of the testimony of the witnesses, the exhibits received in evidence, any stipulated facts, and any facts that "[the judge] say[s the jurors] may accept but are not required to accept." The jury was again informed that statements, arguments, and questions of the lawyers for the State and Wynne were not evidence.

[20,21] The purpose of jury instructions is to ensure decisions that are consistent with the evidence and the law, to inform the jury clearly and succinctly of the role it is to play and the decisions it must make, and to assist and guide the jury in understanding the case and considering testimony. See *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016). Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *Id.*

Unlike the prosecutor in *State v. McSwine, supra*, both the prosecutor and his cocounsel in this case qualified their references to "evidence" to indicate they were referring to evidence presented at trial. We conclude that the jury was not misled or unduly influenced by the comments about there having been no evidence presented at trial as to the user of the gray number. These statements were not misconduct. Nor do we find the cocounsel's further comments in rebuttal to be misconduct. Nonetheless, as set forth below, even if any of these statements, those of either the prosecutor or his

cocounsel, were misconduct, they were not so prejudicial as to violate Wynne's due process rights.

(b) Statements Were Not Prejudicial

[22] In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction. *State v. McSwine, supra*.

The statements of the prosecutor and his cocounsel did not mislead or unduly influence the jury to a significant degree. Their remarks about the gray number were qualified as being about the evidence presented at trial. And, the jury in this case was well instructed on what it was to consider in its deliberations. It was instructed to consider only evidence presented at trial and instructed that counsel's statements, arguments, and questions were not evidence. The first factor weighs against prejudice.

Next, the comments in question were not extensive in the context of the lengthy initial closing and rebuttal arguments. Nor do we see any indication that defense counsel invited the remarks, except to the extent that the possibility of clarifying rebuttal remarks by the prosecutor's cocounsel was discussed during the arguments on Wynne's motion for mistrial. The second and third factors weigh against prejudice.

With regard to the fourth factor, the district court did give a curative instruction following the State's initial closing argument. And, as noted above, the possibility of clarifying remarks by the prosecutor's cocounsel was discussed in connection with Wynne's motion for mistrial. Wynne did not object to the additional comments by the prosecutor's cocounsel of which he complains. Nor did he make a further motion

for mistrial or explicitly address these additional comments in arguing his motion for new trial to the district court. Again, however, the jury was instructed on what it was to consider in its deliberations. This factor is neutral.

Finally, as addressed more explicitly below in connection with our analysis of Wynne's third assignment of error, there is sufficient evidence to support Wynne's convictions. The fact that there were two individuals involved in the commission of these crimes was clearly known throughout the trial, and the failure of the State to identify the potential user of the gray number did not preclude the possibility that Wynne was one of the individuals involved in the crimes.

Thus, even assuming that the statements by the prosecutor and his cocounsel were misconduct, they were not prejudicial.

3. Sufficiency of Evidence

Wynne asserts that the evidence was insufficient to sustain his conviction for first degree murder on either of the State's alternate theories: felony murder in the commission of or attempt to commit a robbery or intentional killing with premeditation and deliberation. Wynne argues that there was no witness to place him at the scene and challenges the credibility of the fingerprint evidence and the weight to be given to that and the relatively inconclusive DNA evidence. He also relies on the timelines established through the testimony of his mother and his girlfriend. He argues that there is no evidence to support a finding of premeditation or deliberation by him and insufficient evidence to support the felony murder theory of robbery or attempted robbery.

Because Wynne does not challenge the sufficiency of the evidence to support his conviction for use of a deadly weapon to commit a felony, either in his third assignment of error or in his arguments, we address the sufficiency of the evidence to support only his conviction for first degree murder. Pursuant to § 28-303, a person commits murder in the first degree if he or she "kills another person (1) purposely and with deliberate and

premeditated malice, or (2) in the perpetration of or attempt to perpetrate . . . robbery."

Wynne essentially urges us to reweigh the evidence and pass on the credibility of witnesses, something an appellate court does not do, as those matters are for the finder of fact. See *State v. Jenkins*, 294 Neb. 475, 883 N.W.2d 351 (2016). When viewed in the light most favorable to the State, the evidence was sufficient to support Wynne's conviction for first degree murder. The evidence showed that Wynne agreed via text message to purchase marijuana from Haynes and that after exchanging several cell phone calls with Haynes, Wynne arrived with another individual at the parking lot of the beauty supply store, where Haynes was murdered. The evidence also shows that the second individual held back while Wynne proceeded to interact with Haynes outside the open front passenger door of the Jeep, leaving a palmprint in the process, and that Wynne shot Haynes, taking some of his marijuana, which was scattered outside of and behind the Jeep and in the direction of his travel as Wynne and his companion fled the parking lot. In short, the evidence at trial could have led a rational juror to find the essential elements of the crime beyond a reasonable doubt. Wynne's third assignment of error is without merit.

VI. CONCLUSION

The district court did not err in admitting the content of the text messages into evidence or abuse its discretion in denying Wynne's motion for mistrial. The evidence was sufficient to support Wynne's murder conviction.

Affirmed.

State of Nebraska, appellee, v. Michael R. Schiesser, appellant.

888 N.W.2d 736

Filed December 13, 2016. No. A-16-115.

1. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Pleas: Appeal and Error.** A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.
3. **Pleas: Effectiveness of Counsel.** When a court accepts a defendant's plea of no contest, the defendant is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.
4. **Pleas.** A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily.
5. **Criminal Attempt: Intent.** A person is guilty of an attempt to commit a crime if he or she intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be or intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.
6. **Criminal Law: Aiding and Abetting.** Aiding the consummation of a felony occurs when a person intentionally aids another to secrete, disguise, or convert the proceeds of a felony or otherwise profit from a felony.
7. **Criminal Law: Words and Phrases.** Under the phrase "otherwise profit from a felony" as used in Neb. Rev. Stat. § 28-205 (Reissue 2016), the word "profit" is used as a verb and means to make returns, proceeds, or revenue on a transaction.

8. **Criminal Law: Aiding and Abetting**. Pursuant to Neb. Rev. Stat. § 28-205 (Reissue 2016), there is no requirement that the proceeds in question be "profit from a felony" as to both the one who aids and the one who is aided. It is enough that the person who is aided receives the returns or proceeds as a result of the commission of a felony and that the person who aids has intentionally assisted the person aided in enjoying these returns or proceeds.
9. ____: ____. To be convicted under Neb. Rev. Stat. § 28-205 (Reissue 2016), it is not necessary that the underlying felony be committed in Nebraska.
10. **Criminal Law: Aiding and Abetting: Time.** Aiding the consummation of a felony is concerned with conduct that occurs after a felony is committed and is a distinct crime.

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

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

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Inbody, Riedmann, and Bishop, Judges.

Riedmann, Judge.

INTRODUCTION

Michael R. Schiesser appeals from his plea-based conviction of attempted aiding the consummation of a felony. On appeal, he claims the factual basis supporting his plea is insufficient to sustain the conviction. We find no merit to his argument and therefore affirm.

BACKGROUND

Schiesser was initially charged with possession of money to be used in violating Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2014) and aiding the consummation of a felony. Pursuant to a plea agreement, Schiesser pled no contest to the amended information charging him with attempted aiding the consummation of a felony. The State provided a factual basis at the

plea hearing, and the district court accepted the plea and found Schiesser guilty. Schiesser was sentenced to 365 days in jail and received a $1,000 fine.

ASSIGNMENT OF ERROR

Schiesser assigns that the factual basis of his plea of no contest was insufficient to support a finding of guilty.

STANDARD OF REVIEW

[1] When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Wilkinson*, 293 Neb. 876, 881 N.W.2d 850 (2016).

[2] A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion. *Id*.

ANALYSIS

Schiesser argues that the factual basis provided by the State was insufficient to support a finding of guilty. The State claims that because Schiesser pled no contest to the charge, he either waived his ability to challenge the factual basis or should be judicially estopped from asserting a position on appeal which contradicts his position at the trial level. We disagree with the State.

[3,4] In *State v. Wilkinson, supra*, the defendant pled no contest to an amended complaint in county court. He never moved to quash the amended complaint and was found guilty of the charge. He appealed, and the district court affirmed. He appealed again, and the Supreme Court moved the case to its docket. The defendant argued on appeal that the district court erred by affirming the county court's finding that there was a sufficient factual basis to support the conviction. The Supreme Court observed that when a court accepts a defendant's plea of no contest, the defendant is limited to challenging whether the plea was understandingly and voluntarily

made and whether it was the result of ineffective assistance of counsel. See *id.* The court iterated that a sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily. *Id*. The court therefore found that the defendant had not waived his challenge to the factual basis. *Id*.

The same logic applies in the present case, and thus, Schiesser has not waived his challenge to the factual basis supporting his plea. Similarly, because a sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily, the defendant is not judicially estopped from challenging the factual basis even after pleading no contest and essentially declining to challenge the factual basis to the trial court. See *State v. Wilkinson, supra*. We therefore address Schiesser's assignment of error and determine whether the factual basis supports the necessary elements of the crime of which Schiesser was convicted.

[5] Schiesser pled no contest to attempted aiding the consummation of a felony. A person is guilty of an attempt to commit a crime if he or she intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be or intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime. Neb. Rev. Stat. § 28-201(1) (Cum. Supp. 2014).

[6-8] Aiding the consummation of a felony occurs when a person intentionally aids another to secrete, disguise, or convert the proceeds of a felony or otherwise profit from a felony. Neb. Rev. Stat. § 28-205 (Reissue 2016). Under the phrase "otherwise profit from a felony" as used in § 28-205, the word "profit" is used as a verb and means to make "'returns, proceeds, or revenue' on a transaction." *State v. Hansen*, 289 Neb. 478, 482, 855 N.W.2d 777, 782 (2014). There is no requirement that the proceeds in question be "profit from a felony" as

to both the one who aids and the one who is aided. It is enough that the person who is aided receives the returns or proceeds as a result of the commission of a felony and that the person who aids has intentionally assisted the person aided in enjoying these returns or proceeds. *State v. Hansen, supra*.

[9] Schiesser argues that the factual basis was insufficient to prove where the money came from, for what purpose it was to be used, and whether it was the proceeds of a crime committed in Nebraska. Specifically, he argues that "the State still failed to adduce evidence that the $23,000 in possession of [Schiesser] either came from the sale of narcotics in Nebraska, would be used to purchase or sell narcotics in Nebraska or would be transported back through Nebraska." Brief for appellant at 9. To be convicted under § 28-205, however, it is not necessary that the underlying felony be committed in Nebraska. Rather, the statute requires only that a person intentionally aids another to secrete, disguise, or convert the proceeds of a felony or otherwise profit from a felony. The question therefore is whether the evidence provided a sufficient factual basis for the commission of a felony.

In the present case, we find the evidence sufficient to establish a factual basis supporting the charge. Specifically, the State proved a sufficient factual basis by way of inquiry of the prosecutor at the plea hearing and the information contained in the presentence report. See *State v. Cervantes*, 15 Neb. App. 457, 729 N.W.2d 686 (2007) (factual basis for plea may be established by inquiry of prosecutor, interrogation of defendant, or examination of presentence report). The evidence establishes that on September 11, 2014, Schiesser was traveling from Wisconsin to California when his vehicle was stopped by police for a traffic violation in Lancaster County, Nebraska. The officer detected the odor of "burnt marijuana" coming from the vehicle, and Schiesser admitted that he and his passenger had previously smoked marijuana in the vehicle but denied the existence of any controlled substances in the vehicle. Schiesser denied that either he or the passenger was

carrying a large amount of currency, stating that he was carrying only approximately $1,000 of "travel cash."

While searching the vehicle, the officer detected the "very distinct odor of burnt marijuana . . . mixed with the odor of raw marijuana." The officer located a "roach," "a small bit of marijuana," a "small amount of loose marijuana," and "some Fruity Pebble marijuana treats." Despite Schiesser's statements to the contrary, the officer also located approximately $23,000 in banded currency in various locations in the vehicle, including the center console and in a shoebox underneath the back seat. According to police, the currency was bundled in a manner consistent with previously seized currency which was involved in criminal activity. A canine sniff of the currency alerted for the odor of narcotics, and a pretest performed on the currency identified cannabis residue. Schiesser took "full ownership" of the money because he "didn't want [the passenger] to get into trouble."

As further factual basis for the charge, the prosecutor stated that there appeared to have been another trip back to Wisconsin (where Schiesser previously lived) in August 2014. Police also located shipping package labels, "all consistent with the distribution of controlled substances." The prosecutor concluded by stating that "the officer believed that this money was also used or were proceeds from the distribution of the controlled substances."

Schiesser has previous marijuana-related criminal convictions out of Wisconsin between 2004 and 2013, including those for manufacturing/delivering, possession of marijuana, possession with intent to deliver, and maintaining a drug trafficking place. Schiesser's multistate criminal history record contained in the presentence report contains convictions of manufacture/deliver THC; possession of THC, subsequent offense; and possession with intent to deliver, all of which are felony crimes in Wisconsin. Schiesser has a medical marijuana card issued to him in California and admitted to smoking marijuana daily for "'pain relief,'" although he denied having any ongoing

health problems. According to the presentence report, Schiesser indicated that he performs "'odd jobs'" to earn money and denied selling marijuana for profit since he lived in Wisconsin 2 years earlier. He declined to answer questions about growing marijuana. The passenger in the vehicle, however, reported that Schiesser grows marijuana in California and distributes it to dispensaries and patients in the state.

We find that the above evidence, albeit circumstantial, is sufficient to establish the underlying felony of intent to deliver and/or delivery of marijuana in Wisconsin. See *State v. Badami*, 235 Neb. 118, 453 N.W.2d 746 (1990) (holding that appellant's possession of drug and drug paraphernalia and his statement that he had drug problem, although circumstantial evidence, provided sufficient factual basis for finding of guilt of charge of operating motor vehicle while under influence of drug). See, also, *State v. Abraham*, 189 Neb. 728, 205 N.W.2d 342 (1973) (stating that conviction may be based upon circumstantial evidence when facts and circumstances tending to connect accused with crime charged are of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt).

The passenger was a resident of Wisconsin and told the officer that he was accompanying Schiesser on the drive to California and that Schiesser was going to buy him a return airline ticket. The passenger was found to have $1,000 in cash on his person and said that Schiesser gave him the money while they were seated in the police car during the traffic stop. In a recorded telephone call made while Schiesser was incarcerated, Schiesser admitted that of the $15,000 located in the shoebox in the vehicle, $9,000 was his and $6,000 belonged to the passenger.

[10] We find the above evidence establishes that Schiesser attempted to aid the consummation of the felony of possession with intent to deliver and/or delivery of marijuana in Wisconsin and then possessed drug money in Nebraska in violation of § 28-416(17), which is a Class IV felony. Aiding

the consummation of a felony occurred when Schiesser gave $1,000 to the passenger, or in other words, he attempted to intentionally aid the passenger in profiting from a felony. The fact that Schiesser may also be the principal to the underlying felony is not inconsistent with his conviction for attempted aiding the consummation of the felony, because aiding the consummation of a felony is concerned with conduct that occurs after a felony is committed and is a distinct crime. See *State v. Hansen*, 289 Neb. 478, 855 N.W.2d 777 (2014).

We find no requirement, nor does Schiesser direct us to any, that the underlying felony must have occurred in Nebraska. Rather, the State must establish that the crime of which Schiesser was charged occurred in Lancaster County, Nebraska, and the State did so. See *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012) (State must prove proper venue beyond reasonable doubt in criminal cases). Accordingly, we find that the factual basis is sufficient to prove beyond a reasonable doubt that Schiesser is guilty of attempted aiding the consummation of a felony. We therefore affirm the conviction and sentence.

CONCLUSION

Because the factual basis is sufficient to support the conviction for attempted aiding the consummation of a felony, we affirm.

Affirmed.

Lisa Hostetler, appellee, v. First State Bank Nebraska and American Guarantee & Liability, appellants.

889 N.W.2d 123

Filed December 20, 2016. No. A-16-220.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a decision from the Workers' Compensation Court only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient 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. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Evidence: Appeal and Error.** Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
5. **Workers' Compensation: Rules of Evidence: Due Process.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence, but its discretion to admit evidence is subject to the limits on constitutional due process.
6. **Workers' Compensation.** Workers' Comp. Ct. R. of Proc. 42(E) (2015) specifically provides that the parties cannot attempt to influence or control the meeting place, the evaluation's outcome, or the vocational rehabilitation counselor's recommendations, but that the employee can.

7. ____. Under the odd-lot doctrine, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which a claimant can sell his or her services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his or her crippling handicaps.
8. **Workers' Compensation: Judgments: Appeal and Error.** Whether an employee is totally and permanently disabled is a question of fact, and when testing the trial judge's findings of fact, an appellate court considers the evidence in the light most favorable to the successful party.
9. **Trial: Witnesses.** As the trier of fact, the trial judge determines the credibility of the witnesses and the weight to give their testimony.
10. **Workers' Compensation: Words and Phrases.** Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform.
11. ____: ____. Total disability does not mean a state of absolute helplessness. It means that because of an injury, (1) a worker cannot earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform 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.

Appeal from the Workers' Compensation Court: Laureen K. Van Norman, Judge. Affirmed.

Patrick J. Mack and Gregory D. Worth, of McAnany, Van Cleave & Phillips, P.A., for appellants.

Franklin E. Miner, of Miner, Scholz & Dike, P.C., L.L.O., for appellee.

Inbody and Pirtle, Judges, and McCormack, Retired Justice.

Inbody, Judge.

INTRODUCTION

First State Bank Nebraska (FSBN) and its insurance carrier, American Guarantee & Liability (American), appeal the

Nebraska Workers' Compensation Court's determination that Lisa Hostetler was an odd-lot worker and was totally and permanently disabled. FSBN and American also contend the trial court failed to sustain its objection to certain pages of the vocational counselor's report, claiming the report was prejudiced because Hostetler's counsel's letter to the vocational counselor violated the Nebraska Workers' Compensation Court rules of procedure, specifically Workers' Comp. Ct. R. of Proc. 42(E) (2015).

STATEMENT OF FACTS

Hostetler was employed by FSBN as a loan officer on April 5, 2013, when she was walking down the stairs at her workplace and slipped and fell, sustaining an injury to her coccyx (tailbone) and sacral fractures at S-5. As a result of the incident, Hostetler sought treatment from a number of physicians—trying a variety of pain medications, injections, modalities, and treatments—with some pain alleviation.

At trial, Hostetler testified that her job was done primarily while sitting and that initially after the incident, she would work 7 hours per day. Hostetler also testified that while she was working after the injury, sitting continued to be unpleasant, and that although the prescribed pain medications worked well, they made her "foggy" and eventually lost their effectiveness. Specifically, Hostetler testified that the medications interfered with her ability to perform her job functions, because she made mistakes, made technical errors, and took three to four times longer to complete projects. Hostetler stated that she would try different methods to decrease her back pain, including lying down at breaks, getting up every 20 to 30 minutes, sitting on either an icepack or a doughnut-shaped pillow, sitting forward, sitting on one leg or the other, and using a "standing desk" that FSBN purchased for her, but she did not have lasting relief. Hostetler indicated that in January 2015, Dr. Peter Piperis restricted her workday to 4 hours per day. Hostetler testified that FSBN is now accommodating

her needs with a part-time job. However, Hostetler stated her concern that if FSBN changes ownership again, as it has four times since she has been employed there, they may not be as accommodating.

On February 3, 2015, Hostetler participated in a functional capacity evaluation (FCE). The findings provided that Hostetler's most significant restriction is sitting and that she is able to sit for 1- to 2-hour intervals for a total sitting time of 6 to 7 hours throughout the 8-hour workday, so long as she can change positions periodically. Drs. Chris Cornett and Piperis, two of Hostetler's treating physicians, adopted the FCE. However, Dr. Piperis recommended that Hostetler work no more than 4 hours per day.

The parties agreed upon Lisa Porter as a vocational counselor to provide a loss of earning capacity evaluation and opinion. Porter met with Hostetler, reviewed the FCE, and reviewed the opinions of Drs. Cornett, Piperis, and D.M. Gammel, the doctor who performed a medical examination on behalf of FSBN and American. Porter's reports of June 16 and August 25, 2015, determined Hostetler sustained the following losses: a 15-percent loss of earning capacity, based on the FCE and Dr. Cornett's determinations; a 0-percent loss of earning capacity, based on Dr. Gammel's determination; and a 50- to 60-percent loss of earning capacity, based on Dr. Piperis' determination. Porter also provided that the parties should "feel free to contact [her] if [the parties] should have any questions, concerns[,] or comments regarding this report or of the opinions contained herein."

Hostetler's counsel received and reviewed Porter's evaluation, then wrote a letter to Porter on September 1, 2015, stating:

> After reviewing your August 25, 2015[,] addendum to the [loss of earning capacity evaluation], I have to ask if you can answer two additional questions given the 50 to 60 percent [loss of earning capacity] you gave

> in regards to the 4 hour work restrictions given by Dr. Piperis. Please tell the parties whether 4 hours of work per day constitutes not only suitable, but gainful employment given . . . Hostetler had been employed full time for years prior to the April 5, 2013[,] accident. If you believe 4 hours of work per day is suitable and gainful employment by definition, please explain. Further, if you do not believe 4 hours of work per day constitutes gainful employment by its very definition, then is . . . Hostetler odd lot permanently and totally disabled?

In response, on September 8, 2015, Porter sent a letter to both parties, stating that based solely on Dr. Piperis' restrictions to Hostetler working 4 hours per day and his opinion, Hostetler "may indeed be considered an 'odd-lot' worker post-injury."

Hostetler also sought the opinion of rehabilitation specialist Patricia Conway to review and rebut Porter's report. Conway's November 13, 2015, report indicated that Hostetler sustained a 35-percent loss of earning capacity. Conway also determined that Hostetler is an odd-lot worker based on Dr. Piperis' opinion, that she has either a 35- or 60-percent loss of earning capacity based on Dr. Gammel's opinion or the FCE reports.

At trial, FSBN and American objected to Porter's September 8, 2015, response to Hostetler's counsel's September 1 letter. Specifically, FSBN and American objected to Porter's response, claiming the letter was produced in contravention of compensation court rule 42(E), because the parties are not to attempt to persuade or obtain a certain outcome from Porter. The trial court overruled the objection. Additionally, the trial court determined, based on Hostetler's testimony at trial and the opinions of the vocational counselors and Dr. Piperis, that Hostetler was an odd-lot worker and was totally and permanently disabled. FSBN and American have timely appealed to this court.

ASSIGNMENTS OF ERROR

FSBN and American assign the trial court erred in determining that Hostetler was an odd-lot worker and was totally and permanently disabled despite working nearly full time following the work injury. FSBN and American also assign that the trial court erred when it failed to sustain their objection to certain pages of the vocational counselor's report, claiming that those pages of the report were prejudiced because Hostetler's counsel's letter to the vocational counselor violated compensation court rule 42(E).

STANDARD OF REVIEW

[1-3] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a decision from the Workers' Compensation Court only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient 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. *Nichols v. Fairway Bldg. Prods.*, 294 Neb. 657, 884 N.W.2d 124 (2016). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong. See *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Interiano-Lopez v. Tyson Fresh Meats*, 294 Neb. 586, 883 N.W.2d 676 (2016).

[4] Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016).

ANALYSIS

Admission of Porter's September 8, 2015, Addendum Letter

FSBN and American claim the trial court erred in overruling its objection to Porter's September 8, 2015, response to Hostetler's counsel's September 1 letter, because it was procured in violation of compensation court rule 42(E). FSBN and American contend that Hostetler's counsel's letter to Porter was inappropriate contact, because its sole purpose was to influence Porter's initial opinion, which did not indicate whether Hostetler was an odd-lot employee.

[5] The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence, but its discretion to admit evidence is subject to the limits on constitutional due process. *Tchikobava v. Albatross Express, supra*. Admission of evidence is within the discretion of the compensation court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Id.*

Compensation court rule 42(E) provides in part that "[t]he parties, *other than the employee*, shall not attempt to influence or to control the meeting place, the outcome of the evaluation, or the recommendations of the vocational rehabilitation counselor." (Emphasis supplied.)

[6] Compensation court rule 42(E) specifically provides that the "parties" cannot attempt to influence or control the meeting place, the evaluation's outcome, or the vocational rehabilitation counselor's recommendations, but that the "employee" can. In this instance, Hostetler, as an employee, sought additional information regarding the rehabilitation counselor's recommendations, and was allowed to do so under rule 42(E).

Further, upon review of the letter written by Hostetler's counsel to Porter, which was also sent to FSBN and American, it does not appear it was the letter's intent to influence or

control the outcome or recommendations of Porter's evaluation. Rather, it appears Hostetler contacted Porter in accordance with her invitation to "contact [her] if [the parties] should have any questions, concerns[,] or comments regarding this report or of the opinions contained herein." Specifically, Hostetler asked "*if* [Porter] can answer . . . additional questions" in considering Dr. Piperis' restrictions for Hostetler. (Emphasis supplied.) The language of the letter appears to show that it was Hostetler's counsel's intent to receive further instructions regarding whether Dr. Piperis' opinion that Hostetler be limited to a 4-hour workday would be suitable and gainful employment; an explanation of why a 4-hour workday might be considered suitable and gainful employment; and, if Hostetler is not considered suitably and gainfully employed, whether she would now be described as "odd lot permanently and totally disabled." Such questions of clarification provide no indication that Hostetler sought to influence or control Porter's recommendation, particularly as Porter had no obligation to respond.

Moreover, Porter's response did not indicate any bias, as there appears to be no change to the original recommendation and opinion and as her response indicated that Hostetler "*may* indeed be considered an 'odd-lot' worker post-injury based solely on the medical opinion of Dr. . . . Piperis." (Emphasis supplied.)

Therefore, we conclude that the Workers' Compensation Court did not abuse its discretion admitting Porter's September 8, 2015, letter addendum to her report, in response to Hostetler's counsel's inquiry.

Trial Court's Odd-Lot Determination

FSBN and American contend the trial court erred in its determination that Hostetler was an odd-lot worker and was totally and permanently disabled because she is still able to perform her job responsibilities and compete in the open

labor market. FSBN and American argue that even if Porter's September 8, 2015, letter is allowed into evidence, a 4-hour workday restriction does not warrant a finding of an odd-lot designation or a total and permanent disability.

[7] Under the odd-lot doctrine, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which a claimant can sell his or her services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his or her crippling handicaps. *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012).

[8,9] Whether Hostetler is totally and permanently disabled is a question of fact, and when testing the trial judge's findings of fact, we consider the evidence in the light most favorable to the successful party. See, *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008); *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). As the trier of fact, the trial judge determines the credibility of the witnesses and the weight to give their testimony. *Id*.

[10,11] Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. *Frauendorfer v. Lindsay Mfg. Co., supra.* Total disability does not mean a state of absolute helplessness. It means that because of an injury, (1) a worker cannot earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform 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. *Money v. Tyrrell Flowers, supra*; *Frauendorfer v. Lindsay Mfg. Co., supra.*

Hostetler sought medical attention from a variety of doctors and tried an array of pain medications, injections, modalities,

and treatments, with no continued success. Hostetler appeared to be diligent in her use of pain alleviation techniques through the use of a standing desk, regular movement throughout the workday, lying down on breaks, or the use of icepacks and doughnut-shaped pillows, with limited alleviation. Hostetler's testimony at trial indicated that much of her work is sedentary and is done while seated and that she continues to suffer pain, discomfort, and difficulty in accomplishing required job tasks. Dr. Piperis prescribed a 4-hour workday restriction, which continued at the time of trial. Considering the evidence in the light most favorable to Hostetler and giving her the benefit of every inference reasonably deducible from the evidence, we cannot say that the trial judge erred in finding Hostetler totally and permanently disabled.

CONCLUSION

The compensation court did not abuse its discretion in admitting into evidence the vocational counselor's letter addendum to her report. Further, the trial court did not err in finding that Hostetler was an odd-lot worker and was totally and permanently disabled.

Affirmed.

David Patera, appellant and cross-appellee, v. Jaime Patera, appellee and cross-appellant.

889 N.W.2d 624

Filed January 3, 2017. No. A-16-338.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which the trial court's (1) resolution of issues of law is reviewed de novo, (2) factual findings are reviewed for clear error, and (3) determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
2. **Attorney Fees: Appeal and Error.** 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.
3. **Contempt.** Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party.
4. **Contempt: Words and Phrases.** Willful disobedience is an essential element of contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
5. **Contempt: Proof: Presumptions.** Outside of statutory procedures imposing a different standard or an evidentiary presumption, the complainant in a civil contempt proceeding must prove all elements of contempt by clear and convincing evidence.
6. **Contempt: Appeal and Error.** An appellate court's review of a district court's finding of contempt is only for an abuse of discretion, not to determine whether the appellate court would have reached the same conclusion based on the facts presented.
7. **Contempt: Costs: Attorney Fees.** Costs, including reasonable attorney fees, can be awarded in a contempt proceeding.

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

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Steven J. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellee.

Inbody and Pirtle, Judges, and McCormack, Retired Justice.

McCormack, Retired Justice.

I. INTRODUCTION

David Patera appeals from the order of the district court holding Jaime Patera in contempt for failing to follow the court-ordered parenting plan and allowing Jaime to purge the contempt by permitting David to spend an additional 7 days of parenting time with the couple's daughter, Karissa Patera. David argues that the purge order should have required Jaime to let David spend time with both of the parties' children, not just Karissa, and that the district court should have awarded David additional parenting time. David also argues that the district court erred in failing to order Jaime to pay the full amount of his attorney fees.

Jaime cross-appeals, arguing that the district court erred in finding her in contempt, because David gave her permission to deviate from the parenting plan.

Upon our review, we find no merit to either David's or Jaime's arguments, and we affirm the order of the district court.

II. BACKGROUND

David and Jaime are the divorced parents of Karissa and Joseph Patera. Jaime has primary physical custody of the children, subject to David's parenting time. David is scheduled for parenting time with Karissa and Joseph from Thursday through Tuesday every other weekend. In the summer, David gets an additional 2 weeks with the children. The present dispute revolves around parenting time David missed with Karissa in July 2015.

In July 2015, Karissa attended a softball tournament and a church camp, both of which were out of state. Jaime did not dispute that Karissa's attendance at these activities infringed upon David's court-ordered parenting time. Following his missed parenting time due to Karissa's tournament and camp, David filed an application for order to show cause why Jaime should not be held in contempt for failing to comply with the parenting plan. The court held a trial in the matter, at which both David and Jaime testified. At the end of the trial, David sought parenting time with both Karissa and Joseph for 9 days he claimed to have missed. He also asked to be awarded additional days of parenting time and attorney fees.

The district court found that Jaime had willfully violated the court-ordered parenting plan and held her in contempt. The court sentenced Jaime to 7 days' incarceration. It further ordered that Jaime could purge the contempt by allowing David 1 week of uninterrupted parenting time with Karissa. Lastly, the court ordered Jaime to pay $250 of David's attorney fees.

David filed a motion for new trial, arguing that the court's order was insufficient. David argued that he should have been awarded at least 9 days of parenting time with both Karissa and Joseph for time he missed "with his family together as a whole." David also argued that he should be entitled to additional parenting time beyond the time he missed and that Jaime should be required to pay more of his attorney fees. The district court overruled David's motion for new trial.

David appeals and Jaime cross-appeals from the district court's order finding Jaime in contempt and setting forth the terms by which Jaime could purge the contempt. Additional facts will be discussed, as necessary, in the analysis section below.

III. ASSIGNMENTS OF ERROR

David argues, restated, that the trial court erred in instituting a purge order that allowed David parenting time with just Karissa, not Joseph, and in not awarding David additional

parenting time. David also argues that the district court erred in ordering Jaime to pay only $250 of David's attorney fees, rather than the full amount he requested.

On cross-appeal, Jaime argues that the district court erred in finding her in contempt, because she relied on David's consent in deviating from the parenting plan.

IV. STANDARD OF REVIEW

[1] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which the trial court's (1) resolution of issues of law is reviewed de novo, (2) factual findings are reviewed for clear error, and (3) determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion. *Sickler v. Sickler*, 293 Neb. 521, 878 N.W.2d 549 (2016).

[2] 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. *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011).

V. ANALYSIS

We will first address Jaime's argument on cross-appeal that the district court erred in finding her in contempt. If Jaime's argument is meritorious, we need not reach David's arguments regarding the purge order.

1. Cross-Appeal: Finding of Contempt

Jaime argues that the district court erred in finding her in contempt. Jaime asserts that she deviated from the parenting plan because David had consented to Karissa's attending the softball tournament and church camp during his parenting time. Jaime therefore argues that her violation of

the parenting plan was not willful. We find no merit to this assignment of error.

[3-5] Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party. *Sickler, supra*. Willful disobedience is an essential element of contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order. *Id.* Outside of statutory procedures imposing a different standard or an evidentiary presumption, the complainant must prove all elements of contempt by clear and convincing evidence. *Id.*

The evidence presented at the contempt hearing showed that David and Jaime had discussed Karissa's attendance at a softball tournament in Oklahoma during the latter part of July 2015. The parties agreed that the tournament in question was during David's parenting time. In particular, in April 2015, David wrote, "I am ok with you having them that weekend [of the tournament] if you will trade it for another weekend."

The parties continued to discuss Karissa's attendance at the tournament into mid-July 2015, but did not reach an agreement regarding when David would be compensated for his missed parenting time. On July 14, David e-mailed Jaime and asked for additional details regarding when Karissa was leaving for the Oklahoma softball tournament and when she would return. David also wrote that he was aware Karissa would be attending a church camp in Illinois during another period of his parenting time. David asked Jaime to contact him so they could "make a plan to cover this week [of the softball tournament] and to cover the week for Karissa's church camp."

On July 18, 2015, David e-mailed Jaime again regarding Karissa. David wrote that he had learned from a telephone conversation with Karissa that she was no longer attending the Oklahoma softball tournament, but was planning to attend a different tournament in Minnesota during the same period of time. David proposed a trade of days to compensate for his

missed parenting time with Karissa during her attendance at the new softball tournament and the church camp. Later that day, David e-mailed Jaime again and stated, "If you will not trade the days for Karissa's softball tournament then she is not going."

On July 20, 2015, Jaime e-mailed David and offered to let him have Karissa and Joseph for 2 days, or to take them to dinner one night. It appears that this exchange did not occur, and Karissa attended the softball tournament and church camp.

On July 30, 2015, David e-mailed Jaime and requested additional parenting time with Karissa and Joseph for the time he claimed to have missed. David attached a timeline which indicated that he believed he lost 4 days of parenting time with Karissa due to the softball tournament and 3 days with Karissa due to the church camp. David also indicated he had missed 2 days with Karissa due to a ski trip, but no additional evidence of a ski trip was presented.

Jaime argues that the series of e-mail exchanges show that David consented to Karissa's attending the softball tournament and church camp. Jaime argues that the situation is analogous to this court's decision in *Belitz v. Belitz*, 21 Neb. App. 716, 842 N.W.2d 613 (2014).

In *Belitz*, the district court declined to hold the mother in contempt for failing to return her child to the father after her summer parenting time. No specific date of return was contained in the court order and the mother and father had ongoing discussions regarding allowing the child to remain with the mother. *Id.* The mother also filed a motion to modify custody after failing to return the child and then complied with the ex parte order requiring her to return the child. *Id.* We affirmed the order of the district court declining to find the mother in contempt. *Id.*

Jaime points out that, just as in *Belitz*, she and David had ongoing discussions regarding trading days in order to allow Karissa to attend the softball tournament and church

camp. However, Jaime's argument ignores important differences between *Belitz* and the present case. In *Belitz*, the district court declined to hold the mother in contempt based on the lack of a concrete return date, ongoing discussions about the child remaining with the mother, and the mother filing to modify custody and complying with the ex parte order to return the child. In contrast, here, the district court *did* find Jaime in contempt, a decision which we are reviewing only for an abuse of discretion. Although there were ongoing discussions regarding a trade of days between David and Jaime so Karissa could attend the tournament and camp, no agreement was ever reached. Furthermore, Jaime was aware that David was missing his scheduled parenting time and that he requested a trade of days in order for Karissa to attend the events in question.

[6] As stated above, our review is only to determine whether the district court's finding of contempt was an abuse of discretion, not whether we would have reached the same conclusion based on the facts presented. See *Sickler v. Sickler*, 293 Neb. 521, 878 N.W.2d 549 (2016). The evidence supports the district court's determination that Jaime's denial of David's parenting time was, in fact, willful. Despite the fact that *Belitz, supra*, also involved ongoing discussions between the parents about changing the parenting time schedule, that case is distinguishable on both its facts and its procedural posture. Given the e-mail communications and Jaime's awareness that David did not intend to relinquish his scheduled parenting time without arranging to trade days, we cannot conclude that the district court's finding of contempt was an abuse of discretion. Jaime's cross-appeal is without merit.

2. David's Appeal

Given our determination that the district court did not err in finding Jaime to be in contempt, we turn now to David's arguments regarding the adequacy of the remedy imposed and the amount of attorney fees he was awarded.

(a) Purge Order

David argues that the district court erred in ordering David to have parenting time with Karissa alone, rather than with Karissa and Joseph together, and in not allowing David additional parenting time as part of the purge order. David does not challenge the court's factual finding that he was deprived of 7 days of parenting time with Karissa. Rather, David argues that when he was deprived of parenting time with Karissa, he missed out on time with his family as a whole, including Karissa's spending time with Joseph and with David's children from his current marriage. David also argues that the court should have awarded him more parenting time than he actually missed with Karissa because such additional parenting time would coerce Jaime into complying with the parenting plan in the future. We find no merit to this assignment of error.

The district court determined, and David does not contest, that David missed 7 total days of parenting time with Karissa only. In fact, David's own evidence, the timeline he e-mailed to Jaime in late July 2015, supports the court's determination that David lost 7 days with Karissa due to her attendance at the softball tournament and church camp. Given that the court compensated David for the amount of parenting time he actually missed with Karissa, we cannot say that its decision not to impose additional parenting time or to order parenting time with Joseph was an abuse of discretion.

(b) Attorney Fees

Lastly, David argues that the district court erred in ordering Jaime to pay only $250 of his attorney fees. David argues that Jaime should be ordered to pay the full amount of his requested attorney fees, $2,500. We find no merit to this assignment of error.

[7] Costs, including reasonable attorney fees, can be awarded in a contempt proceeding. *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010),

disapproved on other grounds, Hossaini v. Vaelizadeh, 283 Neb. 369, 808 N.W.2d 867 (2012).

At trial, David claimed he had missed 9 days of parenting time with both Karissa and Joseph. The court ultimately determined that David had missed only 7 days of parenting time with Karissa, not Joseph, and that David was not entitled to additional parenting time, as discussed above. Given this finding only partially in David's favor, the court's partial award of attorney fees to David was reasonable.

VI. CONCLUSION

The district court did not err in finding Jaime to be in contempt of the court-ordered parenting plan. Furthermore, the court did not err in ordering that Jaime could purge the contempt by allowing David 7 days of parenting time with Karissa or in ordering Jaime to pay $250 of David's attorney fees.

Affirmed.

Jason Boyer, appellant, v.
Lauren Boyer, appellee.
889 N.W.2d 832

Filed January 17, 2017. No. A-16-150.

1. **Child Custody: Visitation: Appeal and Error.** Child custody and visitation determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
4. ____. Remarriage is a commonly found legitimate reason for removal of a child from the state.
5. ____. Absent evidence of an ulterior motive, a custodial parent's desire to live with his or her current spouse, who is located outside of the custodial jurisdiction, is a legitimate reason to remove the minor child.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
7. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in the child's best interests, the court considers (1) each parent's motives for seeking or opposing the move; (2) the potential the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such move will have on contact

between the child and the noncustodial parent, when viewed in the light of reasonable visitation.

8. **Child Custody.** The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted removal in an effort to frustrate or manipulate the other party.
9. ____. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent.
10. ____. The list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted.
11. ____. The existence of educational advantages factor receives little or no weight when the custodial parent fails to prove that the new schools are superior.
12. **Child Custody: Visitation.** A noncustodial parent's visitation rights are important, but a reduction in visitation time does not necessarily preclude a custodial parent from relocating for a legitimate reason.
13. **Child Custody.** In considering removal of a child to another jurisdiction, a court focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

Aimee S. Melton and A. Bree Robbins, of Reagan, Melton & Delaney, L.L.P., for appellant.

Robin L. Binning, of Binning & Plambeck, for appellee.

Moore, Chief Judge, and Pirtle, Judge, and McCormack, Retired Justice.

Pirtle, Judge.

I. INTRODUCTION

Jason Boyer appeals from an order of the district court for Sarpy County which granted Lauren Boyer's request to remove the parties' minor child from Nebraska to Alaska. We find that Lauren had a legitimate reason to request removal and find, upon our de novo review, that she sufficiently demonstrated removal would be in the child's best interests. Accordingly, we affirm the district court's order.

II. BACKGROUND

The parties met in Montana in 2004. Jason was a member of the U.S. Air Force at the time. The parties married in November 2006 in Nebraska, and they had one child together, Micah Boyer, who was born in 2010. During their relationship, they moved frequently due to Jason's military service. The parties separated around February 2011. At that time, they were living in California. Following the separation, Lauren and Micah moved to Bellevue, Nebraska, where Lauren's parents were living due to her father's military service.

Jason filed for divorce in California, and a divorce decree was entered on April 25, 2013. Lauren was awarded physical custody of Micah, and the parties were awarded joint legal custody. Lauren was allowed to stay in Nebraska with Micah. Jason continued to live in California due to his military service until he was honorably discharged in August 2014. He moved to Nebraska in September 2014 to be closer to Micah.

Between February 2011 and September 2014, Jason made multiple trips to Nebraska to visit Micah. Jason also maintained contact with Micah through telephone and "Skype" conversations. Upon moving to Nebraska, Jason began spending time with Micah on a frequent basis.

After moving to Nebraska, Jason enrolled in a bachelor's degree program, which he completed, and he also worked

part time. At the time of trial in January 2016, he had been accepted into a master's degree program in security management that was set to start the month after trial.

When Lauren first moved to Nebraska with Micah, they lived with Lauren's parents for about 6 months and then moved into a two-bedroom apartment. At the time of trial, they were living with Lauren's parents again, because Lauren had given up her apartment in anticipation of her move out of state.

After moving to Nebraska, Lauren went to nursing school, and in August 2014, she became a licensed practical nurse (LPN). She was employed as a nursing supervisor at a long-term care facility, where she had worked various shifts.

In the summer of 2014, Lauren met her current husband, Collin Stone, on a dating Web site. They began communicating with each other by telephone and e-mail, and she learned early on that Collin lived in Alaska. After about a year of communicating with him, Collin came to Nebraska in June 2015, and she met him in person for the first time. Micah met Collin as well. Lauren and Collin next saw each other in July, when they met each other in Montana. Micah was not present on this trip. During this visit, Lauren and Collin became engaged. They were married in August, after Jason filed this action. Lauren had never been to Alaska until August or September, after her marriage to Collin. The first time Micah went to Alaska was for Christmas. At trial, Lauren testified that three home pregnancy tests had indicated she was pregnant, although she had not yet been to a doctor.

On August 5, 2015, Jason filed an application to register the parties' California dissolution order in Nebraska. He also filed a complaint for modification alleging that material changes in circumstances had occurred that warranted a modification to the decree. The alleged changes were that Jason had moved to Nebraska to be closer to Micah; that the parties mediated a parenting plan, and Jason had been actively involved in Micah's life; that Lauren told Jason that she was getting married, moving to Alaska, and taking Micah with her; that such move would substantially impact Jason's relationship with

Micah; and that the move to Alaska is contrary to Micah's best interests. He requested that the decree be modified to order Lauren to stay in Nebraska with Micah or, in the alternative, to order that Micah stay in Nebraska. If Lauren chooses to leave Nebraska, Jason asked that custody be awarded to him. Jason also requested an increase in the amount of his visitations previously ordered.

Lauren filed an answer and counterclaim on August 13, 2015. In her counterclaim, she alleged that material changes in circumstances had occurred to warrant modification of the decree, in that joint legal custody was no longer in Micah's best interests, that Lauren is remarried and plans to relocate to Alaska, that it was in Micah's best interests to grant Lauren permission to remove Micah from Nebraska, and that Lauren has been responsible for providing the daily care and the financial support for Micah since the decree was entered. Lauren requested that the court award her legal and physical custody of Micah, subject to reasonable parenting time by Jason, and grant her permission to remove Micah from Nebraska to Alaska.

Following trial on Jason's complaint for modification and Lauren's counterclaim for modification, the trial court found that Lauren had met her burden of proof as to removal and granted her permission to remove Micah from Nebraska to Alaska.

III. ASSIGNMENTS OF ERROR

Jason assigns that the trial court erred in (1) finding that Lauren had a legitimate reason to remove Micah from Nebraska to Alaska, (2) finding that removal was in Micah's best interests, (3) receiving exhibit 39 into evidence, and (4) finding that the parties shall share joint legal custody of Micah effective January 1, 2018.

IV. STANDARD OF REVIEW

[1,2] Child custody and visitation determinations are matters initially entrusted to the discretion of the trial court, and

although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2013). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

V. ANALYSIS

[3] Jason's first two assignments of error relate to the trial court's granting Lauren permission to remove Micah from Nebraska to Alaska. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Dragon v. Dragon, supra.*

1. Legitimate Reason for Leaving State

[4,5] The trial court found that Lauren's remarriage and subsequent pregnancy constituted legitimate reasons to leave the state. It is well established in Nebraska case law that remarriage is a commonly found legitimate reason for removal of a child from the state. See, *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994); *Curtis v. Curtis*, 17 Neb. App. 230, 759 N.W.2d 269 (2008). Our precedent has recognized that absent evidence of an ulterior motive, a custodial parent's desire to live with his or her current spouse, who is located outside of the custodial jurisdiction, is a legitimate reason to remove the minor child. *Daniels v. Maldonado-Morin*, 288 Neb. 240, 847 N.W.2d 79 (2014).

Jason argues that the facts in this case are distinguishable from the facts in prior cases where marriage has been found to be a legitimate reason for removal. He contends that in cases such as *Vogel v. Vogel, supra*, and *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002), the parties met their spouses in Nebraska and sought removal after the new spouse needed to relocate for career reasons, which is not the situation here. Lauren and Collin did not meet in Nebraska, and removal is not being sought for a career reason of Collin's. Jason also argues that because Lauren met her current husband online and did not meet him in person until a few months before their marriage, her marriage is somehow less credible than that of a couple meeting by other means. As the trial court found, there is no basis in the case law to treat this marriage differently than those found in other cases. We conclude that Lauren's marriage to Collin was a legitimate reason for removal.

[6] Having concluded that Lauren's remarriage was a legitimate reason for removal, we need not determine whether her pregnancy was also a legitimate reason. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016).

2. Best Interests

Having determined Lauren met the threshold requirement, we will consider upon our de novo review whether she demonstrated that removing Micah from Nebraska is in his best interests. See *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2013).

[7] In determining whether removal to another jurisdiction is in the child's best interests, the court considers (1) each parent's motives for seeking or opposing the move; (2) the potential the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *Id.*

(a) Each Parent's Motives

[8] The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted removal in an effort to frustrate or manipulate the other party. *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007).

The evidence shows Lauren sought removal because she wants to live with her new husband, who has lived in Alaska for 20 years; who teaches aviation in high school, which is not something he can easily teach anywhere else; and who has shared custody of his three children in Alaska. We note the trial court's concern about the future stability of this marriage, given that Lauren and her new husband have not spent significant time together. Nevertheless, we agree that her motivation in seeking removal appears to be sincere and not an effort to frustrate or manipulate Jason.

Jason's motives for resisting the removal are also sincere. He opposes removal because it would dramatically affect his parenting time and his relationship with Micah. When Jason was discharged from the Air Force, he moved to Nebraska to be close to Micah. Since his move in September 2014, Jason has been spending time with Micah on a regular basis and has been working on establishing a good relationship with him. There is no indication that his opposition to removal is an attempt to frustrate or manipulate Lauren.

Both parties have sincere motives for seeking or opposing removal and neither party acted in bad faith. This factor does not weigh for or against removal.

(b) Quality of Life

[9] In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to

which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent. See, *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Wild v. Wild, supra*.

[10] This list should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted. *Wild v. Wild, supra.*

(i) Emotional, Physical, and Developmental Needs

We first consider the impact on Micah's emotional, physical, and developmental needs in assessing the extent to which the move could enhance the child's life.

The evidence shows that Lauren has always been Micah's primary caregiver and, thus, has been the parent responsible for his emotional, physical, and developmental needs. Lauren testified that when Micah was an infant, she was the one primarily responsible for his care and he was with her all the time. During the marriage, Jason often worked very long hours as a result of his military duties. When Lauren and Micah moved to Nebraska, Lauren was Micah's primary parent and was responsible for his daily needs. The evidence demonstrates that Micah's emotional, physical, and developmental needs have always been met.

Since Jason moved to Nebraska, he and Micah have been spending time together regularly and Jason has been taking on more responsibility in meeting Micah's emotional, physical, and developmental needs. However, Lauren has a more stable

and constant presence in Micah's life and has been the one historically responsible for his emotional, physical, and developmental needs. We agree with the trial court that this factor weighs somewhat in favor of removal.

(ii) Child's Opinion or Preference

Micah did not testify and was too young, at the age of 5, to state his preference on where to live. This factor does not weigh in favor of or against removal.

(iii) Enhancement of Custodial Parent's Income

Lauren claims that the move to Alaska will enhance her income. At the time of trial, she was working as an LPN in a long-term care facility and earning $18 per hour. She testified that she believed that her current income reflected the maximum income she could earn as an LPN in the Omaha, Nebraska, area. She testified that she had not applied anywhere besides the place she works, because the starting pay at other LPN jobs would be lower than what she makes. However, she had no corroborating evidence to support her opinions.

Lauren testified that she had been offered a job with the school district in Nenana, Alaska. She testified that she was offered a position as a school nurse, which the school currently does not have. She stated that she would be paid $25 per hour and that her work hours would be the same hours as Micah's schoolday. She also testified that she would be working at the same school Micah would be attending. Lauren testified that the job was an opportunity that she would not have in Nebraska, because there are a lot of nurses in Nebraska.

Lauren testified that she had received a written confirmation of the job offer from the Nenana school district. Exhibit 39 is the purported job offer from the superintendent of the school district, which exhibit was admitted into evidence, over Jason's objection.

Jason assigns that the trial court erred in receiving exhibit 39 into evidence. He objected to the admission of the exhibit

into evidence based on the grounds of hearsay and foundation. Lauren's counsel stated she was not offering the exhibit for the truth of the matter asserted in the exhibit, but for confirmation that Lauren received an offer from the Nenana school district. The court overruled Jason's objection and received the exhibit for the limited purpose as offered.

Assuming without deciding that the trial court erred in admitting exhibit 39 into evidence, it was harmless error because the exhibit failed to provide any evidence that Lauren has a job in Alaska. The "offer" that was made to Lauren, as set forth in exhibit 39, was to do "an assessment of the medical practices and procedures utilized at the Nenana Student Living Center and throughout the Nenana City School." The assessment was expected to take 1 month, and during that time, Lauren would be paid $25 an hour. Exhibit 39 further states that once the assessment is complete, the school district would then decide, based on the results, whether it would offer Lauren a permanent position to provide nursing services. A permanent position would provide "competitive wages"; a fully paid medical, dental, and vision plan; and "participation in Alaska's Public Employees Retirement System."

Therefore, exhibit 39 shows only that the school district will allow Lauren to do an assessment to see if there is a need for a new position. She had not been offered a permanent position, only the possibility of one. Further, even if we could construe exhibit 39 as a job offer, there is nothing to indicate that her income will be enhanced. She will be paid $25 per hour during the assessment, but in regard to a permanent position, we know only that she will be paid "competitive wages." There is no indication as to what that means or any evidence as to what LPN's are paid on average in Alaska. In addition, Lauren failed to provide any evidence regarding the cost of living in Nenana versus Bellevue. Any potential increase in her earnings could be spent on cost-of-living increases. See *Wild v. Wild*, 13 Neb. App. 495, 696 N.W.2d 886 (2005). Finally, we note that Lauren also testified that she always wanted to be a stay-at-home

mother and that she could do that if she wanted by moving to Alaska, which contradicts any evidence about an enhancement in her income.

We conclude that there is no evidence that Lauren's income will be enhanced by a move to Alaska. Accordingly, this factor does not weigh in favor of removal.

(iv) Degree to Which Housing or Living Conditions Would Be Improved

At the time of trial, Lauren and Micah were living with Lauren's parents in their home. Prior to making plans to move to Alaska, Lauren and Micah lived in a two-bedroom apartment. Lauren testified that if she stayed in Nebraska with Micah, she would find another two-bedroom apartment to live in. Jason also lives in a two-bedroom apartment. If removal were allowed, Lauren and Micah would live in a three-bedroom house that Collin owns. There was testimony that a loft area of the house could be used as an additional bedroom. The house is located on a 1-acre lot in a wooded area just outside Nenana, which is a small town of about 500 people. The closest city is Fairbanks, Alaska, which is about a 40-minute drive.

We conclude that housing or living conditions would be somewhat improved by the move to Alaska. Accordingly, this factor weighs in favor of removal.

(v) Existence of Educational Advantages

[11] We next consider whether Alaska offers educational advantages. We have held this factor receives little or no weight when the custodial parent fails to prove that the new schools are superior. *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008).

At the time of trial, Micah was attending school in the Bellevue public school system. In Alaska, he would attend school in the Nenana public school system. There was no evidence presented that one school district would provide educational advantages over the other. Lauren testified that she

believed both school systems would provide a good education and that the education factor was neutral. Therefore, we find this factor does not weigh in favor of or against removal.

(vi) Quality of Relationship Between Child and Each Parent

The evidence showed that Micah has a good and loving relationship with both parents. There was no real bond established between Jason and Micah when Micah was a baby, because Jason often worked long hours and Lauren and Micah moved to Nebraska when Micah was less than a year old. The relationship between Jason and Micah has gotten stronger since Jason's move to Nebraska. They have grown closer since then, and they spend time with each other on a regular basis. As the trial court noted, Jason has made a sincere effort to build a strong relationship with Micah since he moved to Nebraska. Lauren testified that Micah has a lot of fun with Jason and that they do activities and go places when they are together. She was concerned, however, that Jason does not discipline Micah and that they are more "buddies" than father and son.

Lauren has been Micah's primary caregiver all of his life, and they have a strong bond. As the court noted, if Micah had to be separated from one or the other parent, he would more easily adapt to not seeing Jason on a frequent basis, given his close bond to Lauren.

Although the evidence shows that Jason has a good relationship with Micah, the relationship between Lauren and Micah is stronger and well-established. Therefore, we conclude that Micah's strong bond with Lauren weighs in favor of removal.

(vii) Strength of Child's Ties to Present Community and Extended Family

Micah was only 5 years old at the time of trial, so he does not have any strong ties to the Bellevue community. He does, however, have strong ties to Lauren's extended family who

live in the Bellevue area. Lauren's parents and several of her siblings live in Bellevue. Lauren and Micah lived with Lauren's parents when they first moved to Nebraska and lived with them again after Lauren planned to move to Alaska. Lauren's parents have also been Micah's childcare providers when Lauren is working.

Lauren's father, however, testified that he and his wife may move out of Nebraska at some point because he would like to pursue other career opportunities. Lauren's father was in the Air Force and was stationed in Nebraska in 2006. He retired in 2009 and has stayed in Nebraska since then, working at the Air Force base as a civilian employee. He testified that he and his wife would consider moving out of Nebraska for a career opportunity, but not until after his daughter finished her cosmetology school education in the next 18 months. He had previously turned down job offers outside of Nebraska because the timing was not right. He testified that if he and his wife moved, he did not know whether his two adult children that live in Bellevue would also move or remain in Nebraska.

Jason has no ties to Nebraska and no family in the state. Neither Jason nor Lauren have any family in Alaska. We conclude that this factor does not weigh in favor of or against removal.

(viii) Likelihood That Allowing or Denying Move Would Antagonize Hostilities Between Parties

The evidence shows that there is hostility between the parties, primarily as a result of Lauren's desire to move to Alaska. Prior to Lauren's remarriage and desire to move, the parties were able to communicate with each other about Micah. There has been some contentious communication between the parties in the past, primarily caused by Jason.

Any decision in this situation has the potential to antagonize the hostilities between the parties, at least for a period of time. Lauren could be hostile toward Jason if she is not allowed to move to Alaska with her new husband and the father of the

child she is pregnant with. Likewise, Jason may be hostile if Lauren is allowed to take Micah to Alaska, after he moved from California to Nebraska to be near Micah. Therefore, this factor does not weigh in favor of or against removal.

(ix) Living Conditions and Employment Opportunities of Custodial Parent

This factor is repetitive of other facts already discussed. We concluded that the living conditions in Alaska would somewhat improve and that Lauren's income or employment opportunities would not necessarily improve. We give no weight to this factor as it is incorporated into other factors.

(x) Conclusion Regarding Quality of Life

After considering all of the quality-of-life factors, we conclude upon our de novo review of the record that Lauren established removal would enhance the quality of life for Micah.

(c) Impact on Noncustodial Parent's Visitation

Relocating to Alaska will undoubtedly have a significant impact on Jason's visitation time. Since moving to Nebraska, Jason has been spending time with Micah on a regular basis and has become very involved in his life. If Lauren is allowed to move to Alaska with Micah, given the distance involved, Jason will no longer see Micah on a regular basis and is mostly likely to see him only a few times per year. The new parenting plan provides for Jason to have Micah in Nebraska for 7 weeks during the summer vacation and approximately 1 week during the Christmas vacation, with transportation paid for by Lauren. Jason also has the option to exercise parenting time during spring break, at his cost, and to have three 1-week visits in Alaska. The majority of Jason's contact with Micah would be by telephone or Skype, which cannot replace the frequent, in-person contact he currently has and would continue to have if Micah were to remain in Nebraska.

[12,13] Nebraska courts have recognized that a noncustodial parent's visitation rights are important, but a reduction in visitation time does not necessarily preclude a custodial parent from relocating for a legitimate reason. *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2013), citing *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986). Rather, we focus on the ability of the noncustodial parent to maintain a meaningful parent-child relationship. *Dragon v. Dragon, supra*, citing *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). A meaningful relationship would be difficult, if not impossible, if Lauren moves to Alaska.

This factor weighs against removal because the move will dramatically reduce the amount of in-person contact Jason has with Micah and it would be difficult to maintain a meaningful relationship.

(d) Conclusion on Best Interests

A de novo review of the evidence shows that the parents were not motivated by an effort to frustrate the relationship of their child with the other parent and that the move would enhance Micah's quality of life. Although the move would greatly impact the relationship between Jason and Micah, the record overall demonstrates that it is in Micah's best interests to move with Lauren from Nebraska to Alaska.

(e) Conclusion on Removal

Based on the totality of the record, we conclude that the trial court did not err in finding that Lauren has a legitimate reason for leaving the state and that it is in Micah's best interests to continue living with Lauren. Accordingly, we affirm the court's order granting Lauren permission to move with Micah to Alaska.

3. Legal Custody

Finally, Jason assigns that the trial court "erred in finding that the parties shall share joint legal custody of Micah effective January 1, 2018." Brief for appellant at 28. Jason

contends that the court ordered that Lauren would have sole legal custody until January 1, 2018, at which time he and Lauren would have joint legal custody of Micah as originally set forth in the decree. He argues there was no reason for such an order.

The court found that communication between the parties had become strained and that joint decisionmaking had become more difficult, but was likely to improve in the future. As a result, it held:

> [T]he Court finds that the parties shall continue to have joint legal custody of their minor child. However, due to the current level of animosity and difficulty of communication, the Court finds that final decision-making authority on all major decisions involving the minor child shall be granted to [Lauren] through December 31, 2017. Effective January 1, 2018, the parties shall resume joint legal custody as outlined in the decree of dissolution. During the interim period, [Lauren] shall discuss all major decisions regarding the child's well being with [Jason] and seek to reach consensus with [him] regarding said decisions. She shall only exert her final decision-making authority in the event that a complete impasse exists between the parties. No major decision shall be made without consultation with [Jason].

We conclude that the court did not temporarily change joint legal custody, as Jason contends. Rather, the court ordered that the parties would continue to have joint legal custody of Micah, but it gave Lauren temporary final decisionmaking authority on all major decisions until December 31, 2017. We find no merit to Jason's final assignment of error and further conclude that the trial court did not abuse its discretion in giving Lauren temporary final decisionmaking authority.

VI. CONCLUSION

We conclude the district court did not abuse its discretion in determining that Lauren's marriage to Collin constituted a legitimate reason to leave the state and that it was in Micah's

best interests to continue living with Lauren in Alaska. We further conclude that the district court did not err in giving Lauren final decisionmaking authority until December 31, 2017. Accordingly, the district court's opinion and order of modification is affirmed in its entirety.

Affirmed.

Moore, Chief Judge, concurring.

I write separately to express my discomfort with the district court's grant of Lauren's application to remove Micah from Nebraska. While I have no complaint with the finding that Lauren established a legitimate reason to move from Nebraska, I am troubled by the finding that the move would be in Micah's best interests. The facts that, in my mind, weigh against granting the removal are as follows: (1) Jason's move from California to Nebraska to be close to Micah; (2) the significant distance between Nebraska and Alaska, with the corresponding travel limitations; and (3) the relatively weak evidence that Micah's quality of life would be enhanced in Alaska. The strongest argument against removal, though, is the negative impact that the move will have on the relationship between Jason and Micah, a relationship that has grown substantially stronger since Jason moved to Nebraska. The parenting plan, while granting Jason visitation in Nebraska during part of the Christmas and summer vacations, does not adequately substitute for the more regular interaction that Jason and Micah have grown accustomed to in Nebraska. In addition, at the time of trial, Micah had not had an opportunity to establish a meaningful relationship with his stepfather, Collin; they had only met on one occasion before the marriage and only two or three times before the trial. Thus, Micah is moving far away from his stable home in Nebraska, where his father, grandparents, and aunts and uncles reside, to a home in Alaska where he is largely unfamiliar with his new blended family.

Nevertheless, I ultimately agree that our standard of review in custody and removal cases dictates that we affirm the trial

court's decision in this case. The Nebraska Supreme Court has recognized:

> In parental relocation cases, trial and appellate courts deal with the tension created by a mobile society and the problems associated with uprooting children from stable environments. Courts are required to balance the noncustodial parent's desire to maintain their current involvement in the child's life with the custodial parent's chance to embark on a new or better life. These issues are among the most difficult issues that courts face in postdivorce proceedings. It is for this reason that such determinations are matters initially entrusted to the discretion of the trial judge, and the trial judge's determination is to be given deference.

Steffy v. Steffy, 287 Neb. 529, 537, 843 N.W.2d 655, 662-63 (2014). See, also, *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

After giving appropriate deference to the discretion of the trial judge, who observed the demeanor of the witnesses, I am unable to find that the decision was so untenable as to rise to the level of an abuse of that discretion. Thus, I join in the majority's opinion affirming the trial court's decision.

State of Nebraska, appellee, v. Frederick E. McSwine, also known as Frederick E. Johnson, appellant.

890 N.W.2d 518

Filed January 31, 2017. No. A-13-887.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Constitutional Law: Criminal Law: Sexual Misconduct: Evidence.** Under Nebraska's rape shield statute, Neb. Rev. Stat. § 27-412(2)(a) (Reissue 2016), evidence of a victim's prior sexual behavior or sexual predisposition is not admissible in a criminal case except under limited circumstances, including when the exclusion of the evidence would violate the constitutional rights of the accused.
4. **Sexual Misconduct: Evidence: Appeal and Error.** A court does not err in excluding evidence about a victim's sexual history prior to an assault when the State does not open the door to such evidence, when the evidence does not directly relate to the issue of consent, and when the evidence would not give the jury a significantly different impression of the victim's credibility.
5. **Motions for Mistrial: Juror Misconduct: Appeal and Error.** When a defendant moves for a mistrial based on juror misconduct, an appellate court will review the trial court's determinations of witness credibility and historical fact for clear error and review de novo its ultimate determination whether the defendant was prejudiced by juror misconduct.
6. **Criminal Law: Juror Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance

of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.

7. **Criminal Law: Juror Misconduct: Presumptions: Proof.** In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.
8. **Juror Misconduct: Proof.** Extraneous material or information considered by a jury can be prejudicial without proof of actual prejudice if (1) the material or information relates to an issue submitted to the jury and (2) there is a reasonable possibility that it affected the jury's verdict to the challenger's prejudice.
9. **Juror Misconduct.** Whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror.
10. **New Trial: Appeal and Error.** While any one of several errors may not, in and of itself, constitute prejudicial error warranting a reversal, if all of the errors in the aggregate establish that the defendant did not receive a fair trial, a new trial must be granted.
11. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
12. ____: ____. To show prejudice under the prejudice component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.
13. **Effectiveness of Counsel: Presumptions.** When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
14. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.

Appeal from the District Court for Lancaster County: Paul D. Merritt, Jr., Judge. Affirmed.

Mark E. Rappl for appellant.

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

Inbody and Pirtle, Judges.

Per Curiam.

I. INTRODUCTION

Frederick E. McSwine, also known as Frederick E. Johnson, was convicted by a jury of terroristic threats, kidnapping, first degree sexual assault, and use of a deadly weapon to commit a felony. He was sentenced to a total of 57 to 85 years' imprisonment. We previously found that, during the trial, the State committed prosecutorial misconduct in its closing argument and that such misconduct amounted to plain error. See *State v. McSwine*, 22 Neb. App. 791, 860 N.W.2d 776 (2015). We also found that McSwine's trial counsel was ineffective when he did not raise a timely objection to the State's closing argument. *Id*. As a result of these findings, we reversed McSwine's convictions. *Id*. The Nebraska Supreme Court granted further review and reversed our decision, finding that the State did not commit prosecutorial misconduct in its closing argument and that because there was no misconduct, McSwine's trial counsel was not ineffective when he failed to object to the State's closing argument. *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016). The Supreme Court remanded the cause to this court for us to consider and decide the other assignments of error that we had not addressed because of the result we reached in our first decision. Thus, the matter is now before us for consideration of McSwine's remaining assignments of error.

The remaining assignments of error include McSwine's assertions that the district court erred in excluding certain evidence about the victim's prior sexual experiences pursuant to Neb. Rev. Stat. § 27-412 (Reissue 2016) and in failing to order a mistrial after an issue of juror misconduct was brought to the court's attention. McSwine also asserts that he received

ineffective assistance of trial counsel in a variety of respects. For the reasons set forth herein, we affirm.

II. BACKGROUND

The following summary of the circumstances surrounding McSwine's convictions is taken from our original opinion. See *State v. McSwine*, 22 Neb. App. 791, 860 N.W.2d 776 (2015). Additional facts regarding the remaining assignments of error will be discussed as necessary in the analysis section below.

> The State filed a criminal complaint charging McSwine with terroristic threats, kidnapping, first degree sexual assault, and use of a weapon to commit a felony. The charges against McSwine stem from an incident which occurred between McSwine and C.S. in October 2012. McSwine and C.S. knew each other prior to October 2012 because McSwine had been employed at a gas station that C.S. had frequented. However, the extent of the relationship was disputed at trial.
>
> Evidence adduced by the State established that on the morning of October 13, 2012, McSwine knocked on the door to C.S.' apartment and asked if he could come in the apartment and use the bathroom. This was not the first occasion that McSwine had come to C.S.' apartment and asked to use the bathroom. A few weeks prior to the day in question, McSwine had appeared on C.S.' doorstep with a similar request. On that day, C.S., who was entertaining friends, let him in the apartment. McSwine then left C.S.' apartment immediately after going into the bathroom.
>
> On October 13, 2012, when McSwine again appeared on C.S.' doorstep requesting to use her bathroom, the only other person in her apartment was her boyfriend, who was asleep in her bedroom. She let McSwine into the apartment, and after he went into the bathroom, he returned to the doorway, threatened C.S. with a "sharp

> instrument," and forced her from the apartment and into his vehicle. McSwine then drove to three separate, isolated areas where he forced C.S. to engage in various sexual acts. After keeping C.S. with him for approximately 5 hours, McSwine permitted C.S. to flee his car. She then ran to a nearby home where the residents called law enforcement.
>
> McSwine disputed the evidence presented by the State. During his trial testimony, he testified that on the morning of October 13, 2012, C.S. accompanied him to his car willingly and consented to engaging in various sexual acts with him. He also testified that at some point during their encounter, C.S. became upset with him after she discovered that he had lied to her about having a charger for his cellular telephone in the car. After she became upset, she began to accuse McSwine of "using [her] for sex." She then asked to get out of his car, and McSwine stopped the car on the side of a road in order to permit her to leave. During closing arguments, McSwine's counsel argued that C.S. concocted the story about being kidnapped and sexually assaulted because she was angry with McSwine and because she did not want to get in trouble with her boyfriend or with her parents.
>
> After hearing all of the evidence, the jury convicted McSwine of all four charges: terroristic threats, kidnapping, first degree sexual assault, and use of a weapon to commit a felony. The district court subsequently sentenced McSwine to a total of 56 years 8 months to 85 years in prison.

Id. at 793-94, 860 N.W.2d at 780.

III. ASSIGNMENTS OF ERROR

McSwine raises five assignments of error in this appeal. The first assignment of error alleged that the district court erred in failing to grant McSwine's motion for a new trial due to prosecutorial misconduct during closing arguments. This assignment

of error has been conclusively resolved against McSwine by the Supreme Court. Therefore, there now remain four assignments of error for us to resolve.

First, McSwine alleges that the district court erred in failing to admit evidence of a specific instance of C.S.' sexual behavior prior to the day of the assault. Second, McSwine alleges that the district court erred in overruling his motion for a mistrial which was based on an allegation of juror misconduct. Third, McSwine alleges that the totality of all the errors committed during the proceedings below prohibited him from receiving a fair trial. Finally, McSwine alleges that he received ineffective assistance of trial counsel for a variety of reasons. We note that one of McSwine's assertions of ineffective assistance of trial counsel alleges that trial counsel failed to timely object to inappropriate statements made by the prosecutor during closing arguments. This assertion has also been conclusively resolved against McSwine by the Supreme Court. As such, we focus only on McSwine's remaining allegations of ineffective assistance of trial counsel.

IV. ANALYSIS

1. Admissibility of Evidence of Specific Instance of C.S.' Past Sexual Behavior

McSwine argues that the district court abused its discretion when it refused to allow him to introduce evidence of C.S.' sexual experiences prior to October 13, 2012. Specifically, McSwine asserts that the district court should have permitted him to introduce evidence that prior to October 13, C.S. had engaged in oral sex, contrary to her testimony at trial. McSwine asserts that such evidence is directly related to the question of whether C.S. consented to the sexual contact with McSwine on October 13 and is directly related to C.S.' credibility. Upon our review, we conclude that the district court did not abuse its discretion in prohibiting McSwine from eliciting such evidence about C.S.' prior sexual experiences.

(a) Standard of Review

[1,2] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999). See, also, *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013). When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Podrazo, supra*.

(b) Background

During its direct examination of C.S., the State questioned her regarding specific details of the assault. During this line of questioning, C.S. testified that after McSwine took her to the first isolated area, he told her to take off her clothes and he pulled his pants and underwear down around his ankles. C.S. testified that at that point, she was not sure what McSwine wanted her to do. She indicated that McSwine then told her to "put [his penis] in [her] mouth and suck on it." C.S. testified that she told McSwine that she "didn't know how" to perform oral sex. She testified that McSwine forced her to perform oral sex on him anyway and that at some point, he told her to "stop sucking on it and to finish with [her] hands, which he also had to tell [her] how to do."

C.S. also testified, upon questioning by the State, that prior to October 13, 2012, she had engaged in sexual intercourse with her boyfriend, and that the last time she had sexual intercourse was approximately a month prior to the day of the assault. She admitted that when she was initially questioned by the police, she had lied about whether she had previously had sexual intercourse. C.S. testified that she lied because her mother was with her during her initial interview with police and she did not want her mother to know that she and her boyfriend had a sexual relationship.

During the cross-examination of C.S., defense counsel questioned her further about her prior sexual experiences. Specifically, counsel asked her whether she was being truthful with McSwine when she told him that she did not know how to perform oral sex. C.S. responded that she was being truthful and that she had never engaged in oral sex prior to October 13, 2012. Defense counsel also questioned C.S. about whether she lied to police about anything other than her prior sexual experiences. C.S. indicated that initially she had not told police that her boyfriend was sleeping in her bedroom when she was abducted from her apartment. She testified that neither her parents nor her boyfriend's parents would approve of them spending the night together.

After C.S.' testimony, defense counsel made a motion to admit evidence of a specific instance of C.S.' prior sexual experience, which would contradict her trial testimony. Specifically, defense counsel wished to offer evidence that prior to October 13, 2012, C.S. had engaged in oral sex. After a hearing, the district court denied the motion, finding:

> Whether [C.S.] performed oral sex on a male prior to October 13th, 2012, has no bearing on whether, on that date, she consented to perform — and "that date" being October 13th, 2012 — she consented to perform oral sex on . . . McSwine. . . . In fact, as I noted, it would be offered to attack her credibility, and I find there has been sufficient evidence already introduced . . . on that issue, that additional evidence [about her prior sexual experiences], even if found to be credible, would be repetitive.

McSwine appeals from the district court's decision to exclude evidence that C.S. had engaged in oral sex prior to October 13, 2012.

(c) Analysis

[3] Under Nebraska's rape shield statute, § 27-412(2)(a), evidence of a victim's prior sexual behavior or sexual

predisposition is not admissible in a criminal case except under limited circumstances, including when the exclusion of the evidence would violate the constitutional rights of the accused.

This court has previously explained the rationale for the protections provided by the rape shield statute:

> The rape shield law is designed to protect people from being "assaulted" in the courtroom by their sexual history. We believe that its philosophical underpinnings are that consent to sex with one person is not consent to sex with all people, nor is consent on one occasion consent for all occasions. The rape shield law seeks to bring those notions into our rules of evidence by restricting a defendant's examination of a victim's sexual history.

State v. Johnson, 9 Neb. App. 140, 153, 609 N.W.2d 48, 58 (2000). With this context in mind, we address McSwine's specific assertions.

On appeal, McSwine centers his assertions around § 27-412(2)(a)(iii). He argues that when the district court prohibited him from introducing evidence that C.S. had previously engaged in oral sex, it violated his right to confront his accuser under the Sixth Amendment to the U.S. Constitution. The Sixth Amendment provides that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . .'" *State v. Lessley*, 257 Neb. 903, 908, 601 N.W.2d 521, 526 (1999).

Specifically, McSwine argues that evidence that C.S. had engaged in oral sex prior to October 13, 2012, was admissible because it was highly relevant to the issue of consent. McSwine asserts that if the jury believed that C.S. had never engaged in oral sex prior to the assault, it would be less likely that the jury would believe McSwine's defense that C.S. had "consent[ed] to such a sexual act" with him. See supplemental brief for appellant at 4. McSwine also argues that this evidence was highly relevant to the jury's analysis of

C.S.' credibility, because she testified during defense counsel's cross-examination that she never engaged in oral sex prior to the day of her assault. We separately address McSwine's assertions that the excluded evidence should have been admitted to demonstrate (1) consent and (2) C.S.' lack of credibility.

To support his assertion that the district court should have permitted evidence of C.S.' prior sexual experiences because it was relevant to the issue of consent, McSwine relies on the Nebraska Supreme Court's decision in *State v. Lessley, supra*. In *Lessley*, the Supreme Court found that certain evidence concerning the victim's prior sexual experiences was admissible on constitutional grounds because of a defendant's right to confront his accuser.

In that case, the victim testified, during her direct examination by the State, that she was a lesbian. Despite this evidence of the victim's sexual preferences, the trial court refused to allow the defendant to introduce evidence to contradict the victim's denial that she told a coworker that she had engaged in anal intercourse with men prior to the assault. *Id*. On appeal, the Nebraska Supreme Court ruled that the defendant's Sixth Amendment right to confront his accuser on the dispositive issue of consent required that he be allowed to explore this matter, because the "direct examination regarding [the victim's] sexual preference and experience permitted the jury to draw an inference that [as a lesbian,] she did not consent to sexual relations" with the defendant. *State v. Lessley*, 257 Neb. at 911, 601 N.W.2d at 528. Finding that the evidence the defendant wanted to offer would have made this critical inference less probable and that the State had "'opened the door'" to the victim's sexual past, the Supreme Court reversed the trial court's decision not to allow its admission. *Id*. at 912, 601 N.W.2d at 528.

Upon our review, we conclude that the facts of this case are distinguishable from those present in *State v. Lessley, supra*. First, in this case, C.S.' testimony that she had not engaged in oral sex prior to October 13, 2012, was elicited during

defense counsel's cross-examination, rather than during the State's direct examination. During its direct examination, the State merely asked C.S. if she "protest[ed]" after McSwine told her to "put [his penis] in [her] mouth and suck on it." C.S. responded that she told McSwine that she "didn't know how" to perform oral sex. While this statement could imply that C.S. had never before engaged in oral sex, it could also simply indicate that C.S. was trying to avoid performing oral sex on McSwine or trying to delay the impending assault. The State did not question C.S. further on this topic. Defense counsel, on the other hand, elicited additional information on this topic during the cross-examination of C.S. Counsel specifically asked C.S. if she was telling McSwine the truth when she said that she did not know how to perform oral sex. C.S. then testified that she had never engaged in oral sex prior to October 13.

Because C.S.' testimony that she had never engaged in oral sex prior to the assault was elicited during defense counsel's cross-examination and not during the State's direct examination, we conclude that the State did not open the door to this issue like it opened the door to the victim's sexual preferences in *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999). In *Lessley*, the State specifically elicited evidence that the victim was a lesbian. And, because the State elicited this information, the Supreme Court found that it could not thereafter "hide" behind the rape shield statute to exclude evidence which would contradict the implication that the victim would never consent to having sexual contact with a man. *Id.* at 908, 601 N.W.2d at 526. Here, defense counsel elicited testimony about the victim's sexual history and then tried to capitalize on that testimony to admit additional evidence that would ordinarily be irrelevant and prohibited by the rape shield statute. Upon our review, we conclude that the State's nominal role in eliciting evidence about C.S.' prior experiences with oral sex was not sufficient to warrant the loss of the protection of the rape shield statute.

In his brief to this court, McSwine also asserts that the State opened the door to the evidence about C.S.' prior experience with oral sex when it "introduced a large amount of evidence surrounding [C.S.'] propensity for 'pureness' and naïveté regarding sexual acts." Brief for appellant at 44. Essentially, McSwine asserts that the State made the issue of C.S.' prior sexual experience highly relevant when it admitted "a large amount of evidence" which tended to show that C.S. would not consent to having any sexual contact with McSwine. Upon our review, we conclude that, contrary to McSwine's assertions, the State did not offer a significant amount of evidence about C.S.' propensity for pureness or innocence.

As we discussed above, the State did question C.S. about whether she had ever had sexual intercourse prior to the day of the assault. She responded that she had. Then, the State questioned her about why she lied to police about this fact during her initial interview. C.S. explained that her mother was with her and that she did not want her mother to know that she and her boyfriend had a sexual relationship. While this evidence may indicate that C.S. was embarrassed or uncomfortable discussing her past sexual experiences in front of her mother, it does not necessarily portray her as pure or innocent. And, certainly, it does not portray such characteristics so significantly that it would open the door to the defense offering evidence about C.S.' prior sexual history.

In addition to finding that the State did not open the door to the excluded evidence to the extent it did so in *State v. Lessley, supra*, we also find that the excluded evidence here does not relate to whether C.S. would have consented to engaging in oral sex with McSwine in the same way and to the same degree as the suggestion in *Lessley* that "lesbians do not have consensual sex with men" bears upon and refutes a defense of consent when the victim is a lesbian. C.S. testified during the defense's cross-examination that she had not engaged in oral sex prior to October 13, 2012. She did not testify that she would never engage in oral sex. The Supreme Court's decision in *State v.*

Lessley, supra, was based on the direct correlation between the excluded evidence and consent. We do not find that same direct correlation present in the facts of this case. We conclude that the district court did not abuse its discretion in deciding that the evidence offered by McSwine was not highly relevant to the issue of consent such that it should be admitted despite the protections of the rape shield statute.

McSwine also asserts that the evidence that C.S. had previously engaged in oral sex was highly relevant to her credibility and that, as a result, the evidence should have been admitted on that basis. The State, relying on this court's decision in *State v. Johnson*, 9 Neb. App. 140, 609 N.W.2d 48 (2000), disagrees with McSwine's assertion.

In *State v. Johnson, supra*, we concluded that the district court's decision to exclude evidence of the victim's prior sexual conduct was proper because such evidence related only to the victim's credibility in a peripheral and collateral matter. In that case, the victim was assaulted by her former boyfriend's roommate. In the State's direct examination of the victim, it asked her whether she and her former boyfriend had engaged in sexual intercourse during their relationship. The State's question about the victim's relationship with the boyfriend was apparently meant to establish that the victim understood what sexual intercourse was and could therefore testify that the incident with the defendant involved sexual intercourse.

During the cross-examination of the victim, defense counsel attempted to question her further about her prior sexual experiences, including about a prior, specific incident when she and her boyfriend were engaged in sexual intercourse and she invited the defendant "to watch them." *Id*. at 146, 609 N.W.2d at 54. Defense counsel argued that this evidence was relevant to disprove the victim's prior testimony that she was "uncomfortable" with the defendant's interest in her and sexual advances toward her. *Id*. The district court did not permit this line of questioning, and we affirmed that decision. We stated:

> The cross-examination does not address [the victim's] consent to have sex with [the defendant], nor does it so directly impact and relate to [the victim's] credibility that it must be admitted. In the words of *State v. Privat*, 251 Neb. 233, 248, 556 N.W.2d 29, 38 (1996), the cross-examination would not give a reasonable jury a "significantly different impression of [the victim's] credibility" if [the defendant] had been allowed to pursue this line of questioning. In *State v. Earl*, 252 Neb. 127, 135, 560 N.W.2d 491, 497 (1997), the court said that rejected evidence of the victim's "prior sexual behavior [was not] so relevant and probative that [the defendant's] constitutional right to present it would be triggered."

State v. Johnson, 9 Neb. App. at 152, 609 N.W.2d at 57-58.

In this case, we do not find that the excluded evidence concerning C.S.' prior experience with oral sex would have given the jury a significantly different impression of her credibility, nor do we conclude that the excluded evidence was so probative and relevant that the Constitution required that it be admitted. Other evidence elicited by both the State and the defense demonstrated that C.S. had a tendency to be untruthful about her past sexual experiences. Accordingly, even if the jury believed that C.S. had lied about never having performed oral sex prior to the day of the assault, such information would probably not have resulted in the jury's forming a different impression of her credibility. And, whether C.S. had previously engaged in oral sex was a collateral issue that did not have any significant bearing on whether she consented to sexual contact with McSwine on the day of the assault.

[4] The district court did not err in excluding evidence about the victim's sexual history prior to the assault when the State did not open the door to such evidence, when the evidence did not directly relate to the issue of consent, and when the evidence would not have given the jury a significantly different impression of the victim's credibility.

2. Juror Misconduct

Next, McSwine argues that the district court erred when it denied his motion for a mistrial after the court became aware that one of the jurors received extraneous information about the case. Upon our review of the record, we conclude that McSwine's assertion has no merit.

(a) Standard of Review

[5] When a defendant moves for a mistrial based on juror misconduct, we will review the trial court's determinations of witness credibility and historical fact for clear error; we review de novo the trial court's ultimate determination whether the defendant was prejudiced by juror misconduct. *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

(b) Background

After the case was submitted to the jury, a juror informed the district court that another juror may have received information about the case that was not admitted into evidence at the trial. Specifically, the juror informed the court that another juror had come back from a lunch break and stated to other members of the jury that "her husband had told her about an article about this case." That juror then stated, "'I've got some insight.'" The juror who reported this incident to the court indicated that although the other juror had not specifically said what was in the article, this juror definitely had a particular "stance."

After the court received this information, it decided to speak to each juror individually about this incident. Three of the jurors indicated to the court that they had no recollection about the incident and that they did not hear anyone talking about an article written about the case. Six of the jurors indicated they remembered a juror making a comment that her husband saw an article in the newspaper about the case. None of these jurors indicated that the juror said she read the article or that she relayed what was in the article to anyone else. One juror told the court that she remembered another juror come into

the deliberation room and tell other jurors that her husband informed her there was an article about the case in the newspaper. She also remembered that juror saying that she had told her husband she was a juror for a rape case.

The juror who was alleged to have received extraneous information about the case also spoke to the court. That juror admitted that her husband had told her there was an article in the newspaper about the case. However, she said that she had never looked at the article. She also said that she had never indicated to any other juror that she had special insight into the case.

After the court spoke with all of the jurors, McSwine moved for a mistrial on the basis of juror misconduct. He argued that there was an improper communication between a juror and her husband and that this communication amounted to juror misconduct. The court denied McSwine's motion. The court found that there was clear and convincing evidence which demonstrated that a juror told other jurors that her husband had read an article about this case. However, the court also found there was no evidence to suggest that this juror was provided with any information from the article or that she relayed any information from the article to other jurors. The court concluded:

> I find that there was no juror misconduct in this case, and I further find, even presuming for purposes of argument there was juror misconduct by [the juror] mentioning her husband had read . . . an article, and that's all I find she did, that surely was not prejudicial to . . . McSwine.

McSwine appeals from the district court's denial of his motion for a mistrial.

(c) Analysis

[6-9] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied

a fair trial. *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome. *Id*. Extraneous material or information considered by a jury can be prejudicial without proof of actual prejudice if (1) the material or information relates to an issue submitted to the jury and (2) there is a reasonable possibility that it affected the jury's verdict to the challenger's prejudice. *Id*. Whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror. *Id*.

In this case, the district court found that one of the jurors had been informed by her husband that there was an article in the newspaper about the case and that this juror told other jurors about the existence of the article. However, the court also found that this communication between the juror and her husband and between the juror and the other members of the jury did not amount to juror misconduct. The court based this decision on its finding that the juror was not provided any information from the article and that, as a result, she did not provide any information to other jurors.

Upon our review of the record, we do not find that the district court erred in determining there was no juror misconduct. There was no evidence which demonstrated that any juror received extraneous information about the specifics of this case. And, as the district court stated, even if we were to assume that there was some sort of misconduct in the juror's communications, McSwine was not in any way prejudiced by the juror's actions. A juror's knowledge that an article about the case appeared in the local newspaper, without any additional information, would not affect the average juror's ability to remain impartial.

The district court correctly denied McSwine's motion for a mistrial.

3. Cumulative Effect of Trial Errors

[10] McSwine also contends that the cumulative effect of the other errors he assigned deprived him of a fair trial. While any one of several errors may not, in and of itself, constitute prejudicial error warranting a reversal, if all of the errors in the aggregate establish that the defendant did not receive a fair trial, a new trial must be granted. See *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986). See, also, *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016). The question, then, is whether in the aggregate the claimed errors denied McSwine a fair trial. See *State v. Kern, supra*.

Having rejected each of McSwine's assignments of error to this point, we also conclude that he was not denied a fair trial and reject this assignment of error as well.

4. Ineffective Assistance of Counsel

Finally, we turn to McSwine's claims of ineffective assistance of trial counsel. McSwine claims that he received ineffective assistance of trial counsel for a number of reasons. We conclude with respect to each claim either that the claim is without merit or that the record on direct appeal is insufficient to determine the merits of the claim.

[11,12] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). The two-prong ineffective assistance of counsel test need not be addressed in order. *State v. Nesbitt*, 279 Neb. 355, 777 N.W.2d 821 (2010). To show prejudice under the prejudice component of the *Strickland* test, the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been

different. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.

[13,14] When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Nesbitt, supra*. Furthermore, trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id*.

Because McSwine has different counsel in this appeal from trial counsel, he must raise any issue of ineffective assistance of trial counsel which is known to him or which is apparent from the record, or the issue will be procedurally barred on postconviction review. See *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007). However, the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016). The determining factor is whether the record is sufficient to adequately review the question. *Id*. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *Id*.

(a) Failure to Prepare Defense

McSwine claims that he received ineffective assistance because his trial counsel failed to adequately prepare his defense. He asserts that counsel did not depose C.S. prior to trial, nor did counsel obtain video surveillance of McSwine's previous encounters with C.S. from the gas station where he worked. McSwine's claims involve allegations regarding evidence and other information not presented at trial and not present in the record, and furthermore, his claims would require proof of matters outside the trial record. We therefore conclude that these claims cannot be adequately reviewed in this direct appeal.

(b) Failure to Introduce Evidence Relevant to McSwine's Consent Defense

McSwine claims that he received ineffective assistance because his trial counsel failed to introduce certain evidence relevant to his consent defense, including evidence of a prior sexual relationship between McSwine and C.S., sufficient evidence that McSwine committed trespass on the morning of the assault, and evidence that a friend and fellow inmate of McSwine's who testified against him had access to police reports about the assault. There is no evidence in the record that would allow us to determine whether trial counsel consciously chose as part of a trial strategy not to present certain evidence related to these topics.

As we stated above, when reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics. See *State v. Nesbitt, supra*. And, there is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions. *Id*. Because of this deference, the question of whether the failure to present certain evidence was part of counsel's trial strategy is essential to a resolution of McSwine's ineffective assistance of counsel claims. We therefore conclude that these claims cannot be adequately reviewed in this direct appeal.

(c) Failure to Subject C.S. to Handwriting Analysis

McSwine claims that he received ineffective assistance because his trial counsel failed to subject C.S. to a handwriting analysis to prove that she wrote a note which allegedly contained directions from her apartment to a location near McSwine's home. McSwine asserts that if it had been established that C.S. wrote this note, it would have corroborated his testimony that he and C.S. planned to meet at some point on October 13, 2012. Upon our review, we conclude that

McSwine's assertions lack merit because he cannot show he was prejudiced by his counsel's failure to subject C.S. to a handwriting analysis.

During the cross-examination of C.S., McSwine's trial counsel asked her about the note which apparently contained directions from her apartment to a location near McSwine's home. C.S. testified that the handwriting on the note "look[ed] like it could possibly be" her handwriting, but that she was not sure. Upon further questioning, C.S. admitted that the handwriting looked "similar" to her handwriting, but she also indicated that she did not remember writing the note, nor did she know where the directions led.

Given C.S.' testimony about the similarity between her handwriting and the handwriting on the note, we find that McSwine was not prejudiced by his counsel's failure to obtain a handwriting analysis of C.S. Even if such a handwriting analysis proved that the handwriting on the note matched C.S.' handwriting, C.S. essentially admitted to that fact in her testimony. As such, evidence of the handwriting analysis would have been cumulative and would not have changed the result of the trial.

(d) Failure to Strike Juror Who Was Related to Law Enforcement Officer

McSwine claims that he received ineffective assistance because his trial counsel failed to strike from the jury a prospective juror who was the brother of "a law enforcement officer who took an active role in the investigation which ultimately led to the arrest of [McSwine]." Brief for appellant at 52. McSwine alleges that as a result of counsel's failure to strike this prospective juror, he was placed on the jury which ultimately convicted him. Upon our review, we conclude that McSwine's assertions lack merit because he cannot show he was prejudiced by his counsel's failure to strike the prospective juror.

During voir dire, the following exchange occurred between defense counsel and the prospective juror at issue:

> [Defense counsel]: . . . Your brother's a deputy?
>
> [Prospective juror]: (Nodding in the affirmative.)
>
> [Defense counsel]: Okay. And he had very limited involvement in this case. He interviewed one person, I think, and that's it, and he won't testify, and I'm not even certain the person he interviewed will testify. Did you ever talk with your brother about this case?
>
> [Prospective juror]: (Shaking head in the negative.)
>
> [Defense counsel]: Does he talk with you about some of his work?
>
> [Prospective juror]: Oh, no. I mean, other than asking questions, but — me asking questions.
>
> [Defense counsel]: Sometimes you're curious?
>
> [Prospective juror]: Yeah.
>
> [Defense counsel]: Okay. But you never heard anything about this case?
>
> [Prospective juror]: No.

Based on defense counsel's questions, it is clear that, contrary to McSwine's assertion on appeal, the prospective juror's brother did not play an "active" role in the investigation of this case. Rather, it appears that the brother played a very minimal role in this investigation. Moreover, it is clear that the prospective juror had not discussed this case with his brother, nor did he even appear to know about his brother's involvement in the case until informed of such by defense counsel. There is simply no indication that the prospective juror had received any extraneous information about the case. In addition, there is no indication that the prospective juror was influenced in any way by his brother's involvement in the investigation. Accordingly, there is no reason that defense counsel should have struck the prospective juror from the jury on the basis of his brother's involvement in the case. And, because McSwine only alleges ineffective assistance due to counsel's failure to strike the juror on the basis of his brother's role in

the investigation, we do not find that McSwine was prejudiced by counsel's actions.

(e) Failure to Object to State's Questions About C.S.' Sexual Naivety

McSwine claims that he received ineffective assistance because his trial counsel failed to "object to the [State's] repeated attempts to portray [C.S.] as a sexually naïve person." Brief for appellant at 52. McSwine alleges that because counsel failed to object to evidence that C.S. was "pure" and "innocent," such evidence was admitted and "crippled" his consent defense. *Id.* at 53. Upon our review, we conclude that McSwine's assertions lack merit. McSwine cannot demonstrate he was prejudiced by his counsel's failure to object to this evidence because, even if he had objected, such evidence was relevant and admissible.

First, we note that, as we discussed above and contrary to McSwine's assertions, the State did not offer a significant amount of evidence about C.S.' propensity for pureness or innocence. And, what evidence the State did offer, which could have been interpreted as demonstrating that C.S. was somewhat innocent, was relevant to the State's presentation of its case. For example, in his brief on appeal, McSwine emphasizes C.S.' testimony during the State's direct examination that she did not want her parents to know that she and her boyfriend had a sexual relationship. While this testimony may be interpreted to demonstrate some sort of innocence or lack of sexual experience on C.S.' part, it was relevant to explain why C.S. had initially lied to police about whether she had ever engaged in sexual intercourse prior to the day of the assault. Because this evidence was relevant to the State's case and to its discussion about C.S.' credibility, any objection made to the evidence by defense counsel would have been overruled. This allegation of ineffective assistance of trial counsel is without merit.

V. CONCLUSION

Upon our review, we affirm McSwine's convictions for terroristic threats, kidnapping, first degree sexual assault, and use of a deadly weapon to commit a felony. We find that the district court did not err in excluding evidence about C.S.' sexual experience prior to the day of the assault or in overruling McSwine's motion for a mistrial due to alleged juror misconduct.

As to McSwine's claims of ineffective assistance of trial counsel, we find that he was not denied effective assistance of counsel when counsel failed to subject C.S. to a handwriting analysis, to strike a prospective juror whose brother was a law enforcement officer, and to object to evidence that portrayed C.S. as pure or innocent. We find that the record is insufficient to review the remaining grounds for McSwine's ineffective assistance of counsel claim.

Affirmed.

Moore, Chief Judge, participating on briefs.

State of Nebraska on behalf of Natalya B. and Nikiah A., minor children, appellee, v. Bishop A., defendant and third-party plaintiff, appellee, and Mimi B. third-party defendant, appellant.

891 N.W.2d 685

Filed January 31, 2017. No. A-16-368.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judgments: Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue. When the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
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. **Visitation.** The best interests of the children are the primary and paramount considerations in determining and modifying parenting time.
6. ____. The right of parenting time is subject to continuous review by the court, and a party may seek modification of parenting time on the grounds that there has been a material change in circumstances.
7. **Directed Verdict: Evidence.** A directed verdict is proper 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.

8. **Directed Verdict: Appeal and Error.** In reviewing a directed verdict, an appellate court gives the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.
9. **Child Custody: Visitation: Stipulations.** It is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests, which is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties or by third parties.
10. **Judgments: Appeal and Error.** When evidence is in conflict, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
11. **Records: Appeal and Error.** When reviewing a decision of a lower court, an appellate court may consider only evidence included within the record.
12. ____: ____. A party's brief may not expand the evidentiary record.
13. **Trial: Evidence: Records: Appeal and Error.** The erroneous admission of evidence in a bench trial is not reversible error if other relevant evidence, properly admitted, sustains the trial court's necessary factual findings; in such case, reversal is warranted only if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.
14. **Modification of Decree: Child Support: Appeal and Error.** Although an appellate court reviews the modification of child support payments de novo on the record, it affirms the trial court's decision absent an abuse of discretion.

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

B. Gail Steen, of Steen Law Office, for appellant.

Stephanie Flynn, of Stephanie Flynn Law Office, P.C., L.L.O., for appellee Bishop A.

Inbody and Pirtle, Judges, and McCormack, Retired Justice.

Pirtle, Judge.

I. INTRODUCTION

Mimi B. appeals the order of the Lancaster County District Court which modified Bishop A.'s parenting time and temporarily suspended his child support obligations. For the reasons that follow, we affirm.

II. BACKGROUND

Mimi and Bishop are the parents of two minor children, Natalya B., born in 2007, and Nikiah A., born in 2005. The children made allegations of physical and sexual abuse against their father, Bishop. At the time of the allegations, Natalya was 3 years old and Nikiah was approximately 5 years old. No criminal or juvenile court proceedings were filed as a result of these allegations, but the allegations have been a central issue throughout this case.

An order was entered in August 2012 granting custody of the minor children to Mimi, subject to Bishop's parenting time, as set forth in an incorporated parenting plan. The parenting plan was signed by both Bishop (identified as the "Defendant"), and Mimi (identified as the "Third-Party Defendant"), who were both aware of the abuse allegations at that time.

The original parenting plan provided a "step-up" parenting time schedule. It stated:

> Because there has been no parenting time for a significant period of time, [Bishop's] visits with the children should begin in a therapeutic setting/family therapy and continue for a period of at least four (4) sessions, or until the therapist recommends parenting time increase to Step 2 below. This family therapy shall not be administered by the child's current therapist, but rather by a different therapist. [Bishop's] suggestion is that Bertine Loop be named to direct these family therapy sessions. It is [Mimi's] responsibility . . . to make sure the children attend these sessions and are picked up from these sessions. . . . Bertine should communicate with both counsel

> after each of the first four (4) sessions in order to help each counsel assess progress and comfort level of Bishop and the girls. Bertine should also communicate with both counsel about realistically proceeding to Step 2 in a timely fashion and potential persons to supervise/monitor those visits set forth in Steps 2, 3 and 4[.]

Steps 2, 3, and 4 were also listed in the parenting plan, providing for progressively longer parenting time with decreasing levels of supervision. Ultimately, the plan was for Bishop to enjoy a normal parenting schedule, including alternating weekends and holidays.

Bishop filed a complaint for modification on May 14, 2014, alleging that (1) he had not had any contact with the minor children since the entry of the court's order; (2) the therapeutic visitation provided for in the parenting plan had not occurred, so none of the steps in the step-up plan had been satisfactorily completed; and (3) it is in the best interests of the minor children to award him parenting time.

Mimi filed an answer, denying the allegations in Bishop's complaint and affirmatively alleging:

> [N]o therapist who has worked with the minor children believe[s] it is in their best interest for them to have contact with [Bishop] due to disclosures of sexual abuse and other physical abuse. [Mimi] affirmatively asserts and alleges [Bishop] has admitted to such abuse to [Mimi], yet has attempted to have contact with the minor children outside of the Court's orders.

Bishop filed a motion for temporary orders on November 3, 2014. On December 19, the court overruled the motion in part and ordered the parties to establish mediation and/or counseling for Bishop and report progress by February 2, 2015. Bishop filed another motion for temporary orders on January 27, and the motion was sustained on February 20. The court ordered Bishop to engage in therapy, either with "M.Paine or M.Fran Flood," who are named but not otherwise identified in our record, or with someone of his choice who was approved

by Mimi. The court further ordered that Bishop could begin scheduled parenting time after completing a month of therapy, so long as it was supervised by someone approved by Mimi, and such approval could not be unreasonably withheld.

Bishop filed another motion for temporary orders on April 21, 2015, and the motion was sustained. A journal entry, signed by the judge on May 29, stated that Bishop "shall be allowed visitation with the minor children so long as it is supervised." The journal entry also stated that the temporary parenting time should be exercised on Saturday or Sunday each weekend for a period of not more than 2 hours. The court provided that "[t]o the extent [Mimi] does not approve someone able and willing to supervise the visitation [Bishop] shall receive a $50 credit toward child support, the total amount of which is to be determined at trial . . . ." No parenting time occurred.

Trial took place on August 18, 2015. Bishop's "significant other" testified that she had been in a relationship with Bishop for about 5 years. She was aware of the allegations of abuse, but she had no concerns about living with him or allowing him to be around her children. Another witness testified that he was aware of the allegations of abuse, but trusted Bishop to be around his children. The witness testified that Bishop was happiest when he was with Natalya and Nikiah and that the girls loved Bishop.

Bishop testified that he became aware of the allegations against him on August 1, 2011, and that he spoke to Mimi and police officers about the allegations of abuse. Bishop was not cited by law enforcement, and there have been no criminal actions or juvenile court proceedings regarding these allegations. Bishop testified that Mimi has filed protection orders against him and that he pled no contest to violations of these orders. At the time of trial, Bishop was on probation for violation of a protection order.

Bishop testified that he participated in the required family therapy with Bertine Loop-Schenken (Loop) and sought information regarding group therapy sessions. Bishop was

notified that Loop recommended additional counseling services, and he participated in 8 weeks of therapy with Kristin Smith in 2013. He contacted several agencies and individuals regarding supervision for visits, but despite his efforts, no family therapy ever occurred. He asked Dr. Lisa Blankenau to supervise visits, but she declined. He testified that the last time he had any contact with the children was February 15, 2011.

Bishop also testified that he was told that supervised visits could occur after he completed a month of therapy, which he completed with Dr. Steven Blum in 2015. They discussed how to act around the children and how to safely reestablish a connection with the children.

Mimi testified that she met with Loop, but that the children had not. She stated that she agreed to the original parenting time, which included a plan for graduated visitation, but that she did not believe it to be in the children's best interests. Mimi did not believe that any visitation should occur until Bishop "takes responsibility and gets help for himself." She said Bishop should admit the children's allegations and seek professional help. Mimi testified that she was aware of the temporary order for supervised visitation but that there was no one she felt comfortable with as a supervisor until Bishop sought help.

Mimi moved for directed verdict, and the court overruled her motion. The court noted that the 2012 order contained a graduated schedule for parenting time and placed the decision-making authority with a counselor for making parenting time decisions. The court noted that Nebraska case law states that arrangements of this nature are not proper.

Rita Regnier testified that she met with Natalya and Nikiah in individual and family therapy approximately 19 times between 2013 and 2015. In 2015, Regnier met with the children twice, once in March and once in May. Regnier became aware that Nikiah's anxiety was heightened prior to court proceedings, leading to self-harming behavior. This information

was provided by Mimi and was not gained through personal contact with the children. She said the children have been very consistent in stating that they care about their father but that they did not want to see him. Regnier testified that there were concerns the children had been coached but that in her opinion, they were not and their accounts of the alleged abuse were consistent.

Regnier opined that the children needed to be given some control over whether visitation with Bishop occurred. She concluded that visitation would not be in the children's best interests unless they demonstrated a desire to see him. Regnier did not meet or see Bishop around the children, and she testified that, given her relationship with Mimi and the children, she could not be objective toward him.

Loop testified that she had not had contact with the parties since October 2013 and that, at that time, she had recommended that Bishop and the children have no contact. Loop testified that further individual therapy was needed prior to starting family therapy.

On October 5, 2015, the trial court issued an order finding that Bishop had met his burden to show there had been a material change of circumstances and that the prior orders of the court should be modified accordingly. The court found that establishing parenting time with Bishop was in the children's best interests and that such parenting time should be entered into cautiously. However, the court found the evidence was insufficient to create an appropriate long-term parenting plan. The court found that this could only be completed after the children were prepared for contact with their father and supervised parenting time had occurred. The court issued temporary orders for Bishop to attend counseling focused on minimizing discomfort or stress in reconnecting with the children and for the children to engage in counseling to prepare them for contact with their father. Therapeutic parenting time was scheduled to begin the week of November 23, 2015. The court scheduled an affidavit-only hearing on

January 8, 2016, to review the temporary order "as well as proposals for ongoing parenting time prior to entry of a final order by the court."

On November 3, 2015, Mimi filed a motion for order to show cause alleging Bishop attempted to contact the children in public on October 8. She sought an order of the court directing Bishop to appear and show cause why he should not be punished for contempt of court as a result of his "willful and contumacious failure to comply with the Court's Orders of August 10, 2012 and October 5, 2015." A hearing was scheduled for November 30.

Mimi filed a motion to modify parenting time on November 19, 2015. She alleged that the children were not in a position to begin visits with Bishop at that time.

At the hearing on November 30, 2015, the court stated that eventually visits between Bishop and the children would happen but said they would "walk slowly." The court noted the difficulty of determining the disputed factual matters while balancing the children's anxiety and the children's best interests. Following the hearing, the court filed temporary orders which suspended Bishop's child support obligation, temporarily suspended visitation between Bishop and the children pending further hearing, continued the obligation for the children to participate in individual therapy, and ordered Mimi to prevent her mother from participating in or discussing therapy sessions with the children. Mimi was also ordered to pay the costs of therapeutic visits between Bishop and the minor children.

A final hearing took place on January 20, 2016. The court received evidence through affidavits upon agreement of the parties and an offer of proof as to Bishop's testimony. The parties stipulated to an affidavit from Regnier as to her recommendations and professional opinions regarding parenting time.

The court filed an order on March 7, 2016. The court found the evidence before it did not support a finding of contempt.

The court vacated the order to show cause and dismissed Mimi's contempt application. The court also found that visitation between Bishop and the minor children continued to be in the children's best interests in the long term. The court ordered the children to continue in counseling to prepare them for contact with Bishop, and it set a new schedule for gradually introducing parenting time and increasing the duration of time Bishop spends with the children incrementally. The court ordered Bishop's child support obligation to resume on September 1.

III. ASSIGNMENTS OF ERROR

Mimi asserts the district court erred in overruling her motion for directed verdict and in modifying the parties' parenting plan. She asserts that the district court's decision was made in reliance on improperly received evidence and that the district court erred in temporarily suspending Bishop's child support obligation.

IV. STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Floerchinger v. Floerchinger, ante* p. 120, 883 N.W.2d 419 (2016).

[2] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue. When the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.* See, also, *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

[3,4] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable

or if its action is clearly against justice or conscience, reason, and evidence. *Id.* A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.*

V. ANALYSIS

1. Modification of Parenting Time

[5,6] The best interests of the children are the primary and paramount considerations in determining and modifying parenting time. *State on behalf of Maddox S. v. Matthew E.*, 23 Neb. App. 500, 873 N.W.2d 208 (2016). The right of parenting time is subject to continuous review by the court, and a party may seek modification of parenting time on the grounds that there has been a material change in circumstances. *Id.* See, also, *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997).

In 2012, the parties agreed to a parenting plan allowing Bishop to have parenting time with the minor children pursuant to a "step-up parenting time schedule." Step 1 of the plan stated that Bishop would have visits with the children in "a therapeutic setting/family therapy" for at least four sessions, or until the therapist recommended the parties should progress to Step 2, and beyond. In 2014, Bishop filed a complaint for modification, asserting that a material change of circumstances which warranted modification of the order had occurred. Specifically, he asserted that he had not seen and had not been able to contact the children since the adoption of the parenting plan and that no therapeutic visits had occurred. Bishop asserted that the court should award him reasonable parenting time, because it was in the best interests of the minor children.

(a) Directed Verdict

Mimi asserts the district court erred in denying her motion for directed verdict at the close of Bishop's evidence at trial.

She asserts there was no material change of circumstances justifying modification of the existing parenting plan.

[7,8] A directed verdict is proper 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. *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015). In reviewing that determination, we give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence. *Id.*

[9] Nebraska case law dictates that it is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests, which is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties or by third parties. *Mark J. v. Darla B.*, 21 Neb. App. 770, 842 N.W.2d 832 (2014). After reviewing the existing parenting plan, the district court found it provided for an improper "delegation of authority" to allow a therapist or other third party to determine when and if parenting time should occur. Thus, the court determined that the parenting plan must be modified.

Mimi asserts that the district court does not give weight to the fact that Bishop stipulated to the 2012 order which included the provision that a therapist make determinations regarding when parenting time should move forward. However, this court and the Nebraska Supreme Court have found, as stated above, that the authority to determine the extent and time of visitation is an independent responsibility of the court and cannot be controlled by the agreement or stipulation of the parties or by third parties. *Mark J. v. Darla B., supra.* See *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). Thus, the trial court did not err in determining that the original parenting plan must be modified and did not err in overruling Mimi's motion for directed verdict.

(b) Best Interests

The court found that parenting time with Bishop is in the children's best interests. The March 2016 order established a plan to gradually reintroduce visits between Bishop and the children in a safe, controlled environment and to work up to longer periods of unsupervised parenting time. Mimi argues the district court erred by finding that any parenting time with Bishop is in the children's best interests.

Neb. Rev. Stat. § 43-2923(1) (Reissue 2016) states that the best interests of a child require a parenting arrangement and parenting plan providing for a "child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress for school-age children." Section 43-2923(6) states that the court shall consider the best interests of the minor children, which includes, but is not limited to the following factors:

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child;
>
> (d) Credible evidence of abuse inflicted on any family or household member. . . ; and
>
> (e) Credible evidence of child abuse or neglect or domestic partner abuse.

The court heard evidence from the parties, witnesses, and professionals regarding the history of the minor children and the reports that they have experienced fear and anxiety related to their relationship with their father. The court found that it is clear that the children are fearful of Bishop and may not feel safe in his presence, but that Bishop denied the abuse and the court had "no basis to act on that fear."

While the court recognized that witnesses opined that contact with Bishop could be emotionally harmful, even in a therapeutic setting, the court also considered the fact that the witnesses had little or no personal contact with Bishop. Regnier testified that she had never met Bishop, that she has not seen him around the children, and that her opinion was based solely on communications with Mimi and the children. She testified that she saw no benefit to seeing Bishop for therapy, because she could not be objective toward him.

There was no expert testimony specifically supporting the establishment of parenting time between Bishop and the children. However, Bishop requested assistance from several therapists and his requests were declined. Specifically, Dr. Blankenau declined to facilitate the court-ordered visits, in part due to Regnier's recommendation that visits were not in the children's best interests at that time.

The court considered the evidence that Bishop is employed, has frequent contact with children, and expressed an understanding that reestablishing a connection with his own children must be a gradual process. Bishop's "significant other" testified that she was aware of the allegations of abuse, yet expressed no hesitation in allowing Bishop to come in contact with her own children. The court found that Bishop could be trusted to slowly, carefully, and prudently reestablish contact with the children.

[10] An appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Floerchinger v. Floerchinger, ante* p. 120, 883 N.W.2d 419 (2016). See, also, *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

Upon our review, it is clear that the district court considered the health, welfare, and social behavior of the minor children, as well as their desires and wishes. The evidence shows that

the relationship of the children to Bishop was strained prior to the commencement of the initial action and that there has been no contact for a number of years, beginning with the original allegations of physical and sexual abuse. However, in the most recent years, Bishop was allowed no contact with the children despite court orders specifically allowing supervised therapeutic visits.

We do not discount the children's allegations or Mimi's concerns, but there is little in the record to support a finding that Bishop should be barred from all future interaction with the children. The parties agree that the children have a genuine fear and belief that Bishop behaved inappropriately, but there is no evidence *in our record* that abuse by Bishop did, in fact, occur. The parties agree that there were no criminal charges or juvenile court proceedings brought as a result of these allegations.

Mimi argues that Bishop did not deny the allegations of abuse in his testimony. While this is true, it is a mischaracterization of the evidence, as he was not asked on direct or cross-examination to address whether the alleged abuse occurred. Bishop did deny improper contact with his daughters in his affidavit stating that he has dealt with "false allegations of abuse." He also denied the allegations in his communication with counselors and therapists, and Loop testified that she was aware of this fact.

The children did not testify as to their feelings regarding this situation or their desire to see their father going forward. Mimi argues Bishop did not provide any evidence the children wanted to see him, but such evidence would be difficult to obtain given that he has not been permitted to see the children since the entry of the original parenting plan in 2012. The statements the children made to Regnier are the only evidence in the record of the children's wishes regarding parenting time. With regard to Regnier, the court found that her strongly held opinions "apparently have crowded out any

alternative" to barring further contact between Bishop and the children.

Mimi challenges the court's finding of Bishop's fitness to parent, alleging that there is "uncontroverted evidence of his violence against [her] as documented by protection orders, convictions for violations of those protection orders, and being on parole at time of trial." Brief for appellant at 22. We note that Mimi incorrectly states that Bishop was on parole, when he was actually on probation at the time of trial. Further, the record presented does not support the assertion that there was uncontroverted evidence of violence by Bishop against Mimi.

[11,12] When reviewing a decision of a lower court, we may consider only evidence included within the record. *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993). See, also, *Ging v. Ging*, 18 Neb. App. 145, 775 N.W.2d 479 (2009). A party's brief may not expand the evidentiary record. *Id.* We do not discount the fact that a protection order was granted, or the fact that Bishop admitted to violating such protection order. The record does contain evidence of an alleged probation violation in which Mimi asserted that Bishop improperly contacted her by telephone. However, any specific instances or allegations of violence by Bishop toward Mimi are not a part of the record, and thus, we may not consider any alleged violence as a factor in determining the children's best interests.

We find the district court considered the appropriate factors, and we give deference to the district court's attempt to find a workable solution to best protect the children's best interests. Clearly, the evidence was in conflict, and we consider and give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Floerchinger v. Floerchinger, ante* p. 120, 883 N.W.2d 419 (2016). Under the circumstances of this case and in consideration of the record that was presented to us for

review, we cannot say that the district court abused its discretion in finding that parenting time with Bishop, beginning in a safe space under the supervision of a therapist, was in the children's best interests.

2. Reliance on Improper Evidence

Mimi asserts the district court's findings were not supported by properly received evidence. She argues that the court should consider only evidence presented in and properly received by the court and that exhibit 16, cited in the district court's order, was not properly received.

Exhibit 16 is a letter from Dr. Blum referencing his therapy sessions with Bishop. This letter was offered at trial on August 18, 2015. Mimi asserted hearsay and foundation objections, and the court took the matter under advisement. The court sustained the objection in the order filed on October 5. In the order, filed March 7, 2016, the trial court referred to exhibit 16, and as a result, Mimi asserts the district court's findings were supported by evidence that was not properly received.

[13] Assuming, without deciding, that the trial court abused its discretion in reviewing the content of exhibit 16, we find there is no reversible error. The erroneous admission of evidence in a bench trial is not reversible error if other relevant evidence, properly admitted, sustains the trial court's necessary factual findings; in such case, reversal is warranted only if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence. *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015).

The district court cited exhibit 16 in stating Dr. Blum's opinion that Bishop "understood and had empathy for the possible fear that his daughters might hold." The parties stipulated that Bishop participated in therapy with Dr. Blum, and Bishop also testified regarding his therapy sessions with him. Bishop testified that they discussed the fact the children "believed

certain things" about him and he would be like a stranger to them at first, due to the time that has passed since they last saw one another. Bishop testified that he and Dr. Blum discussed how displays of affection could be misinterpreted, and Dr. Blum advised him regarding how to approach the children once a parenting time schedule was established. They discussed how to reestablish a connection and find a common bond with the children. The court's reference to and reliance upon this exhibit was limited. We find that the evidence is cumulative and that other relevant evidence, properly admitted, supports the findings of the district court. See *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

To the extent that Mimi challenges the court's findings of parental fitness related to parenting time, the sufficiency of the evidence regarding the children's best interests was previously addressed in our discussion of the modification of parenting time.

3. Child Support

Mimi asserts the district court erred in suspending Bishop's child support obligation.

[14] Although an appellate court reviews the modification of child support payments de novo on the record, it affirms the trial court's decision absent an abuse of discretion. *Stekr v. Beecham*, 291 Neb. 883, 869 N.W.2d 347 (2015).

The trial court's temporary order on December 10, 2015, stated that Bishop's child support obligation would be suspended commencing November 30 and continuing until further order of the court. At that time, any scheduled visits were suspended until further hearing on Bishop's complaint to modify and Mimi's contempt action. The order also set the date for the next hearing, and the issue of child support was addressed at that time.

The order of March 7, 2016, which is the order at issue on this appeal, continued the suspension of child support temporarily. Bishop's child support obligation was scheduled to

resume on September 1. The parenting plan detailed in the court's order provided that Bishop would have parenting time in increasing frequency and duration, with decreasing supervision over time. By August 15, 2016, the parties were to follow the parenting schedule allowing Bishop reasonable parenting time comporting with *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987). This schedule includes every other weekend and certain holidays. September was to be the first full month where that schedule would apply.

Mimi argues that to "abate child support only hurts the children and rewards [Bishop]." Brief for appellant at 24. She argues that she was not a barrier to Bishop's parenting time with the children, but, rather, it was Bishop's actions and the children's anxiety stemming from being around him that were the barriers.

The child support issue on appeal is the suspension of child support between December 2015 and September 2016. However, the parties' history, related to child support, is relevant in determining whether the district court's order is an abuse of discretion. On May 29, 2015, the court ordered Bishop to be allowed visitation with the minor children so long as it was supervised. In the same order, the court allowed Bishop to receive a $50 credit toward child support if Mimi did not "approve someone able and willing to supervise the visitation." The evidence shows that Mimi never approved anyone to supervise and no visits ever occurred. The child support credit was used by the district court as a means to compensate Bishop for his inability to exercise his court-ordered visitation.

Upon reviewing the evidence at trial, the district court determined that both parties had taken actions which were detrimental to the children and that the court did not believe that Mimi had always "acted in good faith and taken all steps reasonable to promote establishing a reasonable schedule of parenting time with [Bishop]." As previously discussed, the court found that allowing Bishop to have parenting time was

in the children's best interests, and we found that this was not an abuse of discretion. A portion of Mimi's brief suggests that child support was suspended indefinitely, when, in fact, child support was suspended from December 2015 to September 2016. In light of the complicated history of these parties, and the fact that Bishop had been allowed no contact with the children since the entry of the original parenting plan, we find the district court did not abuse its discretion in suspending child support temporarily until Bishop was allowed to begin reasonable parenting time.

VI. CONCLUSION

We find the district court did not abuse its discretion in overruling Mimi's motion for directed verdict, in finding that parenting time with Bishop was in the children's best interests, and in temporarily suspending child support.

Affirmed.

State of Nebraska, appellee, v. Brian A. McCrickert, appellant.

890 N.W.2d 798

Filed February 7, 2017. No. A-15-1161.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** Traffic violations, no matter how minor, create probable cause to stop the driver of a vehicle.
3. **Constitutional Law: Search and Seizure: Motor Vehicles.** In determining whether the government's intrusion into a motorist's Fourth Amendment interests was reasonable, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved that violation.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.
5. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
6. **Probable Cause: Police Officers and Sheriffs.** Probable cause is not defeated because an officer incorrectly believes that a crime has been or is being committed. But implicit in the probable cause standard is the requirement that a law enforcement officer's mistakes be reasonable.

7. **Probable Cause: Appeal and Error.** An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.

Appeal from the District Court for Seward County: James C. Stecker, Judge. Affirmed.

William J. O'Brien for appellant.

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

Moore, Chief Judge, and Pirtle, Judge, and McCormack, Retired Justice.

Pirtle, Judge.

INTRODUCTION

Brian A. McCrickert appeals from his conviction for possession of marijuana, more than 1 pound, a Class IV felony. He asserts the evidence obtained during a traffic stop should have been suppressed because there was no probable cause to initiate the stop. For the reasons that follow, we affirm.

BACKGROUND

On December 4, 2013, Sgt. Michael Vance of the Seward County sheriff's office was on duty and conducting traffic control on Interstate 80. At approximately 7 p.m., Vance observed a black vehicle traveling eastbound in the left-hand lane, also known as the passing lane, traveling at a slower speed. He observed two other vehicles using the "slow lane" to pass the vehicle on the right. Vance activated his patrol vehicle's radar and determined the vehicle in the left-hand lane was traveling at 66 miles per hour in a 75-mile-per-hour zone.

Vance pulled up near the vehicle to let the driver know that he was there and activated his patrol vehicle's in-car camera. Then Vance backed off so the driver could change lanes, but

the driver did not do so. Vance testified that he would have moved on if the vehicle had moved into the right-hand lane. At that point, Vance pulled into the left-hand lane behind the vehicle and activated his patrol vehicle's emergency lights to conduct a traffic stop. Vance testified that he made the decision to stop the vehicle because it was in violation of the Nebraska Rules of the Road. He testified that even though the vehicle was traveling under the speed limit, it was not a dangerous speed. The driver was not driving below the minimum speed allowed, nor above the maximum speed allowed. Vance stated that drivers in the inside lane are supposed to maintain the speed limit, because "[i]f you are causing cars to pass you in the right lane, it's called impeding traffic."

There was one occupant in the vehicle, and his driver's license indicated he was McCrickert. Vance issued McCrickert a warning for a traffic infraction. Vance searched the passenger compartment of the vehicle with McCrickert's consent and found approximately 3 pounds of marijuana in the trunk.

McCrickert filed a motion to suppress the evidence citing numerous grounds, including the assertion that the traffic stop was unconstitutional. Vance testified at the suppression hearing, and a DVD of the video captured by the in-car camera was admitted as an exhibit. The video shows a white van approaching McCrickert's vehicle in the left lane and using the right lane to pass.

The district court issued a "Memorandum Opinion" overruling McCrickert's motion to suppress on December 3, 2014. The court noted Vance's testimony that McCrickert violated Neb. Rev. Stat. § 60-6,131(2) (Reissue 2010) for failing to drive on the right half of the roadway and that the video confirms McCrickert was driving in the left lane and was not passing while he was driving in the left lane. The court stated that a traffic violation, no matter how minor, creates probable cause to stop the driver, and it concluded the traffic stop of McCrickert's vehicle was valid and not a violation of his rights.

On December 9, 2014, McCrickert filed a motion to reconsider urging the court to reconsider the findings in the order issued on December 3. The court granted McCrickert's motion to reconsider, but issued a memorandum opinion on December 17, concluding that the stop was valid and not a violation of McCrickert's rights.

On March 31, 2015, the parties agreed to a stipulated bench trial on the allegations in the amended information. The court read McCrickert his rights, and McCrickert indicated that he understood them. The court found that McCrickert knowingly, voluntarily, and intelligently waived his rights to a preliminary hearing and to a jury trial. The defense requested that the court reconsider the motion to suppress and the motion in limine, and it was overruled.

The court found McCrickert guilty of count I of the amended information: possession of marijuana, more than 1 pound, a Class IV felony. On November 16, 2015, McCrickert was sentenced to 28 days' imprisonment and was given credit for the 28 days he had served. McCrickert was also ordered to pay a $5,000 fine. McCrickert timely appealed.

ASSIGNMENT OF ERROR

McCrickert asserts the evidence obtained during the traffic stop should have been suppressed because the State failed to meet its burden to show there was probable cause or reasonable suspicion to initiate the stop.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *State v. Rolenc, ante* p. 282, 885 N.W.2d 568 (2016).

ANALYSIS

McCrickert asserts there was no probable cause or reasonable suspicion for Vance to initiate the traffic stop which led to the discovery of marijuana in his vehicle; thus, he argues the evidence should have been suppressed.

[2-4] Traffic violations, no matter how minor, create probable cause to stop the driver of a vehicle. *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010). See *State v. Sanders*, 289 Neb. 335, 855 N.W.2d 350 (2014). In determining whether the government's intrusion into a motorist's Fourth Amendment interests was reasonable, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved that violation. *State v. Prescott, supra*. Instead, an officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred. *Id.*

Vance testified that he pulled the vehicle over because it was committing a traffic infraction. Vance testified that he stopped McCrickert for "impeding traffic," based upon his visual observation that McCrickert's vehicle was traveling in the left-hand lane, at a speed slower than the speed limit, and that as a result, other vehicles were forced to pass the vehicle on the right-hand side.

McCrickert challenges the use of § 60-6,131 to determine that there was probable cause to justify the traffic stop in this case. He asserts § 60-6,131(1) is inapplicable because it applies to "[divided] highways that are *not divided* into separate roadways, as the Interstate is." Reply brief for appellant at 7. He refers to *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003), in which the Nebraska Supreme Court determined that, because the collision occurred on a four-lane divided highway, a jury instruction based on Neb. Rev. Stat. § 60-6,141 (Reissue 2010) rather than § 60-6,131 was appropriate.

He also asserts that the State relied on § 60-6,131(2) to justify the stop, which would require proof McCrickert was

driving at "less than the normal speed of traffic," and that the State did not meet this burden. Therefore, he asserts there was no legal basis for the traffic stop.

Section 60-6,131 requires vehicles to be driven on the right side of the roadway except under certain circumstances; specifically, subsection (2) states:

> Upon all roadways, any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

In *U.S. v. Guevara*, 731 F.3d 824 (8th Cir. 2013), the U.S. Court of Appeals for the Eighth Circuit considered a factual situation similar to this case and applied § 60-6,131. In *Guevara,* the defendant was observed to be "driving in the left lane and failing to move over to the right lane for faster moving cars." 731 F.3d at 828. The Eighth Circuit determined that there was probable cause to initiate a traffic stop for improperly driving in the left lane of the Interstate. As noted by the district court for Seward County in the case at hand, *U.S. v. Guevara, supra*, is not controlling, but it is instructive in that the Eighth Circuit found the same driving which is the subject of this case to constitute probable cause, and it was sufficient to justify a stop of that defendant's vehicle.

[5,6] Even if § 60-6,131 does not, in fact, apply to incidents occurring on divided roadways, such as the Interstate, Vance still had probable cause to initiate the traffic stop of McCrickert's vehicle. In cases involving probable cause to support a warrantless arrest, the Nebraska Supreme Court has stated that probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014); *State v. McCave*,

282 Neb. 500, 805 N.W.2d 290 (2011). Probable cause is not defeated because an officer incorrectly believes that a crime has been or is being committed. *Id.* But implicit in the probable cause standard is the requirement that a law enforcement officer's mistakes be reasonable. *Id.* Given the apparent conflict between *Brouillette* and *Guevara*, any potential mistake made by Vance with regard to the applicability of § 60-6,131 would be reasonable under these circumstances.

The Nebraska statutes also include a provision which states: "No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law." Neb. Rev. Stat. § 60-6,193(1) (Reissue 2010).

[7] It is not clear which statute Vance relied upon in initiating the stop of McCrickert's vehicle. However, the Nebraska Supreme Court has stated that an appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances. *State v. McCave, supra.*

In this case, the evidence shows that Vance objectively believed that a traffic violation had occurred, because he observed McCrickert's vehicle to be impeding the flow of traffic on the roadway. Specifically, Vance observed McCrickert's vehicle driving in the left-hand lane, while other vehicles were forced to pass McCrickert's vehicle using the right-hand lane. The video from Vance's in-car camera shows at least one vehicle, a white van, used the right-hand lane to pass McCrickert's vehicle. Vance's report and testimony indicate McCrickert was traveling 66 miles per hour in a 75-mile-per-hour zone. Vance initiated a traffic stop and notified McCrickert that he would receive a warning for impeding traffic. The evidence shows that Vance had probable cause to believe that a traffic violation had occurred, and this was sufficient to justify the initial stop of McCrickert's vehicle.

Thus, the stop was valid and not a violation of McCrickert's rights. The district court did not err in overruling McCrickert's motions to suppress which were based on the allegation that the stop was initiated without probable cause.

CONCLUSION

A traffic violation, no matter how minor, creates probable cause to stop the driver; thus, the traffic stop of McCrickert's vehicle was valid and not a violation of his constitutional rights. For the reasons stated above, we affirm the decision of the district court for Seward County in its entirety.

Affirmed.

Michael B., as father and next friend of KaLeigh B., appellant, v. Northfield Retirement Communities, appellee.

891 N.W.2d 698

Filed February 7, 2017. No. A-16-486.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may only modify, reverse, or set aside a Workers' Compensation Court decision when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. **Death: Presumptions.** The presumption against suicide is one of law, not of fact, and is based upon the natural characteristics of persons for love of life and fear of death.
4. **Death: Presumptions: Evidence: Proof.** The presumption against suicide can be overcome and rebutted by the introduction of evidence tending to show how the death occurred.
5. ____: ____: ____: ____. If the presumption against suicide is overcome, the burden shifts to the party asserting the death was accidental to adduce evidence of such.
6. **Workers' Compensation: Negligence.** A claimant cannot recover under the workers' compensation law if the employee was willfully negligent.
7. ____: ____. Willful negligence consists of a deliberate act, conduct evidencing a reckless indifference to safety, or intoxication at the time of injury without consent, knowledge, or acquiescence of the employer.

8. **Workers' Compensation: Negligence: Death.** Committing suicide generally constitutes willful negligence within the meaning of Neb. Rev. Stat. § 48-151(7) (Reissue 2010) and thereby bars recovery under the workers' compensation law.
9. **Workers' Compensation: Negligence: Death: Evidence.** There is an exception to the rule that suicide constitutes willful negligence when the evidence shows that suicide was nonvoluntary.
10. ____: ____: ____: ____. There are factors that can override a person's free will, and scientific testimony to such can be admitted as evidence that the suicide was not willful, thereby allowing for workers' compensation recovery.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Affirmed.

Michael W. Meister for appellant.

Gregory D. Worth, of McAnany, Van Cleave & Phillips, for appellee.

Moore, Chief Judge, and Riedmann and Bishop, Judges.

Riedmann, Judge.

INTRODUCTION

Michael B., as father and next friend of KaLeigh B., appeals from an order from the Workers' Compensation Court denying survivor benefits, following the death of Kena B. Based on our review of the record, we affirm.

BACKGROUND

Kena sustained an injury arising out of her employment with Northfield Retirement Communities in 2009. In 2012, a stipulated award was entered in her favor. At the time, she continued to receive treatment. Kena passed away on April 15, 2014, from an apparent drug overdose. After performing an autopsy, the coroner found her cause of death to be multiple drug toxicity.

Following Kena's death, a suggestion of death, motion to substitute party, and petition for benefits was filed. The

motion sought leave to substitute Michael as the plaintiff. The motion was granted, and Michael was allowed to file an amended petition on KaLeigh's behalf seeking death benefits under the Nebraska Workers' Compensation Act. Northfield Retirement Communities contested the amended petition, and the issue was tried to the court. The evidence reveals the following:

Several hours prior to Kena's death, Det. Henry Moreno of the Gering Police Department accompanied a social worker to Kena's residence at the social worker's request. At the time, Kena and her teenage daughter, KaLeigh, were living at a friend's house. The purpose of the visit was to speak with Kena regarding her drug usage and living situation, as well as to investigate a complaint regarding physical abuse of KaLeigh.

While at the residence, the friend asked Moreno to tell Kena that she was no longer welcome there. The social worker also spoke with Kena about housing options for KaLeigh, because KaLeigh was going to be removed from her custody. Kena was upset to learn that she was being evicted and that her daughter was going to be taken from her. At one point, Kena told the social worker that she was going to take a Xanax because "her anxiety was acting up."

During their conversations, Kena said that she had no family in the area to help her and that she did not know what she was going to do. She repeated several times that she was "at her end." When asked to elaborate on what she meant, she would not do so. The social worker specifically asked her if she was going to harm herself or anyone else, and she said no.

Moreno and the social worker left the residence at 3:54 p.m. after telling Kena to begin packing up her belongings to leave the residence. Moreno stated that he did not feel that Kena was a danger to herself at the time that they left.

Less than an hour later, at 4:51 p.m., a rescue call to the same residence was received. Upon Moreno's arrival, he saw that Kena was unconscious and that emergency personnel were

administering CPR. While at the residence, he collected the pill bottles found in Kena's bedroom and later counted the quantity of some of the more "serious" pills.

Kena was taken to the hospital where she later died. At the hospital, the primary diagnosis was found to be an intentional drug overdose. When her autopsy was performed the following day, however, the coroner found that her death was accidental.

Prior to her death, Kena had been regularly seeing the same primary care doctor for a number of years, Dr. Michelle Cheloha. Dr. Cheloha testified that Kena had been experiencing pain from her work injury ever since it happened, even after she had surgery. Dr. Cheloha had prescribed various painkillers over the years to treat this pain. At the time of Kena's death, she had prescriptions for methadone and oxycodone to treat her continued neck pain. Dr. Cheloha also testified that Kena had a history of anxiety and depression that predated her work injury and that she had been on medications, such as Xanax, as far back as 2003. She also stated that she was aware Kena had prior suicidal ideations and attempts and that Kena had been admitted to the psychiatric unit on June 4, 2013, because she expressed that she felt hopeless and helpless and "want[ed] to leave the world."

Dr. Cheloha saw Kena 6 days prior to her death. The doctor confirmed which medications she had prescribed at that time and in what quantity. Of the 90 methadone pills she had prescribed, 78 should have remained, but Moreno found only 63. She prescribed 60 oxycodone pills, and 31 were left, and she prescribed 40 Xanax pills, and only 4 were found. Based on the quantities left over, Dr. Cheloha determined that Kena overdosed on all three medications and that the amount of medication unaccounted for would have been sufficient to send her into respiratory arrest and cause her death. She confirmed that the levels of medication found in Kena's body during her autopsy were in excess of what they should have been if she had taken them as prescribed and that, if taken at the correct

dosages, her medications would not have been expected to cause death. Dr. Cheloha also opined that Kena died due to the amount she took, rather than the combination. It was her belief that Xanax in particular caused Kena's death due to its "instantaneous" reaction time. She said that although she was aware of Kena's history using illicit drugs, she had never abused her prescriptions in the past.

The compensation court ruled in favor of Northfield Retirement Communities, finding that Kena's manner of death was suicide, which constituted willful negligence and thus barred any recovery of benefits. The compensation court subsequently dismissed Michael's petition with prejudice. He now appeals to this court.

ASSIGNMENTS OF ERROR

Michael assigns, restated and reordered, that the trial court erred in (1) failing to apply the presumption against suicide; (2) finding sufficient competent evidence in the record to support a determination of suicide; and (3) improperly relying upon evidence which caused the court to exhibit bias, resulting in a denial of benefits.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may only modify, reverse, or set aside a Workers' Compensation Court decision when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016). Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence. *Id.*

ANALYSIS

Presumption Against Suicide.

Michael first assigns as error the trial court's failure to apply the presumption against suicide. He claims that there was not sufficient evidence of suicide to overcome the presumption and that the compensation court should have found Kena's cause of death to be accidental. For the reasons that follow, we disagree.

[3-5] In Nebraska, there is a general rule that where a cause of death is in issue and there is nothing to show how death was caused, there is a negative presumption against suicide. *Hannon v. J. L. Brandeis & Sons, Inc.*, 186 Neb. 122, 181 N.W.2d 253 (1970), *overruled on other grounds, Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983). The presumption against suicide is one of law, not of fact, and is based upon the natural characteristics of persons for love of life and fear of death. See *id.* However, this presumption can be overcome and rebutted by the introduction of evidence tending to show how the death occurred. See *Breckenridge v. Midlands Roofing Co.*, 222 Neb. 452, 384 N.W.2d 298 (1986). If overcome, the burden shifts to the party asserting the death was accidental to adduce evidence of such. See *id.*

The case at bar presented conflicting evidence as to whether Kena's overdose was accidental or intentional. In Michael's claim that Kena's death was accidental, he points to the facts that there were pills left that she did not take, that Moreno testified he did not feel Kena was a threat to herself, and that Dr. Cheloha testified only to Kena's suicidal ideations in the past. We also note that the results of the autopsy indicated that the manner of death was accidental. However, none of these facts are singularly dispositive.

The trial court found that Kena was in a "fragile emotional state" immediately prior to her death, having just been told that she was being evicted and that her daughter was going to be removed from her custody. Additionally, she repeated several times that afternoon that she was "at her end." We find

Kena's statement that she was "at her end" to be similar in nature to the statement made by the decedent in *De Bruler v. City of Bayard*, 124 Neb. 566, 247 N.W. 347 (1933). There, in response to his current financial difficulties, the decedent had been overheard saying, "'I just as well end it all.'" *Id.* at 568, 247 N.W. at 347. The court found that such statement, when considered with other factors, indicated that he had intentionally ended his life. *De Bruler v. City of Bayard, supra*. Here, we similarly find that Kena's statement indicated a sense of hopelessness and emotional instability, which supports a finding of suicide. We also note the short lapse in time between when Kena found out about her eviction and daughter's removal and when she overdosed.

The compensation court also took into consideration Kena's prior history of depression, as well as suicidal ideations and attempts, including a hospitalization for such less than a year prior to her death. The trial court also relied on the amount of medication, specifically Xanax, that Kena took on the day of her death. According to testimony from Kena's doctor, she prescribed 40 Xanax pills to Kena 6 days prior to her death, and only 4 were found. Her doctor also prescribed numerous pills of methadone and oxycodone. Her doctor testified that Kena had no history of abusing her medications and that Kena knew about the dangers of mixing medications because "she was a CNA."

Taking all of the above into consideration, we find no clear error in the trial court's determination that there was evidence tending to show how the death occurred, thereby overcoming the presumption against suicide.

Sufficient Evidence to Support Finding of Suicide.

Michael next asserts that the trial court erred in finding sufficient competent evidence to determine that Kena committed suicide. He argues that the evidence indicated that her death was accidental, thus demonstrating no willful negligence

and allowing recovery of benefits. In the alternative, Michael claims that even if the overdose was intentional, Kena's work injury contributed to her suicide and was therefore compensable. We disagree.

[6-8] Under Neb. Rev. Stat. § 48-101 (Reissue 2010), a claimant cannot recover under the workers' compensation law if the employee was willfully negligent. See *Hannon v. J. L. Brandeis & Sons, Inc.*, 186 Neb. 122, 181 N.W.2d 253 (1970), *overruled on other grounds, Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983). Willful negligence consists of a deliberate act, conduct evidencing a reckless indifference to safety, or intoxication at the time of injury without consent, knowledge, or acquiescence of the employer. See Neb. Rev. Stat. § 48-151(7) (Reissue 2010). Committing suicide generally constitutes willful negligence within the meaning of this language and thereby bars recovery under the workers' compensation law. See *Hannon v. J. L. Brandeis & Sons, Inc., supra*.

[9,10] However, Nebraska law has recognized an exception to the rule that suicide constitutes willful negligence when the evidence shows that suicide was nonvoluntary. See *Friedeman v. State, supra*. In *Friedeman*, the decedent suffered a work injury that left her with chronic pain, making it very difficult for her to engage in any of her preaccident activities, such as working, helping on the family farm, and looking after her family. She had difficulty moving around and getting to sleep and became "a mere shadow of her former self." *Id.* at 415, 339 N.W.2d at 70. Several years after the accident, decedent committed suicide, leaving behind a note explaining that she "'just [could not] stand the pain any longer.'" *Id.* Her doctor later expressed the opinion that the pain from her work injury, rather than depression, drove her to commit suicide and that her decision to do so was nonvoluntary and beyond her control. *Friedeman v. State, supra*. The Nebraska Supreme Court agreed, acknowledging that there are factors which can override a person's free will and that scientific testimony to

such can be admitted as evidence the suicide was not willful, thereby allowing for recovery. *Id.* In so ruling, the Supreme Court carved out an exception from the general rule of *Hannon*, finding that a nonvoluntary suicide does not constitute willful negligence. See *Friedeman v. State, supra*.

For the reasons explained above, we find that the compensation court did not clearly err in finding that Kena's overdose was intentional. Specifically, we note Kena's fragile emotional state, her history of depression and anxiety, her history of suicidal ideations and attempts, and the amount of prescription medication that was unaccounted for and presumably taken by her on the day of her death. While there is no one dispositive factor, such as a suicide note, we find that the record overall does support the trial court's finding.

Michael alternatively asserts that even if Kena's death was intentional, recovery should still be allowed under the *Friedeman* exception because her work injury contributed to her suicide.

However, the trial court did not find that Kena's pain was a contributing factor in her death. Instead, the trial court focused on factors such as her emotional state and prior history. It found no evidence that extreme pain caused Kena to involuntarily end her life. While Dr. Cheloha testified that her pain *may* have exacerbated her anxiety and depression, both were preexisting conditions at the time of the work injury and neither was included in the stipulated award as an injury arising from the work accident. We find that this determination was supported by the record and was not made in error. Accordingly, we find no merit in this assignment of error.

Improper Reliance on Evidence Resulting in Bias Against Kena.

Michael argues that the trial court improperly relied upon evidence of Kena's prior history of illicit drug use, which caused it to exhibit bias against her and resulted in a denial of benefits. We disagree.

Michael claims that the compensation court referred to Kena's illicit drug use "17 times in [its] Order for Dismissal," brief for appellant at 10, evidencing the fact that it improperly relied on such. We find the compensation court primarily referred to her illicit drug use in recounting the facts presented at trial. The only time her drug use was mentioned in the court's findings was to specifically explain that such evidence "played virtually no role" in its decision. The only manner in which the court considered Kena's drug use was in reference to medical records showing that she was hospitalized 2 months prior to her death for renal failure due to methamphetamine use. The court noted that if she was willing to abuse methamphetamine to the point of renal failure, such could indicate that she was willing to overdose on prescription medication to the point of death. Beyond that, the court explicitly stated that it did not rely on any evidence of Kena's illicit drug use.

Furthermore, we find no indication that the compensation court implicitly relied on such evidence. The court laid out each factor it relied upon in making its determination, and we find that those factors provided sufficient grounds to support the finding of suicide. We also note that Michael does not assign as error the admission of any exhibits referencing Kena's illicit drug use. In the absence of any evidence that the compensation court relied on evidence of Kena's drug use, we find that it did not exhibit bias against Kena.

CONCLUSION

Following our review of the record, we determine that the compensation court did not err in failing to apply the presumption against suicide and in finding sufficient evidence to determine that Kena's overdose was intentional. We also determine that the compensation court did not improperly rely on evidence of illicit drug use resulting in bias. We therefore affirm the order of dismissal.

Affirmed.

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

891 N.W.2d 705

Filed February 7, 2017. No. A-16-742.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Sentences: Probation and Parole.** If a defendant is convicted of a Class IV felony, the court shall impose a sentence of probation unless there are substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community, including, but not limited to, the criteria in subsections (2) and (3) of Neb. Rev. Stat. § 29-2260 (Supp. 2015).
3. ____: ____. Notwithstanding the language of Neb. Rev. Stat. § 29-2204.02 (Supp. 2015), Neb. Rev. Stat. § 29-2260 (Supp. 2015) still requires that when considering probation versus imprisonment, the trial court must have regard for the nature and circumstances of the crime.
4. **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.
5. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Mark E. Rappl for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Moore, Chief Judge, and Riedmann and Bishop, Judges.

Riedmann, Judge.

INTRODUCTION

Anthony P. Dyer appeals from his plea-based conviction in the Lancaster County District Court of enticement by an electronic communication device. He assigns only that the court imposed an excessive sentence. Finding no merit to his arguments on appeal, we affirm.

BACKGROUND

On January 28, 2016, the State filed an information charging Dyer with enticement by electronic communication device. He pled no contest to the charge. In exchange for Dyer's agreement to plead to the offense as charged, the State agreed not to pursue any additional charges arising out of the investigation.

According to the factual basis provided by the State at the plea hearing, on November 17 and 18, 2015, Dyer began communicating online and through text messages with an investigator of the Lancaster County sheriff's office, who was acting undercover as a 13-year-old female. During the conversation, Dyer "began to articulate sexual activity" and sent a picture of his genitals to someone he believed to be a 13-year-old female. Dyer arranged a meeting at a specified location, and when he arrived, he was arrested. Dyer was 30 years old at the time. The district court accepted Dyer's plea and found him guilty.

In its sentencing order, the district court found:

> [S]ubstantial and compelling reasons, as checked on the attached sheet, exist why [Dyer] cannot effectively and safely be supervised in the community on probation and that imprisonment of [Dyer] is necessary for the protection of the public because the risk is substantial that,

> during any period of probation, [Dyer] would engage in additional criminal conduct and because a lesser sentence would depreciate the seriousness of [Dyer's] crime and promote disrespect for the law.

On the form attached to the order, the district court indicated its "substantial and compelling reasons" to withhold probation, which included that a lesser sentence would depreciate the seriousness of the crime, a lesser sentence would promote disrespect for the law, incarceration was necessary to protect the safety and security of the public, and the crime caused or threatened serious injury or harm. The court therefore sentenced Dyer to 2 years' imprisonment and 12 months' postrelease supervision. He received credit for 1 day served. Dyer timely appeals to this court.

ASSIGNMENT OF ERROR

Dyer assigns that the district court erred in imposing an excessive sentence.

STANDARD OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

ANALYSIS

Dyer argues that the sentence imposed by the district court is excessive, because the court failed to articulate substantial and compelling reasons why probation would not be appropriate beyond the nature of the crime itself. We find no abuse of discretion in the sentence imposed.

[2] Enticement by an electronic communication device is a Class IV felony. Neb. Rev. Stat. § 28-833 (Reissue 2016). Class IV felonies are punishable by a maximum of 2 years' imprisonment and 12 months' postrelease supervision, a $10,000 fine, or a combination of both fine and imprisonment, and a minimum of 9 months' postrelease supervision if

imprisonment is imposed. See Neb. Rev. Stat. § 28-105 (Supp. 2015). If a defendant is convicted of a Class IV felony, the court shall impose a sentence of probation unless there are substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community, including, but not limited to, the criteria in subsections (2) and (3) of Neb. Rev. Stat. § 29-2260 (Supp. 2015). See Neb. Rev. Stat. § 29-2204.02 (Supp. 2015).

Under § 29-2260:

> (2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.
>
> (3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:
>
> (a) The crime neither caused nor threatened serious harm;
>
> (b) The offender did not contemplate that his or her crime would cause or threaten serious harm;
>
> (c) The offender acted under strong provocation;
>
> (d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;

(e) The victim of the crime induced or facilitated commission of the crime;

(f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;

(g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

Dyer argues that when § 29-2204.02 and related laws were enacted, the Legislature specifically elected not to reclassify enticement by an electronic device from a Class IV felony, meaning there is a presumption of probation for this offense. Thus, he claims that the intent of the Legislature is defeated if a trial court is allowed to withhold probation based solely on the nature of the offense.

[3] We find no merit to this argument for two reasons. First, notwithstanding the language of § 29-2204.02, § 29-2260 still requires that when considering probation versus imprisonment, the trial court must have regard for the nature and circumstances of the crime. See *State v. Charles*, 13 Neb. App. 305, 691 N.W.2d 567 (2005). Thus, the court must consider not only the elements of the crime, but the specific circumstances of the crime which this particular defendant committed. The evidence indicates the trial court did so in the present case. At sentencing, the district court noted that not only did Dyer engage in sexual communication with someone he believed to be a 13-year-old, but he arranged a meeting and

showed up at the agreed upon time and place with condoms in his possession.

We also reject Dyer's argument because the court in this case did not elect to withhold probation based solely on the nature of the offense. Section 29-2260 permits the trial court to withhold probation if it finds that imprisonment "is necessary for protection of the public" because the risk is substantial that during the period of probation the offender will engage in additional criminal conduct or because a lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for the law. The trial court found these factors present in the case at hand. The court relied on the evaluations, some of which determined Dyer's risk for reoffending was in the "moderate-high risk category" which the court concluded put him "in the moderate-high category to re-offend." The court also noted the fact that the State agreed not to pursue additional charges as part of the plea agreement reached with Dyer, despite the fact that Dyer not only engaged in online communication but followed through with his plan to meet a 13-year-old in order to engage in sexual activity.

[4,5] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015). 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. *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*.

Although Dyer received the maximum sentence allowed for a Class IV felony, it falls within the statutory limits. See *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011) (sentence at maximum limit is still within that limit). The trial court considered the required factors in fashioning Dyer's sentence and articulated its substantial and compelling reasons for withholding probation. Based on the foregoing, we cannot say that the sentence imposed constitutes an abuse of the district court's discretion. We therefore affirm.

CONCLUSION

We conclude that the district court did not abuse its discretion with the sentence imposed. The conviction and sentence are therefore affirmed.

Affirmed.

In re Interest of Elijah P. et al., children under 18 years of age. State of Nebraska, appellee and cross-appellee, v. Erika D., appellant, and Joshua P., appellee and cross-appellant.

891 N.W.2d 330

Filed February 21, 2017. No. A-15-946.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Parental Rights: Rules of Evidence: Due Process.** In termination of parental rights hearings, the Nebraska Evidence Rules do not apply; instead, due process controls and requires that fundamentally fair procedures be used by the State in an attempt to prove that a parent's right to his or her child should be terminated.
3. **Parental Rights.** Neb. Rev. Stat. § 43-292(9) (Reissue 2016) allows for terminating parental rights when the parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.
4. ____. Whether aggravated circumstances under Neb. Rev. Stat. § 43-292(9) (Reissue 2016) exist is determined on a case-by-case basis.
5. **Parental Rights: Words and Phrases.** Where the circumstances created by the parent's conduct create an unacceptably high risk to the health, safety, and welfare of the child, they are aggravated.
6. **Evidence: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
7. **Parental Rights.** Generally, a finding of aggravated circumstances under Neb. Rev. Stat. § 43-292(9) (Reissue 2016) is based on severe, intentional actions on the part of the parent.

8. ____. Neb. Rev. Stat. § 43-292(2) (Reissue 2016) provides that parental rights may be terminated when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection.
9. **Juvenile Courts: Rules of Evidence.** Juvenile courts must apply the Nebraska Evidence Rules at adjudication hearings.
10. **Trial: Expert Witnesses.** Once a party calls into question an expert testimony's factual basis, data, principles, methods, or their application, the trial court must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline, and the court does not have the discretion to abdicate its gatekeeping duty.
11. ____: ____. In performing its gatekeeping duty, a trial court has considerable discretion in deciding what procedures to use in determining if an expert's testimony satisfies the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), but a necessary component of the trial court's duty is that when faced with such an objection, the court must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper.
12. **Trial: Expert Witnesses: Appeal and Error.** After a sufficient objection under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), has been made, the losing party is entitled to know that the trial court has engaged in the heavy cognitive burden of determining whether the challenged testimony was relevant and reliable and is entitled to a record that allows for meaningful appellate review.
13. **Trial: Expert Witnesses.** Without specific findings or discussion on the record, it is impossible to determine whether a trial court carefully and meticulously reviewed proffered scientific evidence or simply made an off-the-cuff decision to admit expert testimony.
14. ____: ____. In performing its gatekeeping duty, a trial court must explain its choices, and the record must include more than a recitation of the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), boilerplate language and a conclusory statement that the challenged evidence is or is not admissible.
15. ____: ____. A trial court adequately demonstrates that it has performed its gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the

reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination.

16. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function.
17. **Trial: Expert Witnesses.** *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), do not require that courts reinvent the wheel each time that evidence is adduced, and in such situations, a less extensive analysis and reasoning may be allowed.
18. **New Trial.** Only errors that are prejudicial to the rights of the unsuccessful party justify a new trial.
19. **Trial: Expert Witnesses.** Only if the admission or exclusion of the expert's testimony did not affect the result of the trial unfavorably for the party against whom the ruling was made will a court's abdication of its gatekeeping duty be deemed nonprejudicial.
20. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014), the State must prove the allegations of the petition by a preponderance of the evidence.
21. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Cum. Supp. 2014).
22. **Juvenile Courts: Proof.** While the State need not prove that the juvenile has actually suffered physical harm, at a minimum, the State must establish that without intervention, there is a definite risk of future harm.

Appeal from the Separate Juvenile Court of Douglas County: Christopher Kelly, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas C. Riley, Douglas County Public Defender, and Zoë R. Wade for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, Anthony Hernandez, and Shinelle Newman, Senior Certified Law Student, for appellee State of Nebraska.

Matthew R. Kahler, of Finley & Kahler Law Firm, P.C., L.L.O., for appellee Joshua P.

Moore, Chief Judge, and Riedmann and Bishop, Judges.

Riedmann, Judge.

I. INTRODUCTION

Erika D. appeals and Joshua P. cross-appeals from the order of the separate juvenile court of Douglas County which adjudicated the parties' minor children under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014) and terminated Erika's and Joshua's parental rights as explained below. We affirm the adjudication, but for the reasons that follow, we reverse the termination and remand the cause for further proceedings.

II. BACKGROUND

Erika and Joshua are the parents of five minor children: Joshua P., Jr. (Joshua Jr.), born in February 2006; Zion P., born in February 2008; Isaiah P., born in January 2013; Genesis P., born in November 2013; and Faith P., born in May 2015. Elijah P., born in February 2013, is the biological child of Joshua and another woman, but he had been under the care of Erika since October 2014.

The factual basis underlying the case occurred in January 2015 and is largely undisputed. At that time, the children, including Elijah, were residing with Erika. Joshua did not reside in the home, but he would see the children several times per week. On January 2, Elijah was standing on the armrest of the couch at Erika's house and fell off, landing face first on the floor, which was made of "vinyl covering tile" placed over concrete. He sustained a "knot" above his right eye that began to swell. Erika comforted Elijah and then called Joshua and sent him a photograph of Elijah's face by text message. Joshua told her to put some ice on the injury and keep Elijah awake for a while to monitor his condition. Elijah cried briefly but then acted normally—playing, eating, and drinking. When Joshua arrived at Erika's house a short while later, he talked

to Elijah and noticed nothing unusual about Elijah's behavior or demeanor. A few days later, Elijah began to develop a black eye from the fall, but otherwise there were no observable injuries or anything out of the ordinary about his behavior over the week following the fall.

On the evening of January 11, 2015, Erika fed the children dinner and gave them baths. She put the younger children, including Elijah, to bed around 8:30 p.m., and Elijah "went down easily." A little while later, she checked on him and noticed he was lying down, but his arms were straight up in the air. She pulled the covers off of him and called his name, but he did not wake up or put his arms down. Erika also noticed that he appeared to be stiff. She lowered Elijah's arms down, and then he relaxed and the stiffness went away.

Erika continued to watch Elijah, and a couple minutes later, he stiffened again. Erika then attempted to call Elijah's mother, and when there was no answer, she sent his mother a text message asking if he had ever previously experienced stiffness in his sleep. By this time, Elijah had relaxed again and looked like he was sleeping. Elijah's mother responded that Elijah "was super stiff especially in his legs" when he was born, but it had gone away, and she thought it was unusual that the stiffness had returned. After receiving the text message from Elijah's mother, Erika felt less concerned, because Elijah had experienced something similar in the past. Nevertheless, around 9 p.m., Erika called Joshua, told him about Elijah's stiffness, and asked him to come over.

On his way to Erika's house, Joshua searched the Internet for information on a 2-year-old experiencing stiffness while sleeping, and what he read was not alarming to him. The results of his search revealed that other children experienced stiffness in their sleep off and on—sometimes the parents were able to alleviate the condition and sometimes they were not, but by the next morning the children would be fine.

When Joshua arrived at Erika's house, he observed stiffness in Elijah's arms and legs and attempted to awaken him

by calling his name and touching him on the shoulder. Elijah's body then relaxed. Erika showed Joshua the text message from Elijah's mother reporting that Elijah had experienced stiffness when he was born. Because Elijah had previously experienced something similar, was breathing normally, and appeared to be sleeping, Joshua told Erika to let Elijah continue to sleep and see how he was in the morning when he woke up.

Joshua stayed at Erika's house for approximately an hour, and during that time, there was no indication that Elijah's stiffness had returned. When Joshua left Erika's house, he asked Erika to call him if anything changed or Elijah became stiff again and said if that happened, he would come back. Other than stiffness, Erika and Joshua did not observe any unusual body movements such as shaking, jerking, or signs of a seizure; Elijah's eyes were closed, and he seemed to be sleeping.

After Joshua left, Erika continued to monitor Elijah's condition throughout the night, but he did not experience any more stiffness overnight and appeared to be sleeping. She did not call Joshua because nothing concerning occurred overnight, and Elijah's condition did not change until around 8:30 a.m. the next day. After the older children left for school on the morning of January 12, 2015, Erika heard Elijah whining, so she thought he was awake and ready for breakfast. When she went to get him, she noticed his leg was stiff and one of his eyes was open, but he was not focusing or looking at her. She then called Joshua and asked him to take Elijah to the hospital.

When Joshua arrived, he observed the same symptoms Erika had reported, and he immediately took Elijah to the hospital. There, Elijah was diagnosed with a skull fracture above the right eye, a subdural hematoma, and a significant brain injury. He was taken into surgery to have the hematoma drained. Because of concerns that Elijah's injuries were the result of child abuse, the police and a child abuse pediatrician, Dr. Suzanne Haney, were called to the hospital.

A police detective responded to the hospital and spoke with Joshua, who recounted the events of January 2 and 11, 2015. The detective later met with Erika, and Erika reported the same version of events. Erika's and Joshua's stories remained consistent throughout numerous interviews. The police found no "hard evidence" indicating that Elijah's injuries were intentionally caused. However, in Dr. Haney's opinion, Elijah's injuries were the result of nonaccidental abusive head trauma, and thus, Erika and Joshua were arrested, and all of the children were removed from their care.

In various petitions, amended petitions, and supplemental petitions, the State sought adjudication of the children and termination of Erika's parental rights to Joshua Jr., Zion, Isaiah, Genesis, and Faith, and termination of Joshua's parental rights to Elijah, Joshua Jr., Zion, Isaiah, and Genesis. The State did not seek adjudication of Faith based on any acts of Joshua or termination of his parental rights to Faith.

In the operative pleadings, the State asserted that the children came within the meaning of § 43-247(3)(a), that reasonable efforts to preserve and reunify the family were not required because Elijah had been subjected to "aggravated circumstances," that termination of parental rights was warranted under Neb. Rev. Stat. § 43-292(2) and (9) (Reissue 2016), and that termination was in the children's best interests.

Prior to the juvenile court's holding an adjudication or termination hearing, Erika and Joshua filed a joint motion in limine asking that the court prohibit the State from introducing opinion testimony that Elijah's injuries were intentionally inflicted unless the court first established its reliability under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (*Daubert*/*Schafersman*). Thus, the court held a *Daubert*/*Schafersman* hearing to determine the admissibility of Dr. Haney's opinion testimony. At the conclusion of the *Daubert*/*Schafersman* hearing, the juvenile court

determined that the testimony satisfied the requisite standards and was therefore admissible.

The adjudication hearing and termination hearing were held jointly over the course of 4 days in July and August 2015. At the hearing, Dr. Haney explained that in cases of abusive head trauma, the victims are usually infants who suffer a "sudden change in their level of consciousness" by way of either seizures or unconsciousness, and their injuries generally include an injury to the brain itself; bleeding around the brain, known as subdural or subarachnoid hemorrhages; retinal hemorrhages; and sometimes other injuries such as bruises or broken bones. The mere presence of a subdural hematoma or skull fracture is not indicative of abusive head trauma or child abuse, because the injuries could be the result of accidental trauma such as a car accident or a significant fall.

In Dr. Haney's opinion, Elijah's injuries were the result of two separate incidents. One incident occurring about January 2, 2015, caused the skull fracture above his right eye but did not cause any long-term consequences. In her opinion, a second incident of trauma occurred around the time he became symptomatic on January 11 and led to the subdural hematoma, brain injury, and seizures. She opined that the injuries were caused by separate incidents because they were located on opposite sides of the brain; the skull fracture was on the right side of Elijah's head, and the subdural hematoma was located on the left side of the brain. And in her experience, subdural hematomas resulting from a skull fracture occur directly underneath the fracture itself. In addition, Dr. Haney testified that the severity of Elijah's brain injury and subdural hematoma was not consistent with a short fall and that he would have begun to display symptoms within minutes to hours after sustaining an injury that caused the type of subdural hematoma he had. Thus, based on the history provided to her and the lack of any significant accidental trauma, Dr. Haney opined that the subdural hematoma and brain injury were the result of inflicted blunt force trauma.

Dr. Haney acknowledged that in terms of attempting to date the injuries, the skull fracture and subdural hematoma could have occurred at the same time. But because of the locations of the injuries, she believed they were two separate injuries. She also acknowledged, however, that it is possible that an impact on the right side of the head could result in a bruise or subdural hematoma on the left side of the brain. In Dr. Haney's experience observing skull fractures with subdural hematomas, she had never seen an "isolated opposite side subdural [hematoma]," but she admitted that the fact that she had not seen it did not mean it was not possible.

Other testimony at the hearing revealed that after the children were removed from Erika's and Joshua's care, they underwent medical evaluations. Zion was found to have seven cavities and two abscessed teeth. Otherwise, the children did not appear dirty and none of them had any untreated medical conditions. A pediatrician testified that he examined Isaiah in September 2013 when Isaiah was approximately 8½ months old. He noticed that Isaiah was not moving his eyes together and recommended to Joshua that Isaiah be seen by a pediatric ophthalmologist. The pediatrician followed up several times with Erika and Joshua, and when an appointment had not been made by November, the pediatrician called Child Protective Services, because he was concerned that Isaiah was at risk for vision loss. Erika and Joshua explained the delay in having Isaiah seen was due to Medicaid issues and Genesis' premature birth in November 2013. Isaiah was ultimately seen and underwent eye surgery in January 2014. Thus, the Child Protective Services intake was closed, because no safety risks were identified.

Genesis was born prematurely at 24 weeks' gestation. She had a "brain bleed" on both sides of her brain and was in the hospital for nearly 3 months. Pediatricians recommended early intervention services for Genesis, because she was at risk for developmental and learning problems due to her prematurity. When Genesis presented for her 6-month checkup, she was

developmentally delayed for a normal 6-month-old child, but she was doing things physically that were appropriate for a 3-month-old child; thus, she was developmentally on track for a child born as prematurely as she was. Erika acknowledged that additional services were suggested for Genesis, but because the pediatricians indicated that Genesis was developing on track when considering her prematurity, Erika understood that additional services were not necessary.

After the children were removed from Erika's and Joshua's care, Joshua Jr. and Zion began attending weekly appointments with a licensed mental health therapist. Both children were diagnosed with "adjustment disorder, not otherwise specified." The therapist explained that adjustment disorder occurs when children have experienced a disruption or significant change in their lives, which results in mild symptomology such as increased emotion, a bit of sleep disturbance, or increased "worried thoughts" that interfere in daily functioning. Joshua Jr.'s symptoms included worrying about Erika and Joshua, including what happened to them and if he was going to be able to see them, worrying about living in his foster home with a stranger, and worrying about Elijah. He was having some issues at school with attention and focus and some mild trouble following basic directions. Zion's symptoms included becoming "very emotionally dysregulated" at times, being overly sensitive to corrections, becoming very clingy, having mild trouble sleeping, and experiencing "worried thoughts." Like Joshua Jr., Zion expressed concern over her parents and Elijah. The trauma the therapist was addressing with the children was the trauma of being removed from their parents' care, which is a very traumatic and upsetting event, the injuries to Elijah, and some past events the children experienced, including Zion's reports that she used to get "whoopins" from Joshua. According to the therapist, the children are doing very well in therapy, have been very responsive, and have made significant progress.

Erika and Joshua both testified at the hearing and described the events that occurred on January 2 and 11, 2015. A transcript of text messages Erika and Joshua exchanged between January 12 and 19 was received into evidence. The messages begin with Erika's asking Joshua if Elijah had been examined at the hospital yet, and Joshua's response asking Erika to clean up the house. The following messages were then exchanged:

> [Joshua:] They said he has a skull fracture and bleeding by his brain from when he [fell] off the couch
>
> [Erika:] Oh no
>
> . . . .
>
> [Erika:] Is he going to be ok[?]
>
> . . . .
>
> [Joshua:] It[']s critical. He has to go to the ICU and he's on life support
>
> [Erika:] [Oh my God] no
>
> [Erika:] We should [have taken] him last night
>
> [Erika:] I didn't even sleep because I was watching him
>
> [Erika:] I can't believe this. From 8:30 to 9 . . . that's so crazy. He walked upstairs. I changed his [diaper,] we said good night [and] I love you[.] [Elijah and] Isaiah even said it to each other. Then I laid them down
>
> [Erika:] I went to the bathroom and peeked to see if they were laying down and that's when I noticed that his hands were in the air
>
> [Erika:] I can't believe this. Is this my fault? Should I [have] just taken him home[?]
>
> [Joshua:] I thought about taking him. At first I thought he was just dreaming but then I googled what might have him doing that and everything I read said that some kids do that and they are fine when they wake up
>
> [Joshua:] Then you told me [Elijah's mother] said that he has done it before so I didn't take him. I was going to tell her to ask the doctor about it at his next doctor's appointment because she said he has one soon

> [Joshua:] If I thought it was anywhere close to this serious I would have [taken] him last night
>
> [Erika:] It was a first for us both so we couldn't be 100% [sure] that there was something wrong
>
> [Erika:] I cannot believe this
>
> [Erika:] He seemed so fine. No crying. Dancing to [a movie] and playing with Joshua [Jr.] prior to dinner
>
> [Erika:] This is crazy. What am I [going to] do? I can't believe there was something majorly wrong with him and I didn't know
>
> [Erika:] What is his mom saying?
>
> [Erika:] She's going to blame me for forever. I thought I was doing something good
>
> . . . .
>
> [Erika:] But he was hurting and I didn't even know
>
> . . . .
>
> [Erika:] Do you think you could go get my mom? She said [the police are] coming about 5:30 maybe but not sure but I'll need her here so I can talk with them and not be distracted by the kids
>
> [Joshua:] [Yes]. Make sure you don't lie about anything. If the[y] ask you a question you don't know the answer to, say you don't know. Don't try to make up anything. No one did anything to try to hurt him and that's what matters.

The court also received into evidence video recordings of forensic interviews conducted of Joshua Jr. and Zion. In their respective interviews, the children described hearing Erika calling Elijah's name on the night of January 11, 2015, after Elijah had gone to bed and going into his bedroom and seeing his stiff arms up in the air. They explained that Elijah was not misbehaving that night and that Erika was not upset. They did not hear Erika yelling or Elijah crying when Erika put him to bed. Joshua Jr. said that when Erika would get upset with Elijah, she would yell or tell him to stop what he was doing. The children said that neither Erika nor Joshua ever hit Elijah

or "whooped" him. Joshua Jr. never saw Erika be mean to Elijah, and she treated him the same as she treated the other children. Zion confirmed that she has seen Erika kiss Elijah and tell him she loves him. Zion believed that Elijah's injuries were the result of his fall off the couch. Joshua Jr. indicated that he would disclose if Erika had hurt Elijah and that he would have told Joshua as well.

The juvenile court entered orders on September 10, 2015, finding that the State proved all of the allegations in the petitions and motions by sufficient evidence. The court therefore determined that the children came within the meaning of § 43-247(3)(a), that Erika's and Joshua's parental rights should be terminated pursuant to § 43-292(2) and (9), that no reasonable efforts were required, and that termination of parental rights was in the children's best interests. Erika timely appeals to this court, and Joshua cross-appeals.

III. ASSIGNMENTS OF ERROR

Erika assigns, renumbered, that the juvenile court erred in (1) "abdicating its gatekeeping function under *Daubert*" by failing to set forth its reasoning for concluding that Dr. Haney's testimony was reliable, (2) implicitly finding that the scientific basis for Dr. Haney's opinion was "scientifically reliable under *Daubert*," (3) implicitly finding that Dr. Haney conducted a "reliable differential diagnosis," (4) finding that Erika subjected Elijah to aggravated circumstances under § 43-292(9), (5) finding that the children come within the meaning of § 43-292(2), (6) finding that termination of Erika's parental rights was in the children's best interests, (7) excusing reasonable efforts under Neb. Rev. Stat. § 43-283.01 (Reissue 2016), and (8) finding that the children come within the meaning of § 43-247(3)(a).

On cross-appeal, Joshua assigns that the juvenile court erred in finding (1) that the children come within the meaning of § 43-292(2) and (9), and (2) that termination of his parental rights was in the children's best interests.

IV. STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Joseph S. et al.*, 291 Neb. 953, 870 N.W.2d 141 (2015).

V. ANALYSIS

1. Termination of Parental Rights

Under the procedural posture of this case, the adjudication hearing and termination hearing were held jointly. The juvenile court found the evidence sufficient to support both adjudication and termination, and Erika and Joshua challenge those decisions on appeal. We first address the termination of their parental rights.

(a) *Daubert*/*Schafersman* Standards

[2] Erika's first two assignments of error challenge the juvenile court's decision to admit Dr. Haney's opinion testimony over her objection that the opinion was not reliable under the *Daubert*/*Schafersman* standards. In termination of parental rights hearings, the Nebraska Evidence Rules do not apply and, thus, neither do the *Daubert*/*Schafersman* standards. See *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). Instead, due process controls and requires that fundamentally fair procedures be used by the State in an attempt to prove that a parent's rights to his or her child should be terminated. *Id*.

In *In re Interest of Rebecka P., supra*, the Nebraska Supreme Court determined that the father's due process rights were not violated by the testimony of a witness, because the father received notice of the termination hearing, he appeared at the hearing and was represented by counsel, and his counsel cross-examined the witness and raised several objections to the witness' testimony. The same is true in the present case. Erika received notice of the termination hearing and the fact that the State was planning to elicit an opinion from Dr. Haney as to

the cause of Elijah's injuries. Erika appeared at the hearing and was represented by counsel, who cross-examined Dr. Haney and objected numerous times during her testimony.

We also note that Erika received a continuance of the termination hearing in order to secure her own expert medical witness and later filed a motion asking for permission to take a trial deposition of an out-of-state expert she secured to rebut Dr. Haney's testimony. The State and guardian ad litem objected, and the juvenile court sustained the objection, thereby preventing Erika from presenting expert medical witness testimony at the hearing. Erika did not, however, assign the denial of her motion as error on appeal, and we therefore do not opine on whether this decision comports with fundamental fairness or the due process standards. We otherwise find that the due process requirements were satisfied and that the juvenile court did not err in allowing Dr. Haney's opinion for consideration on the motion to terminate parental rights. Because the rules of evidence do apply at adjudication hearings, we will address Erika's assignments of error with respect to *Daubert*/*Schafersman* in greater detail in the adjudication section below.

(b) Statutory Grounds

In its order terminating Erika's and Joshua's parental rights, the juvenile court found by clear and convincing evidence that termination was warranted under § 43-292(2) and (9). Erika and Joshua challenge these determinations on appeal. Upon our de novo review of the record, we conclude that the evidence does not clearly and convincingly establish that Erika and Joshua neglected the children under § 43-292(2) or subjected them to aggravated circumstances under § 43-292(9). We first address the allegations of aggravated circumstances.

(i) § 43-292(9)

[3] Section 43-292(9) allows for terminating parental rights when the parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including,

but not limited to, abandonment, torture, chronic abuse, or sexual abuse.

[4,5] Whether aggravated circumstances under § 43-292(9) exist is determined on a case-by-case basis. See *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). The Legislature has not defined "aggravated circumstances" in the juvenile code, but the Supreme Court cited with approval the New Jersey Superior Court, stating that where the circumstances created by the parent's conduct create an unacceptably high risk to the health, safety, and welfare of the child, they are "'aggravated.'" See *In re Interest of Jac'Quez N.*, 266 Neb. 782, 791, 669 N.W.2d 429, 435 (2003).

Because the juvenile court's order does not contain specific factual findings, it is unclear what aggravated circumstances the court found to exist in the case at hand. It appears the State alleged the existence of aggravated circumstances based on either Erika's alleged intentional causation of Elijah's head injuries or Erika's and Joshua's failure to timely seek medical attention for Elijah.

Upon our de novo review of the record, we conclude that the evidence does not clearly and convincingly establish that Erika intentionally caused Elijah's injuries. There do not appear to be any allegations that Joshua intentionally harmed Elijah, and the evidence is undisputed that Elijah's symptoms of a head injury began at a time when Joshua was not present and Erika was home alone with the children. Thus, our analysis as to any assertion of intentional, physical harm to Elijah concerns only Erika.

The only evidence presented at trial from which a finding of intentional abuse could be based is Dr. Haney's opinion that Elijah's brain injury and subdural hematoma were not caused by the fall from the couch. But she admitted that the height of the fall was not presented to her, and her records incorrectly indicated that he fell off a couch and hit his head on a table. The evidence was undisputed that Elijah fell off the couch on January 2, 2015, from a height of 28 inches, and landed on

his face on a floor made of "vinyl covering tile" placed over concrete. He immediately sustained a "knot" over his eye and ultimately developed a black eye. Dr. Haney opined that as a result of the fall, he suffered a skull fracture. Over the course of the next 9 days, however, Elijah was acting normally and did not appear to have any additional injuries.

The evening of January 11, 2015, was, by all witness accounts, uneventful, with the children eating dinner, taking baths, and getting ready for bed. Joshua Jr. and Zion confirmed that Elijah was not misbehaving that night and that Erika was not upset. The older children did not hear any loud noises, commotion, or crying when Erika put Elijah to bed, and Erika confirmed that he went to bed easily that night. The police detective agreed that other than Dr. Haney's opinion, there was no "hard evidence" that would indicate that Elijah's injuries were intentionally caused.

Furthermore, in general, there was no evidence presented that Erika physically disciplined any of the children or was physically abusive. She testified that she does not spank the children, and Joshua Jr. said that Erika does not spank them, but, rather, when the older children get in trouble, she disciplines them by taking away their toys or video games. There was some discussion surrounding a claim that Erika "pops" the children in the mouth. She explained that she does so if the children eat food off the floor and she wants them to spit it out because there are bugs in her apartment. She said it is not a form of discipline. Joshua Jr. and Zion said they have never seen Erika hit or hurt Elijah. Although Zion detailed an incident where Elijah got a "whoopin'" from Erika, she later described a "whoopin'" as Erika's slapping Elijah's hands with her hands. Zion said that it did not hurt Elijah and that he did not cry when Erika did so. Joshua Jr. stated that Erika treated Elijah the same as the other children, and Zion said she has seen Erika give Elijah kisses and tell him that she loves him. Joshua Jr. was asked whether he would tell the interviewer if Erika had hurt Elijah, and Joshua Jr. indicated

that he would and said that he would have told Joshua if Erika had hurt Elijah.

We also consider the text messages between Erika and Joshua sent after the January 2 and 11, 2015, incidents, as well as the inquiry Erika sent Elijah's mother on January 11. Our review of those messages reveals genuine concern and do not support a finding by clear and convincing evidence that Erika intentionally injured Elijah.

[6] Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Josiah T.*, 17 Neb. App. 919, 773 N.W.2d 161 (2009). Although Dr. Haney's testimony could support a conclusion that Erika intentionally inflicted Elijah's injuries, when coupled with the circumstantial evidence presented at trial, the totality of the evidence does not rise to the level of clear and convincing in order to support a finding that Erika intentionally harmed Elijah. There is no evidence that Erika abused or neglected any children in the past or acted with any malicious intent the night Elijah became symptomatic. To the contrary, she not only cared for her own children, but she agreed to also care for Elijah, a child Joshua fathered with another woman. We note the absence of any motive or precipitating event that might have led Erika to intentionally harm Elijah. To the contrary, any loud crying or yelling likely would have been heard by Joshua Jr. and Zion, both of whom heard nothing that evening. In her forensic interview, Zion described hearing a noise she described as both a "boom" and a "bonk," but whether that occurred on January 11, 2015, or a different night is unclear, and regardless, at the time of the noise, Erika was downstairs with Zion, because Zion said Erika asked her to go upstairs to check on the younger children. When Zion investigated, all the children, including Elijah, were sleeping. In addition, the police found no hard evidence indicating that Elijah's injuries were intentionally caused, and the text messages Erika sent to Joshua and

Elijah's mother reveal genuine concern. Therefore, the totality of evidence presented at trial is not clear and does not produce a firm conviction that Erika intentionally harmed Elijah, resulting in significant head injuries.

In addition, we do not find that Erika's and Joshua's delay in seeking medical attention for Elijah constitutes aggravated circumstances. In *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003), the Supreme Court concluded that aggravated circumstances existed where the parents delayed seeking medical attention for 2 days when the child had suffered obvious, serious physical injuries. When the parents ultimately took the 2-month-old child to the hospital, he had a fracture to his right leg, severe cerebral palsy, retinal hemorrhages in both eyes, diffuse brain injury indicating lack of oxygen, and massive swelling of the brain tissue. The physicians found his injuries "consistent with child abuse, specifically, 'shaken baby syndrome.'" *Id.* at 784, 669 N.W.2d at 431. The parents denied harming the child, claiming that 2 days earlier he had fallen off the couch and struck his head against a telephone that was on the floor. The juvenile court ultimately terminated the father's parental rights under two subsections of § 43-292, including subsection (9), finding that he had subjected the child to aggravated circumstances. But the court determined that the State failed to meet its burden of proof as to the mother and declined to terminate her parental rights to the child. The State appealed.

The Supreme Court reversed, finding the evidence sufficient to also terminate the mother's parental rights under § 43-292(9). In reaching this decision, the court found that although the evidence did not tend to establish that the mother inflicted the initial injuries on the child, it clearly and convincingly established that she delayed seeking medical treatment for 48 hours after he had received obvious and serious injuries, thus severely neglecting his medical needs. It was undisputed that the child's injuries were obvious during the 48-hour delay, including the fact that he had a black and swollen eye, was

unresponsive during that time, was shaking, was not acting like himself, was not feeding well, was crying intermittently, was making some twitching movements, and had a change in consciousness. Thus, the Supreme Court found that it should have been apparent to the mother that the child had a serious physical problem, but she nevertheless refused to seek treatment for 2 days, apparently because she feared he would be taken from her.

Although *In re Interest of Jac'Quez N., supra*, appears factually similar to the present case, we find several important distinctions. First, the evidence in *In re Interest of Jac'Quez N.* was undisputed that the child's injuries were obvious and serious during the 48-hour period of delay. Here, according to Erika, Joshua, Joshua Jr., and Zion, Elijah was acting normally after he fell off the couch on January 2, 2015, until the night of January 11. Then, he appeared stiff and was unable to be awakened but displayed no other concerning symptoms, and Erika and Joshua believed he was sleeping. Erika and Joshua both stated that they became less concerned about the stiffness when Elijah's mother indicated he had experienced stiffness as a baby and that their concerns were additionally alleviated by Joshua's Internet research. As soon as Elijah's condition worsened the next morning, Erika called Joshua, who responded immediately and took Elijah to the hospital. Although Elijah was apparently suffering seizures throughout the night, Dr. Haney explained that the symptoms of a seizure can range from a simple "eye deviation [to] grand mal seizures where every extremity is jerking." She testified that Elijah's symptoms of episodes of stiffening and relaxing and unresponsiveness "could be" symptoms of a seizure. Thus, unlike in *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003), the evidence here is not clear and convincing that on the night of January 11, Elijah was displaying obvious signs of a serious medical issue, such as seizures, or that he needed immediate medical attention.

In addition, the parents in *In re Interest of Jac'Quez N., supra*, failed to seek medical attention for their child for 48 hours despite knowing there was something seriously wrong with him. In the present case, Erika and Joshua waited approximately 14 hours, while Erika continued to monitor Elijah's condition, and upon noticing a change, they immediately sought medical care. More importantly, in *In re Interest of Jac'Quez N.*, the parents admitted that they chose not to take the child to the hospital sooner because they were afraid he would be taken from them because of his black eye. Erika and Joshua both indicated that had they known something was seriously wrong with Elijah, they would have immediately taken him to the hospital, and they were not more concerned with his stiffness and unresponsiveness because of his history of similar actions and because he relaxed and appeared to be sleeping. There was no evidence that their delay in seeking medical treatment was intentionally done in an effort to protect themselves from suspicion or to avoid losing custody of Elijah.

[7] Generally, a finding of aggravated circumstances is based on severe, intentional actions on the part of the parent. See, *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012) (finding of aggravated circumstances based on single event of severe, intentional physical abuse); *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011) (aggravated circumstances existed where child suffered severe physical injuries through intentional abuse); *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009) (finding of aggravated circumstances due to chronic abuse of parents' forcing children to repeatedly undergo unnecessary medical treatment, repeatedly disconnecting child's feeding tube, and failing to comply with medical advice and orders for child's treatment). Even in *In re Interest of Jac'Quez N., supra*, the parents delayed seeking medical attention for an obviously injured child because of their fear of losing him. In other words, their failure to timely seek medical care for their child was

a conscious, intentional decision made to protect themselves despite knowing he needed medical attention.

In the instant case, even if it should have been obvious to Erika and Joshua that Elijah needed medical attention on the night of January 11, 2015, Elijah's injuries are the result of their negligent conduct in failing to recognize his need for medical care, rather than a deliberate decision to forgo needed medical attention. The appellate courts of this state have not extended the meaning of aggravated circumstances to include a single act of negligent conduct leading to injury to a child, and we decline to do so now, particularly when the term "aggravated circumstances" has repeatedly been defined to include severe, intentional physical abuse. We therefore find that the evidence does not support terminating Erika's and Joshua's parental rights under § 43-292(9).

(ii) § 43-292(2)

[8] The juvenile court also found that the State presented sufficient evidence to support termination pursuant to § 43-292(2). Section 43-292(2) provides that parental rights may be terminated when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection. The questions of what constitutes neglect and necessary parental care and protection are generally determined on a case-by-case basis. But we observe that none of the common factual patterns often found to establish neglect exist in the instant case, such as parental incarceration, see *In re Interest of Jahon S.*, 291 Neb. 97, 864 N.W.2d 228 (2015); adjudication, involuntary termination, or relinquishment of previous children, see *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010); unsanitary house and unkempt children, see *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000); or addiction to drugs or alcohol, see *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999).

Here, the allegations of neglect apparently stem from not only the injuries to Elijah, but a failure to obtain proper medical care for the other children as well. Specifically, we understand the State to allege that neglect is established because Erika and Joshua failed to obtain medical care for Genesis' specialized needs, failed to timely obtain medical care for Isaiah's eye issues, failed to ensure two of the children were up to date on their vaccinations, and failed to obtain dental care for Zion.

The Supreme Court has previously found that two isolated instances in which a mother failed to provide medical care to a child, which did not result in serious injury to the child, were insufficient to support termination of the mother's parental rights. See *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009). There, the Supreme Court recognized and expressed concern over the mother's medical judgment but disagreed that such error in judgment warranted termination of her parental rights. The court reiterated that the law does not require perfection of a parent. *Id*.

Although the State sought to terminate the mother's parental rights under § 43-292(6) in *In re Interest of Angelica L. & Daniel L., supra*, we find the Supreme Court's rationale applicable in the present case. Under § 43-292(2), the State must establish that the parental neglect was substantial and continuous or repeated. We cannot find that a handful of incidents, none of which resulted in permanent or serious injury to any of the children, meet that threshold. This is particularly true when Erika and Joshua obtained eye surgery for Isaiah 4 months after he was referred to a pediatric ophthalmologist and explained that the delay was due to Medicaid issues and the premature birth of Genesis. Additionally, the record establishes that Erika and Joshua routinely took the children to the pediatrician for both illnesses and regular checkups, and the children were found to be healthy when they were removed from Erika's and Joshua's care. Erika testified that additional services were recommended for Genesis, but because the

pediatrician indicated that Genesis was developmentally on track when considering her prematurity, Erika did not believe such services were necessary. Accordingly, we find the evidence does not clearly and convincingly establish substantial and continuous or repeated neglect to support termination under § 43-292(2). As a result, the State has not proved statutory grounds for termination, and we therefore reverse the termination of Erika's and Joshua's parental rights to the minor children.

Because we find the State failed to establish statutory grounds for terminating Erika's and Joshua's parental rights, we need not determine whether termination was in the children's best interests or whether reasonable efforts at reunifying the family were required.

2. Adjudication

[9] Our inquiry does not end with our reversing the termination of Erika's and Joshua's parental rights, however, because the juvenile court also adjudicated the children under § 43-247(3)(a), a finding Erika challenges on appeal. The rules of evidence apply at adjudication hearings, and thus, we now address Erika's arguments with respect to the admissibility of Dr. Haney's opinion testimony for purposes of adjudication. See *In re Interest of Jordana H. et al.*, 22 Neb. App. 19, 846 N.W.2d 686 (2014) (juvenile court must apply rules of evidence during adjudication hearing).

(a) *Daubert*/*Schafersman* Standards

Erika assigns that the juvenile court erred in abdicating its gatekeeping function by failing to set forth its reasoning for concluding that Dr. Haney's testimony was reliable. We agree.

Prior to trial, Erika and Joshua moved to prevent Dr. Haney from testifying as to her opinion of the cause of Elijah's injuries. They argued that Dr. Haney's testimony on abusive head trauma, otherwise known as shaken baby syndrome, was unreliable under the *Daubert*/*Schafersman* criteria. At

the conclusion of the hearing, the juvenile court denied the motion in limine from the bench, finding by clear and convincing evidence that the *Daubert*/*Schafersman* criteria had been satisfied and that the opinion testimony as to whether the head trauma injury Elijah sustained was nonaccidental and/or intentionally inflicted may be utilized by the State at trial. The court subsequently entered a written order containing the same language.

[10-13] The Nebraska Supreme Court has explained that once a party calls into question an expert testimony's factual basis, data, principles, methods, or their application, the trial court must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline, and the court does not have the discretion to abdicate its gatekeeping duty. See *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004). The trial court has considerable discretion in deciding what procedures to use in determining if an expert's testimony satisfies the *Daubert*/*Schafersman* standards, but a necessary component of the trial court's duty is that when faced with a *Daubert*/*Schafersman* objection, the court must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper. See *Zimmerman, supra*. This is so because after a sufficient *Daubert*/*Schafersman* objection has been made, the losing party is entitled to know that the trial court has engaged in the heavy cognitive burden of determining whether the challenged testimony was relevant and reliable and is entitled to a record that allows for meaningful appellate review. *Zimmerman, supra*. Without specific findings or discussion on the record, it is impossible to determine whether the trial court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit expert testimony. *Id*.

[14-16] This requirement means the trial court must explain its choices, and the record must include more than a recitation of the *Daubert*/*Schafersman* boilerplate language and a conclusory statement that the challenged evidence is or is not

admissible. *Zimmerman, supra*. A trial court adequately demonstrates that it has performed its gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination. *Id*. When the court fails to make these findings, it abdicates its gatekeeping function. *Id*. An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function. *Id*.

The court, in *Zimmerman, supra*, found that the trial court abdicated its gatekeeping duty because the record contained only the court's conclusion but no analysis as to how the expert's testimony at the *Daubert*/*Schafersman* hearing was sufficient to show that the underlying methodology and the manner in which it was used was reliable. Likewise, in the present case, the juvenile court's ruling did not explain why Dr. Haney's testimony was reliable and met the *Daubert*/*Schafersman* standards. The court's oral ruling from the bench and its written order indicated only that the *Daubert*/*Schafersman* standards had been met and that therefore the testimony was admissible, but the court failed to detail how the methodology underlying Dr. Haney's opinion was reliable, particularly when Erika and Joshua argued that the methodology has recently been called into question by other medical experts. Because the juvenile court failed to explain its reasoning, we find that it abdicated its gatekeeping duty.

[17] We recognize that "*Daubert* . . . does not require that courts reinvent the wheel each time that evidence is adduced . . . ," *Schafersman v. Agland Coop*, 262 Neb. 215, 228, 631 N.W.2d 862, 874 (2001), and that our courts have previously accepted expert testimony regarding "shaken baby syndrome," see *State v. Leibhart*, 266 Neb. 133, 143, 662 N.W.2d 618, 627 (2003). In such situations, a less extensive analysis and reasoning may be allowed. See *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006). However, the court is still required to set

forth its reasoning in more than conclusory fashion when ruling on a *Daubert*/*Schafersman* motion. As our Supreme Court noted when considering adoption of such a standard,

> [while] *Daubert* does not require that courts reinvent the wheel[,] it does permit the re-examination of certain types of evidence where recent developments raise doubts about the validity of previously relied-upon theories or techniques. In other words, once an issue is determined under *Frye*, it is closed to further *Frye* analysis because it is no longer "novel." *Daubert*, on the other hand, permits re-examination of the issue if the validity of the prior determination can be appropriately questioned.

Schafersman, 262 Neb. at 228, 631 N.W.2d at 874.

Because Erika and Joshua were questioning the continued validity of "shaken baby syndrome," the absence of the court's reasoning is all the more important.

[18,19] Having determined that the court erred in failing to perform its gatekeeping duty, we must determine whether the error prejudiced Erika and Joshua because only errors that are prejudicial to the rights of the unsuccessful party justify a new trial. See *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004). When a trial court fails to make the requisite findings, the losing party will usually be prejudiced. *Id*. Only if the admission or exclusion of the expert's testimony did not affect the result of the trial unfavorably for the party against whom the ruling was made will a court's abdication of its gatekeeping duty be deemed nonprejudicial. *Id*.

Here, the State sought to adjudicate the minor children under § 43-247(3)(a) based, in part, on Dr. Haney's opinion that Elijah's injuries were nonaccidental. The juvenile court apparently agreed, because it found the evidence sufficient to find that the children came within the meaning of § 43-247(3)(a). We therefore cannot say that the admission of Dr. Haney's testimony did not affect the result of the trial. Accordingly, the testimony should not have been admitted for adjudication purposes.

(b) Adjudication Under § 43-247(3)(a)

The allegations of the petition upon which adjudication was sought under § 43-247(3)(a) as to Elijah included that he presented to the hospital on January 12, 2015, with certain injuries; that he was in the care and custody of both Erika and Joshua at the time the injuries occurred; and that neither Erika nor Joshua could provide a plausible explanation for the injuries.

Although we determined above that it was error to admit Dr. Haney's testimony because the trial court failed to set forth its reasons under *Daubert*/*Schafersman* protocol, the testimony elicited at trial from the police supported the allegation of the petition that the children lacked proper parental care by reason of the fault or habits of Erika in that she did not provide a plausible explanation for Elijah's injuries. A police detective testified without objection that medical personnel indicated to her that Elijah suffered two separate injuries and that the second injury causing the brain bleed was nonaccidental. Based on that information, the detective determined "that there was something else going on." Erika was consistent in her interviews and at trial that she did not know what happened to cause this injury.

[20-22] At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008). The court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247(3)(a). *In re Interest of Anaya, supra*. While the State need not prove that the juvenile has actually suffered physical harm, at a minimum, the State must establish that without intervention, there is a definite risk of future harm. *Id*.

Based on the testimony that Elijah's brain bleed was nonaccidental and Erika's inability to explain the cause, the

juvenile court did not err in finding by a preponderance of the evidence that Erika failed to provide a plausible explanation for Elijah's injury, supporting the allegation that the children lacked proper parental care by reason of the fault or habits of Erika.

While this basis is sufficient to adjudicate the children, for purposes of completeness, we address the remaining allegations of the petition upon which adjudication was based. These allegations included a failure to obtain (1) proper medical care for Genesis' specialized needs, (2) proper medical care for Isaiah's eye issues, (3) proper medical care for the children because they were not up to date on their vaccinations, and (4) proper dental care for Zion. We find these bases insufficient to support adjudication.

In *In re Interest of Anaya, supra*, the Nebraska Supreme Court found that the parents' failure to submit their infant to mandatory blood testing did not, standing alone, establish neglect to warrant adjudication under § 43-247(3)(a). There, the court recognized that while the State need not prove that the juvenile has actually suffered physical harm, at a minimum, the State must establish that without intervention, there is a definite risk of future harm. The court found no evidence establishing that the parents had neglected the child; to the contrary, the evidence indicated that although the parents refused to submit the child for required testing, they were otherwise meeting his needs and he was a healthy baby. As such, the State failed to establish that this was an emergency situation, that harm was imminent, or that continued detention of the child was warranted. *Id.*

Similarly, in the present case, the evidence does not prove that harm was imminent or that the children are at a definite risk of future harm based upon these other allegations. Erika and Joshua obtained eye surgery for Isaiah 4 months after the pediatrician recommended he be examined by a pediatric ophthalmologist and explained the reasons for their delay. In addition, Erika explained that based on the pediatrician's

opinion that Genesis was developmentally on track for a premature baby, she did not believe extra services were necessary. Even Dr. Haney testified that Zion's cavities raise concern as to the type of dental care she was receiving, but it is not necessarily unusual for a 7-year-old child to have cavities. After the children were removed from Erika's and Joshua's care, they were examined and found to be healthy children with no untreated medical conditions. And the record establishes that Erika and Joshua regularly take the children to a pediatrician for illnesses, checkups, and vaccines. Accordingly, we cannot find that the minimal evidence presented here as to a lack of medical care rises to the level necessary to adjudicate the children under § 43-247(3)(a).

VI. CONCLUSION

We conclude that the State failed to prove by clear and convincing evidence that termination of the parental rights of Erika and Joshua is warranted under § 43-292(2) or (9). We therefore reverse the juvenile court's decision terminating their parental rights. We also conclude that the juvenile court erred in failing to explain its reasoning for determining that Dr. Haney's testimony meets the *Daubert*/*Schafersman* standards. We affirm, however, the adjudication of the children, and we remand the cause for further proceedings.

Affirmed in part, and in part reversed and remanded for further proceedings.

State of Nebraska, appellee, v.
Jeffrey A. Huff, appellant.
891 N.W.2d 709

Filed February 28, 2017. No. A-15-897.

1. **Trial: Jurors.** The retention or rejection of a juror is a matter of discretion for the trial court. This rule applies both to the issue of whether a venireperson should be removed for cause and to the situation involving the retention of a juror after the commencement of trial.
2. **Trial: Motions to Dismiss: Jurors: Appeal and Error.** The standard of review in a case involving a motion to dismiss a juror is whether the trial court abused its discretion.
3. **Motions for Mistrial: Appeal and Error.** Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
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. **Trial: Juries.** Neb. Rev. Stat. § 29-2006 (Reissue 2008) establishes when jurors in a criminal trial may be challenged for cause.
6. ____: ____. All challenges for cause shall be made before the jury is sworn, and not afterward.
7. ____: ____. Neb. Rev. Stat. § 29-2004 (Reissue 2008) sets forth the procedure for replacing a juror who is discharged during trial with an alternate juror and refers to the discharge of a juror who has already been chosen as a juror.
8. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

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

Joseph D. Nigro, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

Moore, Chief Judge, and Riedmann and Bishop, Judges.

Riedmann, Judge.

INTRODUCTION

Jeffrey A. Huff appeals from his conviction of first degree sexual assault in the district court for Lancaster County. On appeal, he challenges the court's dismissal of a juror and his corresponding motion for mistrial, and he claims that he received an excessive sentence. Finding no merit to the errors raised, we affirm.

BACKGROUND

Huff was convicted by a jury of first degree sexual assault. Because the errors he raises on appeal do not involve the circumstances underlying the charge, we limit our recitation of the facts to those pertinent to our analysis.

The State filed an information charging Huff on April 15, 2015. Trial began with jury selection on August 10. Both parties questioned the prospective jurors and passed the panel for cause. The parties then exercised their peremptory challenges, and the jury, composed of 12 jurors and 1 alternate, was sworn in. The proceedings were then adjourned for the day, and the jury was excused until the following morning.

When trial reconvened on August 11, 2015, one juror, M.F., communicated that he was anxious about serving on the jury and was brought in to discuss the issue with the court and parties. M.F. explained that due to his upbringing, which included crime, gangs, drugs, and domestic assault, he did not think he was "suitable for [jury service] at all." M.F. was questioned as to whether he could listen to the evidence and jury instructions and be fair and impartial. He initially expressed that he did not think he would "be fair due to" his background and

experiences. He declined to state whether he thought he would be biased toward the State or toward Huff and indicated only that he felt he was not fit for jury service. Upon further questioning, however, M.F. agreed to follow the law and stated that he believed he could follow the instructions given, place his history and background aside, and fairly and impartially make a decision based on the evidence.

The State then moved to strike M.F. from the jury for cause, a motion to which Huff objected. The district court denied the motion at that point, observing that M.F. had taken the oath administered to the jury and opining that he perhaps merely experienced anxiety about jury service during the overnight break. The court indicated, however, that "we [could] keep an eye on that issue" as the trial progressed.

The parties then presented their evidence. After both parties rested, outside the presence of the jury, the court again raised the issue of M.F.'s fitness for jury service. The court expressed concern as to whether M.F. had been paying attention during trial but acknowledged the difficulty in making such a determination. After a brief discussion, the proceedings were adjourned to complete the jury instructions.

When the parties reconvened later that afternoon, the State offered into evidence a transcript of the initial questioning of M.F. and a printout of M.F.'s criminal history. Both exhibits were received into evidence over Huff's objection. The State argued that on a pretrial questionnaire, which was also received into evidence, M.F. had not been forthcoming about the extent or nature of his criminal history. The State then moved to strike M.F. from the jury for cause and replace him with the alternate juror. The court noted that after M.F. initially raised the issue of his own fitness for jury service, it denied the motion to strike him based on his statements that he could be fair and impartial. But based upon learning the truth of M.F.'s criminal record and his apparent disinterest during trial, the court granted the State's motion. Huff requested that the court question M.F. to assess his fitness or lack thereof, but the court declined and found sufficient cause to discharge

him from the jury. The court then excused M.F. and seated the alternate juror.

The parties then gave their closing arguments, and the court instructed the jury. Before the jury's verdict was announced, Huff moved for mistrial based on the court's decision to dismiss M.F. over his objection. The motion was denied. The jury found Huff guilty, and the court sentenced him to 12 to 20 years' imprisonment. Huff timely appeals to this court.

ASSIGNMENTS OF ERROR

Huff assigns that the district court erred in (1) striking M.F. for cause over Huff's objection, (2) denying his motion for mistrial, and (3) imposing an excessive sentence.

STANDARD OF REVIEW

[1,2] The retention or rejection of a juror is a matter of discretion for the trial court. This rule applies both to the issue of whether a venireperson should be removed for cause and to the situation involving the retention of a juror after the commencement of trial. *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009). Thus, the standard of review in a case involving a motion to dismiss a juror is whether the trial court abused its discretion. *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998).

[3] Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016).

[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. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

ANALYSIS

Striking M.F. From Jury.

Huff argues that the district court erred in striking M.F. from the jury for cause over Huff's objection. Although we

disagree with the terminology used, we find that the district court's decision to remove M.F. from the jury was not an abuse of discretion.

[5,6] The district court's ruling was phrased as sustaining the State's motion to strike the juror for cause. In reality, however, the court discharged M.F. from the jury rather than striking him for cause. Neb. Rev. Stat. § 29-2006 (Reissue 2008) establishes when jurors in a criminal trial may be challenged for cause. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). The bases constituting good cause to challenge a juror under § 29-2006 include:

> (1) That he was a member of the grand jury which found the indictment; (2) that he has formed or expressed an opinion as to the guilt or innocence of the accused; . . . (3) in indictments for an offense the punishment whereof is capital, that his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death; (4) that he is a relation within the fifth degree . . . to the person on whose complaint the prosecution was instituted, or to the defendant; (5) that he has served on the petit jury which was sworn in the same cause against the same defendant and which jury either rendered a verdict which was set aside or was discharged, after hearing the evidence; (6) that he has served as a juror in a civil case brought against the defendant for the same act; (7) that he has been in good faith subpoenaed as a witness in the case; (8) that he is a habitual drunkard; (9) the same challenges shall be allowed in criminal prosecutions that are allowed to parties in civil cases.

The challenges allowed in civil cases include challenges that the juror lacks any one of the qualifications mentioned in Neb. Rev. Stat. § 25-1601 (Reissue 2016) or that the juror has requested to be placed on the jury. See Neb. Rev. Stat. §§ 25-1609 and 25-1636 (Reissue 2016). All challenges for cause shall be made before the jury is sworn, and not afterward. Neb. Rev. Stat. § 29-2007 (Reissue 2016).

In the present case, the district court dismissed M.F. from the jury because of his apparent disinterest during trial and dishonesty on the juror questionnaire regarding his criminal history which was voluminous and included several assault convictions. The court's reasons for removing M.F. from the jury do not come under those bases included in § 29-2006, and thus, M.F. was not stricken from the jury for cause.

[7] Neb. Rev. Stat. § 29-2004 (Reissue 2008) sets forth the procedure for replacing a juror who is discharged during trial with an alternate juror. Section 29-2004 refers to the discharge of a juror who has already been chosen as a juror. See *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009). As the Supreme Court observed in *Hilding*, § 29-2004 does not specify the reasons for which a regular juror might be discharged, requiring replacement by an alternate juror. Section 29-2004 merely provides that if, before the final submission of the cause a regular juror dies or is discharged, the court shall order the alternate juror to take his or her place in the jury box. This was the procedure the district court followed in the present case when discharging M.F. and replacing him with the alternate juror.

Huff directs our attention to *State v. Myers*, 190 Neb. 466, 209 N.W.2d 345 (1973). In *Myers*, the Nebraska Supreme Court held that a party who fails to challenge jurors for cause waives any objection to their selection. The court further held that if grounds for a challenge for cause arise out of matters occurring after the jury was sworn, it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause. *Id*. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guaranty of the right to trial by an impartial jury. *Id*. Any lowering of those constitutional standards strikes at the very heart of the jury system. *Id*. Relying on *Myers*, Huff argues that the State waived any argument that M.F. should be stricken from the jury because the State had access to M.F.'s criminal history

before trial started, from which it could have determined that he had been untruthful on his questionnaire. Huff also claims that the district court erred in failing to exercise its duty to question M.F. to determine whether there was good cause to discharge him.

Huff's reliance on *Myers* is misplaced, however, because, as we determined above, despite the court's terminology, M.F. was not stricken for cause, but, rather, he was discharged from the jury. Because there was no good cause under § 29-2006 to strike M.F. from the jury, the State's objection to M.F. as a juror was not waived and the duty to question M.F. prior to discharging him from the jury did not arise in the present case. The court therefore did not err in failing to question M.F. before deciding to discharge him from the jury. The question then becomes whether the court abused its discretion in dismissing M.F. We find it did not.

Nothing occurred during voir dire to raise questions regarding M.F.'s fitness for jury service. It was not until he raised the issue himself and subjected himself to additional scrutiny that the court questioned his ability to render a fair and impartial verdict. After the court initially declined to remove him from the jury, the State gathered further information on M.F., and his extensive criminal history and dishonesty were discovered. M.F. indicated on his juror questionnaire that he had never been charged with a crime other than a traffic offense, when in fact, he had not only been charged with numerous crimes, but had also been convicted of offenses dating back to 1983, including driving under the influence, violating a protection order, disturbing the peace, trespassing, stealing money or goods, and numerous convictions for assault. The trial court expressed concern not only because of the sheer volume of M.F.'s criminal record, but because his record includes charges for violent offenses such as assault and domestic assault, which are particularly relevant in the case at hand involving a charge of sexual assault of a victim known to Huff. The fact that M.F. had failed to disclose any criminal history on

his questionnaire raised additional concerns. The trial court also recognized that M.F. raised the issue of his own fitness, thereby subjecting himself to additional scrutiny by the court and parties as to whether he was fit for jury service and could render an impartial and unbiased decision.

Moreover, although the trial court initially denied the State's motion to dismiss M.F. from the jury, a transcript of the colloquy between M.F., the court, and the parties was received into evidence when the State renewed its motion. The State noted that M.F. did not provide unequivocal responses when questioned about his ability to render a verdict solely based on the evidence and law. He was questioned extensively by the court and parties when he first raised the issue of his own fitness, and he provided conflicting and unclear answers, repeatedly declaring himself unfit for jury service. When we examine the totality of the circumstances, including the fact M.F. raised an issue regarding his fitness for jury service, his responses to questioning by the court and parties, his lack of disclosure on his juror questionnaire, and his criminal history including offenses similar to the offense with which Huff was charged, based on the facts of this case, we cannot find that the district court abused its discretion in dismissing him from the jury and replacing him with an alternate. We therefore find no merit to this assignment of error.

Motion for Mistrial.

Based on our conclusion above, we also reject Huff's argument that the district court erred in denying his motion for mistrial based on the dismissal of M.F. Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016). Huff claims that M.F. should not have been discharged from the jury and that because he was, Huff's motion for mistrial should have been granted. Finding that the court did not abuse its discretion in removing M.F. from the jury, we also

find no abuse of discretion in the decision to deny the motion for mistrial.

Excessive Sentence.

Huff argues that the district court abused its discretion in imposing an excessive sentence. We disagree.

Huff was convicted of first degree sexual assault, a Class II felony. See Neb. Rev. Stat. § 28-319 (Reissue 2016). A Class II felony is punishable by 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014). Thus, Huff's sentence of 12 to 20 years' imprisonment falls within the statutory limits. Nevertheless, he argues that his sentence is excessive because the court failed to meaningfully consider his family obligations, rehabilitative needs, efforts and desire to change, and ability to follow the conditions of probation.

[8] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015). 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. *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*.

Huff was 31 years old at the time of sentencing. He was divorced and the father of two teenage children. The record indicates that he was current on his child support obligations and maintained a consistent relationship with his children. At the time of his arrest, he was employed as a line cook at a restaurant, earning $13 per hour.

His criminal history includes convictions for such crimes as disturbing the peace; stealing money or goods less than

$300; failure to appear; assault, strike, or cause bodily injury; refusing to comply with the order of a police officer; urinating in public; attempted possession of a controlled substance; third degree domestic assault; driving under the influence; and numerous traffic offenses. He was charged with assault, strike, or cause bodily injury on two additional occasions in 2003, but one charge was dismissed and one was amended to disturbing the peace. In 2010, he received 18 months' probation, but the term was later revoked. He was also placed on 18 months' probation in 2014 for second-offense driving under the influence.

The record of the sentencing hearing shows that the court considered the appropriate factors in determining Huff's sentence. The court noted that Huff had failed a prior probationary period, where his probation was revoked and he served jail time. The court determined that probation was not an appropriate option because it would depreciate the seriousness of the crime and promote disrespect for the law. The court also observed that this crime was "terrible" for the victim and Huff's children and stated that crimes against women and violent, sexual acts "just simply can't be tolerated." Based upon the record before us, we cannot say that the sentence imposed by the district court was an abuse of discretion. This assignment of error is therefore meritless.

CONCLUSION

We conclude that the district court did not abuse its discretion in discharging M.F. from the jury, denying Huff's motion for mistrial, or imposing a sentence of 12 to 20 years' imprisonment. We therefore affirm Huff's conviction and sentence.

Affirmed.

Ian T. Hintz, appellant, v. Farmers Cooperative Association, appellee.

891 N.W.2d 716

Filed February 28, 2017. No. A-16-267.

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. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, an appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong.
3. ____: ____. Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
4. **Workers' Compensation: Proof.** Under the Nebraska Workers' Compensation Act, a claimant is entitled to an award for a work-related injury and disability if the claimant shows, by a preponderance of the evidence, that he or she sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment.
5. ____: ____. To recover workers' compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
6. **Trial: Expert Witnesses.** The sufficiency of an expert's opinion is judged in the context of the expert's entire statement.
7. ____: ____. The value of an expert witness' opinion is no stronger than the facts upon which it is based.

Appeal from the Workers' Compensation Court: Thomas E. Stine, Judge. Reversed and remanded with directions.

Thomas R. Lamb and Richard W. Tast, Jr., of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Jason A. Kidd, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

Inbody and Pirtle, Judges, and McCormack, Retired Justice.

McCormack, Retired Justice.

INTRODUCTION

Ian T. Hintz appeals from an order of the Workers' Compensation Court denying his claim for workers' compensation benefits from his former employer, Farmers Cooperative Association (Farmers). On appeal, Hintz argues that the compensation court erred in finding that his injuries were not causally related to his work accident. For the reasons set forth below, we reverse the decision of the compensation court and remand the cause with directions.

BACKGROUND

On November 13, 2014, Hintz was working as a tire technician for Farmers. Hintz' job involved changing and fixing all types of tires. On the morning of November 13, Hintz was working on the repair of a tire for a semitrailer. He had patched a hole in the tire and was attempting to refill the air in the tire when the tire exploded. At the time of the explosion, Hintz was kneeling directly in front of the tire. The force of the explosion threw Hintz approximately 10 feet. He landed on his back, could not feel his legs, had pain in his hips and his groin area, and heard "a whistling" in his ears. A few moments after the incident, Hintz was able to get up and walk, but he had to "drag" his right leg behind him.

Hintz left work immediately after the explosion, because he was in a great deal of pain. He did not return to work the next

day, a Friday, because he continued to be in pain. However, Hintz did not seek any medical care for his injuries in the days immediately following the incident.

Hintz returned to work at Farmers on the Monday following the incident. While Hintz indicated that he was only able to work "a little" at that time, Farmers offered evidence which suggested that in the days and weeks after Hintz returned to work, he was able to complete all of his job requirements. Such evidence includes Hintz' payroll records and the testimony of his coworkers that Hintz returned to work the Monday after the incident and resumed his normal job duties without any notable problems.

A few weeks after the November 13, 2014, incident, on December 4, Hintz tripped while walking up some stairs at his home. The next day, Hintz sought medical treatment with Dr. James Gallentine, a doctor with an orthopedic and sports medicine center. Hintz reported to Dr. Gallentine that he was suffering from pain in his right leg. He indicated that the pain began the night before when he tripped on his stairs and hit his right hip and knee. Hintz also told Dr. Gallentine about the November 13 incident at work. However, he told Dr. Gallentine that since that incident, he had returned to work and "was jumping on and off trucks without any difficulty." Dr. Gallentine prescribed pain medication for Hintz and told him not to return to work for a few days.

Hintz continued to report pain in his right hip and leg. As a result of Hintz' reports, Dr. Gallentine ordered him to undergo an MRI. The results of the MRI revealed that Hintz was suffering from a "superior labral tear and also some irregularity in the posterior labrum with a possible paralabral cyst forming." Dr. Gallentine referred Hintz to Dr. Justin Harris "for a possible hip arthroscopy." On December 19, 2014, Dr. Gallentine indicated that Hintz should remain off work until further notice. Because he could not work, Hintz completed an application for short-term disability benefits from Farmers. On the application, Hintz indicated that he was temporarily,

totally disabled. He also indicated that his condition was not related to his occupation.

On December 30, 2014, Hintz was examined by Dr. Harris. In Dr. Harris' notes from this examination, he indicates that Hintz has been experiencing pain in his right hip since December 4, when he "tripped going up stairs." Dr. Harris' notes do not mention the November 13 incident at Farmers.

On February 25, 2015, Hintz underwent surgery to repair the injuries to his hip. The surgical procedures performed included a right hip arthroscopy and labral repair. Dr. Harris indicated that after the surgery, Hintz was to continue to remain off work until at least his next scheduled appointment in 6 weeks.

After the surgery, Hintz continued to complain of pain in his right hip and leg. He participated in physical therapy and was prescribed pain medication, but did not report any notable improvements to his condition.

In March 2015, Farmers terminated Hintz' employment because he had not been to work in over 3 months. A few days after Hintz was fired from Farmers, he attended an appointment with Dr. Harris. At this appointment, Hintz told Dr. Harris that his hip injury was caused by a "tire [blowing] up on him two weeks prior to . . . seeking medical care."

On April 21, 2015, Hintz filed a petition with the Nebraska Workers' Compensation Court. In the petition, Hintz alleged that he had sustained personal injury in an accident arising out of and in the course of his employment on or about November 13, 2014, and that, as a result, he was entitled to disability benefits. On May 7, 2015, Farmers answered Hintz' petition, denying most of Hintz' assertions. In addition, Farmers affirmatively alleged that any injury or disability Hintz was suffering from was not caused by a "work-related accident."

On May 18, 2015, Dr. Harris authored a letter to Hintz' counsel. In the letter, he discusses Hintz' injury to his right hip and the cause of that injury. Dr. Harris stated:

> I understand that causation is an issue in this case. When the patient initially presented to me on December 30, 2014, the history that was entered into our notes states that the patient had tripped up his stairs on December 4 . . . . The work injury was not documented at that time.
>
> . . . .
>
> As I have had the opportunity to discuss the case with [Hintz] since our initial visit, he makes it very clear to me that his symptoms all started with his work injury and that he was basically trying to deal with these on his own in order to keep working until the symptoms became unrelenting in December.
>
> Unfortunately, the documentation that we have in our notes does not necessarily corroborate what [Hintz] is currently stating. It should be noted, however, that the labral tear that we found at surgery was relatively severe and the mechanism of injury seems much more likely to be a high energy work injury as opposed to simply falling up the steps in order to create this type of labral tear.

Also on May 18, 2015, Dr. Gallentine authored a letter to Hintz' counsel. In the letter, Dr. Gallentine specifically discusses the cause of Hintz' injury. He stated:

> It is very difficult to specifically assign causation to one event versus the other in the case of . . . Hintz. An individual could certainly have hip related pain and labral pathology from the injury as reported at work on the 13th of November. He also could have similar findings from a fall as he noted having on December 5 [sic], 2014. I do not know that there is any reasonable degree of medical certainty that would specifically assign his injury to one event versus the other. I would certainly be willing to defer to Dr. . . . Harris' opinion as he did perform a hip arthroscopy on . . . Hintz and would have had a more direct evaluation of the actual intraarticular pathology

noted at that time and whether this could be assigned more directly to one event or the other.

A third doctor also opined on the cause of Hintz' hip injury. Dr. Dennis Bozarth, from an orthopedic center, reviewed Hintz' medical records at the request of Farmers' counsel and, on June 8, 2015, authored a letter concerning the cause of Hintz' injury. In the letter, Dr. Bozarth states that although he "can't say to a reasonable degree of medical certainty that the work event on November 13, 2014 had any factor in [Hintz'] complaints of right hip pain," he believes that "more likely than not, [Hintz' hip injury] is related to a trip and fall at home." Dr. Bozarth concluded,

> [t]herefore after review of the available medical records, more likely than not, my opinion is that . . . Hintz did have an accident at work where a tire did blow up, injuring his left lower extremity. This did resolve, and he was working without restrictions. A new incident occurred on November 25 [sic], 2014, causing his right hip to become symptomatic.

In January 2016, the Nebraska Workers' Compensation Court conducted a hearing on Hintz' petition for disability benefits. At the hearing, Hintz testified concerning the incident at Farmers on November 13, 2014, his accident at home on December 4, and his resulting injury and medical care.

Hintz testified that he did not seek any medical care immediately after the November 13, 2014, incident because he thought he needed to complete an accident report prior to seeking medical care and Farmers did not supply him with such a report. He also indicated that he did not seek any medical care because he was concerned that if he did, he would get Farmers "in trouble." Hintz testified that he was only able to work "a little bit" after the November 13 incident. He testified that when he filled out his paperwork for short-term disability benefits, Farmers instructed him that if he wanted to remain employed at Farmers, he needed to report that his injury was not the result of a work accident.

Hintz testified that his fall up the stairs at his home on December 4, 2014, was due to the lingering effects of the leg injury he suffered during the November 13 incident. Hintz indicated that prior to being involved in the tire explosion at Farmers, he had never had any problems with his right leg or right hip. Hintz testified that he told Dr. Harris about the tire explosion during their first encounter and that Dr. Harris believes that the injury to his right hip is the result of the November 13 incident.

On February 11, 2016, the compensation court entered an order denying Hintz any workers' compensation benefits. The court noted that both parties agreed that Hintz had a work accident on November 13, 2014. However, the court found that any injury Hintz suffered as a result of the work accident was resolved within 3 days. It further found that Hintz' right hip injury which required surgery was the result of a fall on his stairs at home and not the work accident.

Hintz appeals.

ASSIGNMENTS OF ERROR

Hintz asserts, restated and consolidated, that the compensation court erred in finding that there was not a causal relationship between his injuries and the November 13, 2014, incident at Farmers and that, as a result, he was not entitled to any disability benefits.

STANDARD OF REVIEW

[1-3] 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. *Rader v. Speer Auto*, 287 Neb. 116, 841 N.W.2d 383 (2013);

Contreras v. T.O. Haas, 22 Neb. App. 276, 852 N.W.2d 339 (2014). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, an appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong. *Id*. Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions. *Id*.

ANALYSIS

[4,5] Under the Nebraska Workers' Compensation Act, a claimant is entitled to an award for a work-related injury and disability if the claimant shows, by a preponderance of the evidence, that he or she sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment. See *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). Moreover, to recover workers' compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

In this case, the compensation court found that Hintz failed to prove that his injury arose out of and in the course of his employment at Farmers. Specifically, the compensation court found that "there is no medical evidence to substantiate a causal relationship between [Hintz'] right hip impingement syndrome and acetabular labral tear, his employment with [Farmers], and any resultant disability." Upon our review of the record, we conclude that this finding by the compensation court is clearly wrong. Hintz presented credible medical evidence to prove that his injury was the result of the November 13, 2014, incident at Farmers.

At trial, Hintz offered into evidence a letter authored by Dr. Harris, the doctor who performed his hip surgery. In this letter, Dr. Harris stated, "the labral tear that we found at surgery was relatively severe and the mechanism of injury

seems much more likely to be a high energy work injury as opposed to simply falling up the steps in order to create this type of labral tear." Dr. Harris' medical opinion supports Hintz' position that his injury was caused by the tire explosion at Farmers and not by his tripping up the stairs at home. Additionally, we note that Dr. Harris' opinion is particularly significant because, as Hintz' surgeon, he is the only doctor who was able to observe Hintz' actual injuries closely and thoroughly. In fact, Dr. Gallentine, Hintz' treating physician, specifically indicated that he would defer any opinion as to the cause of Hintz' injuries to Dr. Harris:

> I would certainly be willing to defer to Dr. . . . Harris' opinion as he did perform a hip arthroscopy on . . . Hintz and would have had a more direct evaluation of the actual intraarticular pathology noted at that time and whether this could be assigned more directly to one event or the other.

Despite Dr. Harris' unique position as being the only doctor who observed Hintz' injuries, the compensation court wholly rejected his opinion as to causation. In rejecting Dr. Harris' opinion, the compensation court found that Harris' "opinions are based on an inconsistent history given by [Hintz] and, therefore, [his] opinions lack a credible foundation." This finding is clearly wrong and is not supported by the evidence. As we discussed above, Dr. Harris' opinion about causation is based on his observations of Hintz' injuries during the surgery. While Dr. Harris does acknowledge that there was some inconsistency in Hintz' reports of how he was injured, ultimately, Dr. Harris relied on his personal observations of Hintz and his injuries in forming his opinion that Hintz' injuries were caused by the November 13, 2014, incident at Farmers. Dr. Harris' observations of Hintz during surgery provide a competent, credible foundation for his opinion of causation.

[6,7] Additionally, we note that Dr. Bozarth, the only other doctor who offered an opinion about the cause of Hintz' injuries, did not ever examine Hintz, but, rather, merely reviewed

Hintz' relevant medical records. A reading of Dr. Bozarth's opinion of causation reveals that it is not based on any medical conclusions, but, instead, is based entirely on Hintz' inconsistent reports of the precise onset of his injury. Dr. Bozarth stated:

> The onset of right hip pain, more likely than not, is related to a trip and fall at home on November 25 [sic], 2014, as documented by Dr. Gallentine on December 5, 2014, noting the fall on his hip. It does make mention of the semi tire blowing up and throwing him back 15 feet, and it was also noted that he was able to return to work jumping off and on trucks without any difficulty. He did note some possible swelling in the legs and noted that after the semi tire incident, at least from my reading of this, that he had some swelling in his legs that had improved but now had returned at that visit.

The sufficiency of an expert's opinion is judged in the context of the expert's entire statement. *Bernhardt v. County of Scotts Bluff*, 240 Neb. 423, 482 N.W.2d 262 (1992). Furthermore, the value of an expert witness' opinion is no stronger than the facts upon which it is based. See *id*. Because Dr. Bozarth's opinion is not based on any medical conclusions, we conclude that his opinion does not constitute competent medical testimony.

Dr. Harris provided competent medical testimony which indicated that Hintz' injuries were caused by the November 13, 2014, incident at Farmers. Dr. Harris' opinion of causation was based on his personal observations of Hintz' injuries during surgery, and the opinion was essentially unrebutted by any other competent medical testimony. Accordingly, we conclude that the compensation court erred in finding that there was no medical evidence to support Hintz' contention that his injury was caused by the tire explosion at Farmers. We reverse the compensation court's order denying Hintz' claim for workers' compensation benefits and remand the cause with directions for the court to reconsider the claim in light of Dr. Harris'

competent medical opinion of causation and considering the "beneficent purpose" of the Nebraska Workers' Compensation Act. See *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 431, 657 N.W.2d 634, 640 (2003).

CONCLUSION

Upon our review, we conclude that the compensation court was clearly wrong in finding that there was "no medical evidence to substantiate a causal relationship between [Hintz' injury], his employment with [Farmers], and any resultant disability." Given this incorrect factual finding, we reverse the decision of the compensation court which denied Hintz' claim for workers' compensation benefits and remand the cause with directions for the court to reconsider the claim in light of Dr. Harris' competent medical opinion of causation and considering the beneficent purpose of the Nebraska Workers' Compensation Act.

Reversed and remanded with directions.

Lynne D. Lisec, appellant, v.
James A. Lisec, appellee.
894 N.W.2d 350

Filed March 7, 2017. No. A-15-634.

1. **Motions to Vacate: Time: Appeal and Error.** The decision to vacate an order any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Courts: Jurisdiction.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.
6. **Courts: Jurisdiction: Motions to Vacate: Dismissal and Nonsuit.** A court normally has jurisdiction over a motion to vacate an order of dismissal and reinstate a case.
7. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees de novo on the record to determine whether there has been an abuse of discretion.
8. **Divorce: Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The

first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

9. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
10. **Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

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

Tad D. Eickman for appellant.

Adam R. Little, of Ballew, Covalt & Hazen, P.C., L.L.O., for appellee.

Inbody and Pirtle, Judges, and McCormack, Retired Justice.

Pirtle, Judge.

INTRODUCTION

Lynne D. Lisec appeals from a decree entered by the district court for Lancaster County dissolving her marriage to James A. Lisec. Lynne takes issue with the court's reinstating the case after it had been dismissed, as well as the court's classification and distribution of various assets, its award of attorney fees to James, and its failure to require James to pay discovery costs. Based on the reasons that follow, we affirm.

BACKGROUND

Lynne and James were married in May 2006. This was not a first marriage for either party, and no children were born of this marriage, nor were any minor children affected by these

proceedings. In December 2006, the parties executed a postnuptial agreement, which provided that property each party maintained in his or her own name remained the property of such party and provided that property the parties placed in both of their names as joint tenants became joint marital property.

Lynne filed a complaint for dissolution of marriage on June 6, 2011. James filed an answer on July 6, which sought dissolution of the parties' marriage, division of the parties' assets and debts, and attorney fees and costs.

On September 10, 2012, Lynne filed a voluntary dismissal of her complaint. The trial court ordered the case dismissed on September 13. On that same day, James filed a motion to reinstate the case or to reconsider the dismissal on the ground that his answer included a counterclaim that could not be dismissed by Lynne.

Following a hearing on James' motion, the court found that James' answer included a counterclaim that should not have been dismissed with Lynne's complaint. The court entered an order on September 19, 2012, within the same term, reinstating the case. Specifically, it stated that its prior order of September 13 should be amended "insofar as the dismissal shall only relate to the claims brought by [Lynne]. [James'] claims for dissolution, division of marital assets and debts, attorney fees and costs remain pending."

Trial on James' counterclaim was held on 3 days between September 2014 and March 2015. Both parties, represented by counsel, testified that they believed the postnuptial agreement was a fair and reasonable agreement that was valid and enforceable, and they asked the court to divide the marital estate in accordance with the agreement. We note that the Nebraska Supreme Court recently held in *Devney v. Devney*, 295 Neb. 15, 886 N.W.2d 61 (2016), that historically, postnuptial property settlement agreements were invalid in Nebraska on the ground of public policy, and that Nebraska statutes do not abrogate the public policy against such postnuptial

agreements unless such agreements are concurrent with a separation or divorce. Thus, the *Devney* court found that the parties' postnuptial agreement was void to the extent it settled the parties' property rights. The *Devney* case was released after the court entered its decree in the present case and after Lynne and James filed their briefs on appeal.

In the present case, both parties agree that the postnuptial agreement is fair and reasonable and agree that it should be enforced. Further, by enforcing the agreement, the trial court implicitly found that it was fair and reasonable. As a result, the agreement was ratified at the time of trial and we choose to treat it as a settlement agreement rather than a postnuptial agreement. Accordingly, the agreement will be referred to as such throughout the opinion.

The evidence at trial showed that in 2007, Lynne received monetary gifts in various forms from her mother. The total amount of the gifts was $393,006.66. None of the monetary gifts were given to James, and Lynne maintained all of the gifts in her own name.

In 2009, Lynne and James purchased a house in Hickman, Nebraska, for $220,000. Prior to the closing on the purchase of the house, Lynne cashed two certificates of deposit that had been gifted to her by her mother and deposited the proceeds totaling $40,018.90 into a joint bank account of the parties. The account had been solely Lynne's account prior to the marriage, but James' name had been added to the account after the marriage. A few weeks after depositing the proceeds into the account, Lynne withdrew $47,696.23 from the same account in the form of a cashier's check payable to a title company. The money was used for a downpayment on the house. The house was placed in joint tenancy and both parties were obligated on the deed of trust. The house was sold during the pendency of the divorce proceedings, and the proceeds of the sale totaled $28,678.

Lynne submitted a list of personal property items that she alleged James had in his possession and which she valued at

$10,000. When further questioned about the personal property, Lynne testified that she wanted a money judgment of $10,000 to compensate her for the property. She stated that she was not willing to take all the items back and give James a credit for $10,000.

Lynne also testified that in January 2011, about 5 months before filing for divorce, she withdrew $8,000 from the parties' joint checking account, leaving a balance of $568. Lynne acknowledged that the account was joint and admitted to either still having that money or having spent it. She testified that she withdrew the money because she was concerned about her marriage falling apart and that she was "fleeing" from her home.

James testified that he had several individual retirement accounts that were opened long before the parties married and that he was no longer contributing to them at the time the parties were married. Lynne's name was never put on any of the accounts. In 2011, James used funds from the accounts to create a limited liability company called FUBAR Property Management (FUBAR). James is the sole owner and manager of FUBAR. FUBAR purchased a duplex in Lincoln, Nebraska, with funds from James' accounts. At the time of trial, James was living in one half of the duplex and the other half was a rental unit, managed by FUBAR.

The evidence also showed that prior to the parties' marriage, James owned two vehicles, a 1998 Chevrolet S10 pickup and a 2005 Volkswagen Beetle. After the parties were married, both vehicles were retitled in the name of both parties as joint tenants. The pickup was subsequently sold for $2,500, and the proceeds were being held in a trust account. The parties still owned the Volkswagen.

At the end of trial, the court addressed a motion to allocate discovery costs filed by James, to which Lynne filed an objection, regarding a bill he received from Heige Thanheiser, a private investigator. Lynne had hired Thanheiser to investigate James between 2012 and 2014 concerning a loss of

consortium lawsuit that arose out of a car accident Lynne had in January 2011. However, James believed the investigation was geared toward attacking his credibility and reputation. James issued a subpoena on Thanheiser on February 19, 2014, requesting production of certain documents and surveillance video. Thanheiser refused to comply with the subpoena, and James filed a motion for an order to compel production. The motion was granted, and Thanheiser produced and supplied the information as required to James, as well as separately supplying information to the court. Thanheiser subsequently sent a bill to James for $2,318.85, which he claimed was the reasonable and necessary cost of producing the information.

Thanheiser testified that he never communicated with James' counsel about the charges before producing the requested documents, never discussed charging $75 per hour for 17 hours of work or the costs of video editing or copying costs, and never conditioned the release of the materials on receiving payment. A portion of the expenses were the result of Thanheiser's producing an additional copy of the information for the court, which he was not asked to do.

Following trial, the court entered a decree of dissolution dividing the marital estate, ordering Lynne to pay $8,000 toward James' attorney fees, and denying Lynne's request that James be ordered to pay the fees and costs of Thanheiser.

ASSIGNMENTS OF ERROR

Lynne assigns that the trial court erred in (1) reinstating the case, or amending the dismissal of the same, as James had failed to file a counterclaim or setoff; (2) failing to award her the full value of the house sale proceeds and failing to consider James' vehicles subject to the parties' settlement agreement; (3) failing to award her the full value of the real estate taxes required to be paid by James; (4) failing to order James to return Lynne's personal property, or the value of the same; (5) awarding James all of the money Lynne had withdrawn from

a joint bank account of the parties 5 months before the action was filed; (6) failing to award Lynne any of the assets of James' limited liability company; (7) ordering Lynne to pay a portion of James' attorney fees; and (8) failing to require James to pay certain discovery costs.

STANDARD OF REVIEW

[1,2] The decision to vacate an order any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. *Kibler v. Kibler*, 287 Neb. 1027, 845 N.W.2d 585 (2014). An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

[3,4] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

ANALYSIS

Reinstating Case.

Lynne first assigns that the trial court erred in reinstating or amending the dismissal of the case. Lynne had filed a voluntary dismissal of her complaint, and the trial court ordered the case dismissed. Pursuant to Neb. Rev. Stat. § 25-602 (Reissue 2016), a plaintiff can dismiss his or her action when no counterclaim or setoff has been filed by the opposite party. The court subsequently reinstated the case, finding that James' answer contained a counterclaim that should not have been dismissed with Lynne's complaint. Lynne argues that James

did not file a separate counterclaim or setoff and that his answer should not be treated as a counterclaim.

[5,6] Although not argued by Lynne, we first note that the trial court had the authority to reinstate the case with respect to James' counterclaim. In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it. *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013). A court normally has jurisdiction over a motion to vacate an order of dismissal and reinstate a case. *Id.* The court's order reinstating the case was within the same term that the case was dismissed.

We now turn to whether the trial court properly found that James' answer included a counterclaim. There is nothing in the Nebraska Court Rules of Pleading in Civil Cases that required James to specifically caption his pleading as a "counterclaim." In fact, there is no actual designation for a "counterclaim"; rather, the appropriate designation is an "answer" within which a party can plead a counterclaim. Neb. Ct. R. Pldg. § 6-1107(a) sets forth the pleadings allowed and states as follows:

> There shall be a complaint and an answer; a reply to a counterclaim denominated as such, *if the answer contains a counterclaim*; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned as a third-party defendant; and a third-party answer, if a third party complaint is served. *No other pleading shall be allowed*, except that the court may order a reply to an answer or a third-party answer.

(Emphasis supplied.)

Neb. Ct. R. Pldg. § 6-1108 provides the general rules of pleading and states in part:

> **(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a caption, (2) a short and plain statement of the claim showing

> that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. . . .
>
> . . . .
>
> **(e) Pleadings to Be Concise and Direct; Consistency.**
>
> (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

Further, Neb. Ct. R. Pldg. § 6-1110(a) provides that every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in § 6-1107(a).

Finally, Neb. Ct. R. Pldg. § 6-1113(a) provides that "[a] pleading may state as a counterclaim any claim which at the time of serving the pleading, the pleader has against an opposing party."

Most importantly, the character of a pleading is determined by its content, not by its caption. *Kerr v. Board of Regents*, 15 Neb. App. 907, 739 N.W.2d 224 (2007).

James' answer has a caption setting forth the name of the court (the "District Court [for] Lancaster County"), the title of the action ("LYNNE D. LISEC, Plaintiff, vs. JAMES A. LISEC, Defendant"), the file number ("Case No. CI 11-2309"), and a designation as per § 6-1107(a) ("ANSWER"). James' answer, therefore, meets the requirements of a "caption" under the rules. James' answer also contains short and plain statements alleging who the parties are, where they live, when and where they were married, and that the marriage is irretrievably broken. Finally, the answer contains a demand for judgment for the relief sought, namely a dissolution of the parties' marriage, equitable division of the assets and debts, attorney fees and costs, and any further relief as granted by the court.

We conclude that James' answer meets the requirements of a counterclaim as set forth in Nebraska's pleading rules and should not have been dismissed by Lynne's voluntary dismissal of her petition. Thus, the court did not err in vacating the dismissal and reinstating James' counterclaim.

Division of Property.

[7] Lynne's second through sixth assignments of error relate to the court's division of property. In actions for dissolution of marriage, an appellate court reviews the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees de novo on the record to determine whether there has been an abuse of discretion. *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015).

[8] Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012).

Lynne first argues that the trial court erred in failing to award her all of the proceeds from the sale of the house and to consider James' vehicles, the pickup and the Volkswagen, to be marital property based on the parties' settlement agreement.

In regard to the sale of the house, Lynne argues that she should have been awarded the entire $28,678 in proceeds because she provided the downpayment for the house from nonmarital funds obtained as a gift from her mother. Lynne cashed two certificates of deposit gifted to her by her mother and deposited that money into the parties' joint bank account. Lynne contends that those same funds were thereafter used to make the downpayment on the house and should retain their identity as gifted funds. Thus, Lynne argues that those funds are nonmarital property and that she should have been awarded all of the proceeds from the sale of the house as nonmarital property to reimburse her for those funds.

Lynne testified that she deposited the funds from the certificates of deposit into a joint bank account and that the downpayment for the purchase of the house came out of that joint bank account. Lynne also testified that the house was

placed in joint tenancy and that both of their names were on the mortgage. The parties' settlement agreement provided that property placed in both parties' names became joint marital property. Therefore, when Lynne deposited the funds from the cashed certificates of deposit into the parties' joint bank account, it became joint property based on the terms of the settlement agreement. Where the money in the account originated from is of no consequence; once the money was placed in a joint bank account, it became marital property subject to division by the court in the divorce proceeding. Thus, the court properly treated the proceeds from the sale of the house as a marital asset in accordance with the parties' settlement agreement.

In regard to the pickup and the Volkswagen, Lynne argues that because the two vehicles were put in joint tenancy after the marriage, she should have received one-half of the total value of the vehicles. The two vehicles together were valued at $11,500, allegedly entitling her to $5,750. The trial court awarded the full amount of the vehicles to James.

However, in its order, the trial court specifically found that the pickup and the Volkswagen were placed in joint tenancy during the marriage. Therefore, the trial court determined that the vehicles were marital property, but simply chose to award the value of the two vehicles to James in distributing the entire marital estate.

Lynne's assignment in regard to the distribution of the proceeds from the sale of the house and the value of the pickup and the Volkswagen is without merit.

Lynne next assigns that the trial court erred in failing to award her the entire amount of real estate taxes that James owed. The trial court found that James owed Lynne for half of the real estate taxes on the Hickman house. Lynne contends that the real estate taxes, "for the entire year, were $2,255.65." Brief for appellant at 10. She states that half of $2,255.65 is $1,127.83, but that the court's "'Balance Sheet,'" wherein it distributed the property, included an amount of "$563.92."

Brief for appellant at 10. Lynne asserts that this amount is incorrect and that "she should be allowed an additional sum of $563.91." *Id.*

In a January 2012 temporary order, the trial court noted that the marital home was listed for sale and ordered that for as long as neither party resided in the home, each of them shall pay 50 percent of all ongoing costs, including real estate taxes. The only evidence of real estate taxes is from 2011. Exhibit 19 contains a receipt for a payment in the amount of $2,255.65 for real estate taxes and interest for the first half of 2011, which does not coincide with Lynne's argument that the taxes for the entire year were $2,255.65.

Further, James was specifically asked who paid the real estate taxes reflected in exhibit 19, and he said they were paid out of a joint checking account, so he and Lynne both paid them. At that point, exhibit 19 was offered into evidence, with no objection by Lynne. Later at trial, James acknowledged that he was required to pay half of the real estate taxes after January 2012 and that he "possibly forgot" or did not remember if he paid his half. There is no evidence as to the amount of real estate taxes for 2012.

We conclude that Lynne's assignment of error regarding real estate taxes is not supported by the record, and we find no merit to her assignment of error.

Lynne also assigns that the trial court erred in failing to order James to return certain personal property or to award her the value of the same. Lynne testified that when she left the marital home, she took little personal property with her. She testified that she wanted either to have certain personal items returned to her or to be awarded the sum of $10,000, her estimate of the value of the items. Upon further questioning, Lynne indicated that she preferred to be compensated for the items, rather than having the items returned to her. That is exactly what the court did. The trial court determined that the items of personal property in James' possession had a value of $8,500, and it attributed that value as an asset awarded to

James in dividing the marital estate. There was no error by the trial court.

Lynne next assigns that the trial court erred in awarding James the $8,500 Lynne had withdrawn from a joint bank account prior to filing for divorce. Lynne contends that "at least one-half of the amount . . . withdrawn should be considered Lynne's funds. Nonetheless, the Court credited to Lynne the entire amount of $8,500 when, at best, that amount should have been only $4,250.00." Brief for appellant at 11.

Lynne admitted to withdrawing $8,000 from the parties' joint bank account in anticipation of her marriage ending. She also admitted to either still having the money or having spent it. The trial court found that Lynne withdrew $8,500 from the parties' joint bank account prior to filing the divorce action and that the money was joint property and should be accounted for in the distribution of marital assets. The court attributed the $8,500 to Lynne as an asset awarded to Lynne in dividing the marital estate. There was no error by the court in doing so.

Lynne's last assignment of error related to the court's distribution of the marital estate is that the court erred in failing to award her any of the assets of FUBAR. As the trial court found, the evidence showed that James used funds from his individual retirement accounts to establish FUBAR, which subsequently purchased a duplex. None of these funds were acquired during the marriage or contributed to during the marriage. They were James' sole property at the time of the marriage and were never put into joint tenancy with Lynne. The trial court found that based on the settlement agreement, none of the funds used to create and capitalize FUBAR were marital property. It further found, therefore, that the property owned by FUBAR is nonmarital and not subject to distribution in the marital estate. Based on the evidence in the record, we agree, and the trial court did not err in failing to award Lynne any of the assets of FUBAR.

Attorney Fees.

[9,10] Lynne next assigns that the trial court erred in finding that she should pay a portion of James' attorney fees. The trial court ordered Lynne to pay $8,000 toward James' attorney fees. In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Id.*

In determining that Lynne should pay a portion of James' attorney fees, the trial court found that the original complaint for divorce was filed in June 2011 and that Lynne's actions since then had caused prolonged litigation. Lynne's actions, as noted by the court, included her lack of cooperation relating to the sale of the marital home, which resulted in the court's appointing a receiver, and what the appointed receiver characterized as "vindictive behavior" once a prospective buyer was identified; her efforts to dismiss and refile the same case in another jurisdiction and, when unsuccessful, filing an appeal; her hiring of a private investigator; the issuance of subpoenas to numerous witnesses who were never called to testify; and her failing to disclose assets in discovery. Evidence showed that James had incurred over $40,000 in attorney fees, much of which was incurred as a result of Lynne's actions listed above. We conclude that the trial court did not abuse its discretion in ordering Lynne to pay $8,000 toward James' attorney fees. This assignment of error is without merit.

Discovery Costs.

Lynne's final assignment of error is that the trial court erred in failing to require James to pay certain discovery

costs, specifically Thanheiser's bill to James for the costs in producing information pursuant to the order to compel production. She contends that it was error to require her to pay Thanheiser's bill when it was James who requested the materials. She makes no further argument, and the only authority referenced in her brief to support her position is a "See" citation to Neb. Ct. R. Disc. § 6-334, which deals with the production of documents by parties. Brief for appellant at 13.

The trial court relied on a different discovery rule, Neb. Ct. R. Disc. § 6-334(A)(c)(1), which provides, in part: "A party or an attorney who obtains discovery pursuant to this rule shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." The court also noted § 6-334(A)(c)(2)(B), which provides, in part, that when an order of production is issued on a motion to compel, a nonparty is to be protected "from significant expense."

There is no evidence of any steps taken by James to avoid imposing undue burden or expense on Thanheiser. However, there was also no evidence presented as to how Thanheiser arrived at the amount he was requesting or to show that the amount was reasonable and necessary to comply with the court's order. The bill from Thanheiser, although in the transcript, was not offered into evidence. There was evidence to indicate that a portion of Thanheiser's expenses in complying with the motion to compel were a result of Thanheiser's making separate copies of everything for the court, which was not requested and was inappropriate. There is no way to tell how much of the bill was attributed to the extra copies produced. Further, Thanheiser testified that he had no discussions or other communication with James' counsel about the costs of producing the information prior to compiling the information, making extra copies, and delivering the information. Based on the evidence before us, we conclude that the trial court did not err in finding that James was not required to pay the bill from Thanheiser for the information produced pursuant to the motion to compel.

CONCLUSION

We conclude that the court did not err in reinstating the case upon determining that James' answer included a counterclaim. We further conclude that the court equitably divided the marital estate in accordance with the terms of the parties' settlement agreement, and did not err in awarding attorney fees to James or in failing to require James to pay discovery costs. Accordingly, the trial court's decree of dissolution is affirmed.

Affirmed.

In re Estate of Elsie R. Ackerman, deceased. Sandra Underwood, appellant, v. Judith Bolejack, Personal Representative and individually, appellee.

892 N.W.2d 588

Filed March 14, 2017. No. A-15-977.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict, and an appellate court will not set those findings aside unless they are clearly erroneous.
4. **Decedents' Estates: Banks and Banking: Intent.** When documents to a bank account do not meet the sample form provided for in Neb. Rev. Stat. § 30-2719(a) (Reissue 2016), their interpretation is governed by the provisions of Neb. Rev. Stat. §§ 30-2716 through 30-2733 (Reissue 2016) applicable to the type of account that most nearly conforms to the depositor's intent.
5. **Decedents' Estates: Banks and Banking: Notice.** Pursuant to Neb. Rev. Stat § 30-2724(a) (Reissue 2016), the type of bank account may be altered by written notice given by a party to the financial institution to change the type of account. The notice must be signed by a party and received by the financial institution during the party's lifetime.
6. **Decedents' Estates: Banks and Banking.** A right of survivorship arising from a payable-on-death designation may not be altered by will.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

8. ____. 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.

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

Wayne E. Janssen for appellant.

Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

Riedmann and Bishop, Judges, and McCormack, Retired Justice.

Riedmann, Judge.

INTRODUCTION

Sandra Underwood appeals from the order of the county court for Lancaster County, which concluded that Elsie R. Ackerman did not intend to remove Judith Bolejack as payable-on-death (POD) beneficiary of Ackerman's bank account. We find no merit to the arguments raised on appeal and therefore affirm.

BACKGROUND

The relevant facts of this case are largely undisputed. Ackerman is the mother of Underwood and Bolejack. Ackerman opened an individual checking account in 1955. In 1977, Ackerman filed a signature card with the bank, naming Bolejack the POD beneficiary of the account. The question is whether the POD designation was revoked by subsequent changes made to the account.

Around 1978, Ernest Siems moved in with Ackerman and resided with her until her death. In April 1986, Ackerman signed and filed a card with the bank which removed "access" to the account from Bolejack. The same day, Ackerman signed and filed a card granting "access" to the account to Siems.

In November 1994, a card was filed with the bank removing Siems' access to the account, but the card was not signed by Ackerman. The same day, a card was filed granting Bolejack access to the account. The card did not contain Ackerman's signature, but Bolejack testified that she signed the card at Ackerman's request. When Ackerman died in September 2013, the account had a balance of $208,719.80. After Ackerman's death, the bank sent notice to Bolejack that the funds in the account now solely belonged to her.

On October 21, 2013, Bolejack filed a petition for formal probate of Ackerman's will, determination of heirs, and appointment of a personal representative, and Bolejack was subsequently appointed personal representative. Bolejack filed an inventory with the court and listed the subject bank account as nonprobate property jointly owned by Ackerman and Bolejack.

On November 17, 2014, Underwood filed a complaint alleging that Bolejack improperly converted the funds in the bank account to her own use after Ackerman's death, that the account should be inventoried as the sole property of Ackerman, and that Bolejack should be ordered to reimburse the estate for the funds spent from the account. Bolejack filed an answer, claiming either that the account was held in joint tenancy by Ackerman and Bolejack or that she was the sole owner of the funds as the POD beneficiary of the account.

After holding a hearing, the county court entered an order in which it determined that the account was a single-party account and that the evidence was insufficient to prove Ackerman intended to remove Bolejack as the POD beneficiary. Underwood timely appeals to this court.

ASSIGNMENTS OF ERROR

Underwood assigns that the county court erred in (1) determining that Bolejack was a POD beneficiary of the account at the time of Ackerman's death, (2) failing to find that Bolejack in her personal capacity had converted the funds in

the account at the time of Ackerman's death, (3) failing to find that Bolejack in her personal capacity holds the funds from the account in a resulting or constructive trust, and (4) failing to require Bolejack to recover the funds in the account and administer them as individually owned property of the estate.

STANDARD OF REVIEW

[1-3] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Greb*, 288 Neb. 362, 848 N.W.2d 611 (2014). When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below. *Id*. The probate court's factual findings have the effect of a verdict, and an appellate court will not set those findings aside unless they are clearly erroneous. *Id*.

ANALYSIS

Underwood assigns that the documents that compose the contract of deposit contain provisions in substantially the form provided in Neb. Rev. Stat. § 30-2719(a) (Reissue 2016) and are therefore governed by the provisions of Neb. Rev. Stat. §§ 30-2716 through 30-2733 (Reissue 2016). The county court determined to the contrary, and we agree.

[4] The sample account form of § 30-2719(a) includes provisions for designation of various features, including ownership ("Single-Party Account" or "Multiple-Party Account"); rights at death (including, inter alia, "Right of Survivorship," "POD (Pay on Death) Designation," or single-party account passing at death as part of party's estate); and "Agency (Power of Attorney) Designation." Although the original signature card Ackerman signed in 1955 designates it as an individual account and contains a rights-at-death provision, the subsequent access cards do not contain the statutorily required information. Therefore, their interpretation is governed by the

provisions of §§ 30-2716 through 30-2733 applicable to the type of account that most nearly conforms to the depositor's intent. See § 30-2719(b). See, also, *In re Estate of Greb, supra* (looking to extrinsic evidence of depositor's intent when signature card does not comply with § 30-2719(a)).

Underwood argues that if the court determines the documents are not in substantial compliance with the statutory requirements, the evidence "clearly shows" that Ackerman had a normal relationship with her children and intended that the account be included in her estate. Brief for appellant at 26. She does not dispute that Ackerman changed her original single-party checking account to a POD account in favor of Bolejack in 1977 and that it remained a POD account until 1986. She claims, however, that when Ackerman removed Bolejack's access to the account in 1986 and granted access to Siems, she intended to remove the POD designation, thus making it an asset of her estate upon death. We disagree.

[5,6] Pursuant to § 30-2724(a): "The type of [bank] account may be altered by written notice given by a party to the financial institution to change the type of account . . . . The notice must be signed by a party and received by the financial institution during the party's lifetime." A right of survivorship arising from a POD designation may not be altered by will. § 30-2724(b). See, also, *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

The question in the present case is whether the documents Ackerman executed in 1986 constitute written notice of her intent to alter the type of account she possessed. In other words, Does the evidence establish that in 1986 Ackerman intended to remove Bolejack as POD beneficiary?

At the same time Ackerman removed Bolejack's "access" to the account, she granted "access" to Siems. Siems testified that Ackerman never intended to grant him any rights to the money contained in the account; he explained that during the 35 years the couple cohabited, he and Ackerman maintained separate finances and "never got into each other['s accounts]."

According to Siems, by granting him access to her account, Ackerman merely wanted to allow him to write or cash checks for her. On occasion, she would write a check out to cash, and he would cash it and bring the money back to her. Siems explained that Ackerman decided it would be best to revoke his access to her account in 1994, when he was diagnosed with cancer. At that time, Ackerman then granted access back to Bolejack.

The county court determined that when granting and revoking "access" to the account, Ackerman did not intend to change the disposition of the account upon her death; rather, she wanted to allow another person the ability to write or cash checks for her, whether that person was Siems or Bolejack. We recognize, as did the county court, that the only "access" Bolejack had to the account after 1977 was as the POD beneficiary and that she had no access or right to the account during Ackerman's lifetime. Therefore, Bolejack had no "access" to remove when Ackerman signed the documents in 1986. This does not change our result, however, because, as the county court observed, looking at the fact that both cards were filed simultaneously in 1986, "it only makes sense that any access [Ackerman] believed she was removing from Bolejack at that time was the same form of access that she was granting to Siems." And the court found that the only conclusion supported by the evidence was that Ackerman intended to make Siems a signer or agent on her account by granting him access to the account.

The county court also recognized that a POD account, a multiple party account, and an account with an authorized signer or agent are not mutually exclusive. And in the present case, there was no evidence of an express request to change the type of account from a POD account. Accordingly, the county court held that the purported removal of access of Bolejack in 1986 did not affect the POD designation. We conclude that this factual finding was not clear error and that thus,

the county court did not err in determining that the account belonged to Bolejack as POD beneficiary.

[7,8] Based on our disposition of Underwood's first assignment of error, we need not address the remaining assigned errors. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *D.I. v. Gibson*, 291 Neb. 554, 867 N.W.2d 284 (2015). We also note there are arguments raised in Underwood's brief which were not assigned as error. Specifically, she argues that various parts of the record are not properly before this court and that the county court was not previously asked to determine ownership of the account. 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. *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015). We therefore do not address these arguments.

CONCLUSION

We find that the county court did not err in determining that Ackerman did not intend to remove Bolejack as POD beneficiary of her bank account. We therefore affirm.

Affirmed.

Douglas House, appellant, v. Michele House, appellee.

894 N.W.2d 362

Filed March 21, 2017. No. A-15-1132.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
2. **Child Support.** Neb. Rev. Stat. § 43-512 (Supp. 2015) details the procedure by which any dependent child, or any relative or eligible caretaker of such dependent child, may file a written application for financial assistance to the Department of Health and Human Services.
3. **Child Support: Prosecuting Attorneys.** Pursuant to Neb. Rev. Stat. § 43-512(2) (Supp. 2015), following the application for financial assistance, the Department of Health and Human Services investigates to see if the child has a parent or stepparent who is able to contribute to the support of such child and has failed to do so; upon such a finding, a copy of the finding of such investigation and a copy of the application shall immediately be filed with the county attorney or authorized attorney.
4. **Actions: Child Support: Prosecuting Attorneys.** Pursuant to Neb. Rev. Stat. § 43-512.01 (Reissue 2016), it is the duty of the county attorney or authorized attorney to immediately take action against the nonsupporting parent and initiate a child support enforcement action. If the county attorney initiates an action, he or she shall file either a criminal complaint for nonsupport under Neb. Rev. Stat. § 28-706 (Reissue 2016) or a civil complaint against the nonsupporting parent or stepparent under Neb. Rev. Stat. § 43-512.03 (Reissue 2016).

5. ____: ____: ____. Pursuant to Neb. Rev. Stat. § 43-512.03(4) (Reissue 2016), the State of Nebraska shall be a real party in interest in any action brought by or intervened in by a county attorney to enforce an order for child support.
6. ____: ____: ____. Pursuant to Neb. Rev. Stat. § 43-512.03(1)(c) (Reissue 2016), the county attorney or authorized attorney shall enforce child support orders by civil actions or administrative actions, citing the defendant for contempt, or filing a criminal complaint.
7. **Statutes: Appeal and Error.** An appellate court will try to avoid, if possible, a statutory construction that would lead to an absurd result.
8. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction deals with a court's ability to hear a case; it is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
9. **Courts: Jurisdiction: Contempt.** A court that has jurisdiction to issue an order also has the power to enforce it; the power to punish for contempt is incident to every judicial tribune.
10. **Child Support: Federal Acts: Evidence.** Pursuant to Neb. Rev. Stat. § 43-3342.01 (Reissue 2016), a true copy of the record of payments, balances, and arrearages maintained for services received under title IV-D of the federal Social Security Act is prima facie evidence, without further proof or foundation, of the balance of any amount of support order payments that are in arrears and of all payments made and disbursed to the person or agency to whom the support order payment is to be made; such evidence shall be considered to be satisfactorily authenticated, shall be admitted as prima facie evidence of the transactions shown in such evidence, and is rebuttable only by a specific evidentiary showing to the contrary.
11. **Child Support: Contempt: Presumptions: Proof.** Pursuant to Neb. Rev. Stat. § 42-358(3) (Reissue 2016), a rebuttable presumption of contempt shall be established if a prima facie showing is made that the court-ordered child or spousal support is delinquent.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

Douglas House, pro se.

Joe Kelly, Lancaster County Attorney, and Jordan M. Talsma for appellee.

Riedmann and Bishop, Judges, and McCormack, Retired Justice.

Bishop, Judge.

Douglas House appeals from an order of the district court for Lancaster County that found him in contempt of court for failure to pay child support. We affirm.

BACKGROUND

Douglas and Michele House were married in 2007 and had one child, born that same year. The parties divorced in June 2012. Pursuant to the parties' parenting plan which was approved and adopted in the divorce decree, Michele received physical custody of the parties' minor child, subject to Douglas' reasonable rights of parenting time. Douglas was ordered to pay child support in the amount of $346 per month, commencing on July 1.

On May 11, 2015, a deputy Lancaster County Attorney filed a "Motion for an Order to Show Cause and to Appear," pursuant to Neb. Rev. Stat. § 43-512.03 (Reissue 2016). The motion alleged that Douglas was ordered to pay child support in the amount of $346 per month, but according to the Department of Health and Human Services (DHHS) payment history report, he was delinquent "in an amount greater or equal to the support due and payable for a one month period of time." The deputy Lancaster County Attorney asked the court to order Douglas to show cause as to why he should not be held in contempt of court for failure to comply with the order directing him to pay child support. An order to show cause was entered on May 12, directing Douglas to appear on June 18 and show cause why he should not be held in contempt; he was ordered to bring income tax returns for the past 3 years and his last three wage statements. The court also appointed the Lancaster County Attorney to commence contempt proceedings against Douglas. For reasons not apparent from our record, the show cause/contempt hearing was not held on June 18.

A hearing on the show cause/contempt action was held on November 18, 2015. The deputy county attorney appeared on behalf of the State, and shall be referred to as the "State" hereafter. Douglas appeared pro se. For his opening statement, Douglas said he wanted to "make a statement as to [his] indigence . . . and [his] inability to pay at this time, but, other than that, [he would] let the prosecution go forward."

The State offered into evidence exhibit 1, a certified DHHS payment history report dated November 9, 2015. Douglas objected, arguing that it "doesn't have a wet ink signature, it's not sworn to that this is accurate and correct." The court and the State pointed out that the report had a certification stamp on it, and the State informed Douglas that "it's an electronic signature." Douglas responded, "Well, Your Honor, I really don't know if any person has ever really signed this thing, as far as an electronic signature. Shouldn't a — anything be — that's entered on the court record be a wet ink signature?" The court said, "This is sufficient for a court record," then received exhibit 1 and overruled Douglas' objection. Exhibit 1 showed that as of November 9, Douglas owed a child support balance of $4,112.94 (he had made no child support payments since November 2014). After offering exhibit 1 into evidence and having it received, the State rested.

After being sworn in, Douglas said that in order for the State to bring a claim under § 43-512.03, there has to be a "request" assigning power to be a real party in interest to the county attorney, "[a]nd the record is absent of a request" from DHHS or any other entity that is "authorized." Douglas argued, "For the county attorney to have that authority, he needs to bring forth that request. He has no authority right now . . . . So, I object to this entire proceeding, this claim being brought forth without powers assigned." The State responded that DHHS had requested the claim be brought to enforce the child support order because the recipient of the child support was receiving public assistance benefits. The State acknowledged that DHHS' request had not been made part of the record, but the

State was not aware of any requirement that the request be made part of the record. The court concluded that the State had complied with the statute.

The State then argued that under Neb. Rev. Stat. § 42-358 (Reissue 2016), there is a rebuttable presumption of contempt upon a prima facie showing that the defendant is behind on his child support. When asked if he had anything to rebut the evidence that he was behind in his child support payments, Douglas continued to object to the State's authority to bring the claim. Douglas then said:

> I am indigent. I've got, publicly declared, two poverty affidavits on the court record. I'm currently in the appellate court with a juvenile case. The custody of my daughter is up in the air. It — the juvenile case has been — my brief has just been accepted.
>
> I'm also — currently, the District Court is going to receive an appeal in which I was denied a substantial right during a special proceeding. I appealed that, also, Your Honor. And, you know, so my poverty affidavits in itself speak for themselves. I — I — I cannot pay right now. That's just — it's that simple. I'm indigent. I am under — I have nothing.

The district court informed Douglas that there was a rebuttable presumption that he was in willful contempt of court and that based on the evidence, it found him in willful contempt. Douglas continued to argue that it was an impossibility for him to pay at that time.

In its order filed on November 18, 2015, the district court found Douglas to be in willful contempt of court. The court ordered Douglas to serve 30 days in jail, but suspended the sentence as long as he paid $346 per month on current child support and $50 per month on arrearages commencing January 1, 2016. If Douglas complied with the payment schedule for 24 months, he would be purged of contempt and the sentence would be deemed null and void. If Douglas failed to comply, he would be imprisoned pursuant to his

sentence and would be released and purged of contempt upon payment of the lesser of $3,500 or all arrearages then due and owing.

On December 1, 2015, Douglas filed a "Motion by Affidavit to Modify Judgment," asking the district court to "correct [its] errors" from the November 18 show cause hearing. Douglas claimed the following errors: The State did not have standing, the "'payment history'" was not a "valid bill of costs for child support without anyone attesting to it or signing off on it," and his poverty was not willful contempt of court. On December 3, the district court overruled Douglas' motion.

Douglas timely appeals the district court's order.

ASSIGNMENTS OF ERROR

Douglas assigns, restated: (1) The State did not have standing to enforce a child support order without evidence of proper written authority; (2) the district court did not have subject matter jurisdiction in this action, since there was already an existing support order; (3) the district court erred when it admitted into evidence the child support payment history, "a wholly defective written instrument"; (4) the district court erred when it modified an existing child support order; and (5) the district court erred when it found Douglas to be in willful contempt despite his impoverished status.

STANDARD OF REVIEW

[1] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion. *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

ANALYSIS

Standing.

Douglas argues the State lacks standing to bring the contempt action without evidence of a signed, written request by DHHS conferring such authority.

[2-4] In response, the State asserts that it has the authority to initiate contempt proceedings from a series of Nebraska statutes, see Neb. Rev. Stat. §§ 43-512 through 43-512.18 (Reissue 2016), and that these statutes do not require the State to make part of the court record any request from DHHS to initiate such proceedings. The State correctly states that § 43-512 (Supp. 2015) details the procedure by which any dependent child, or any relative or eligible caretaker of such dependent child, may file a written application for financial assistance to DHHS. (Pursuant to Neb. Rev. Stat. § 43-504(1) (Reissue 2016), a dependent child includes a child under 19 years of age who has received or is in need of state aid.) Following the application, DHHS investigates to see if the child has a parent or stepparent who is able to contribute to the support of such child and has failed to do so; upon such a finding, a copy of the finding of such investigation and a copy of the application "shall immediately be filed with the county attorney or authorized attorney." § 43-512(2). (Section 43-512(6)(a) defines an "[a]uthorized attorney.") Section 43-512.01 states in relevant part that it is the duty of the county attorney or authorized attorney to "immediately take action" against the nonsupporting parent, and initiate a child support enforcement action. "If the county attorney initiates an action, he or she shall file either a criminal complaint for nonsupport under section 28-706 or a civil complaint against the nonsupporting parent or stepparent under section 43-512.03." § 43-512.01.

In its motion for an order to show cause and to appear, the State asserted it was filing the motion under the authority of § 43-512.03, but did not specify under which subsection of the statute it was proceeding. Section 43-512.03 provides in relevant part as follows:

> (1) The county attorney or authorized attorney shall:
>
> (a) On request by [DHHS] as described in subsection (2) of this section or when the investigation or application filed under section 43-512 or 43-512.02 justifies, file a complaint against a nonsupporting party in the district, county, or separate juvenile court praying for an order for child or medical support in cases when there is no existing child or medical support order. After notice and hearing, the court shall adjudicate the child and medical support liability of either party and enter an order accordingly;
>
> (b) Enforce child, spousal, and medical support orders by an action for income withholding pursuant to the Income Withholding for Child Support Act;
>
> (c) In addition to income withholding, *enforce child*, spousal, and medical *support orders* by other civil actions or administrative actions, *citing the defendant for contempt*, or filing a criminal complaint;
>
> (d) Establish paternity and collect child and medical support on behalf of children born out of wedlock; and
>
> (e) Carry out sections 43-512.12 to 43-512.18.

(Emphasis supplied.)

[5] Because the State was attempting to enforce an already existing child support order, the State's action falls under the authority of § 43-512.03(1)(c). And § 43-512.03(4) provides that "[t]he State of Nebraska shall be a real party in interest in any action brought by or intervened in by a county attorney . . . to enforce an order for child, spousal, or medical support." At the show cause/contempt hearing, the State said that DHHS had requested an action be brought to enforce the child support order because the recipient of the child support was receiving public assistance benefits. Contrary to Douglas' contention, we have found no authority stating that the request from DHHS is necessary evidence for the State to have standing in a contempt action under § 43-512.03. Compare *State on behalf of Hopkins v. Batt*, 253 Neb. 852,

573 N.W.2d 425 (1998) (prenotice-pleading case in which court found remedy in § 43-512.03 not applicable because there was no allegation child had received or was eligible to receive public assistance benefits). Accordingly, the State, as the real party in interest, had standing to bring the contempt action against Douglas.

Subject Matter Jurisdiction.

Douglas asserts that the district court "only has subject matter jurisdiction over an action brought pursuant to [§] 43-512.03 when there is no existing child support order." Brief for appellant at 7. And since there was already an existing child support order in this case, Douglas suggests the district court did not have subject matter jurisdiction over the present action. In support of his argument, Douglas cites to *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991), and *State ex rel. Cammarata v. Chambers*, 6 Neb. App. 467, 574 N.W.2d 530 (1998). However, both of these cases addressed subject matter jurisdiction with regard to only one subsection of § 43-512.03—the subsection dealing with the State initiating a child support action, as discussed next.

It is true that in *State ex rel. Gaddis v. Gaddis, supra*, the Nebraska Supreme Court held that "as a prerequisite for an action under § 43-512.03, there cannot be an existing child support order in any jurisdiction" and that "a court has subject matter jurisdiction for an action under § 43-512.03 only 'when there is no existing child support order' in Nebraska or any other jurisdiction." 237 Neb. at 267-68, 465 N.W.2d at 775. See, also, *State ex rel. Cammarata v. Chambers, supra*, (relying on *State ex rel. Gaddis v. Gaddis, supra*, and holding the same). In both cases, the Nebraska Supreme Court and this court generally referred to § 43-512.03 in the analysis. However, a complete reading of both cases makes it clear that their holdings only applied to one subsection of § 43-512.03, specifically what is currently § 43-512.03(1)(a), which pertains to initiating a child support action. The holdings did not

involve other subsections of the statute permitting, as in this case, enforcement of a child support order.

Although the Supreme Court in *State ex rel. Gaddis v. Gaddis, supra*, makes general references to § 43-512.03 throughout the opinion, it does specifically identify the subsection at issue when it states that "the issue is whether the district court had subject matter jurisdiction for the action commenced under § 43-512.03(1)." 237 Neb. at 266, 465 N.W.2d at 775. In that case, it was acknowledged by the State, and substantiated at trial, that there was already a child support order in effect in Colorado at the time the State initiated a petition in Nebraska seeking a child support order against a father who had been making payments pursuant to the Colorado order. It was not an action to enforce child support as in the case before this court; rather, the State was seeking to establish a child support order when such an order already existed.

The version of § 43-512.03 (Reissue 1988) in effect at that time provided:

> The county attorney or authorized attorney shall:
>
> (1) On request by the Department of Social Services or when the investigation or application filed under [§] 43-512 or 43-512.02 justifies, file a petition against a nonsupporting parent or stepparent in the district, county, or separate juvenile court praying for an order for child support in cases when there is no existing child support order. After notice and hearing, the court shall adjudicate child support liability of the nonsupporting parent or stepparent and enter an order accordingly;
>
> (2) Enforce child and spousal support orders by an action for income withholding pursuant to the Income Withholding for Child Support Act;
>
> (3) If income withholding is not feasible, enforce child and spousal support orders by other civil actions, citing the defendant for contempt, or filing a criminal complaint; and

> (4) Establish paternity and collect child support on behalf of children born out of wedlock.

The Supreme Court set forth only the language from subsection (1) above in its opinion, and the language of § 43-512.03(1) at the time of the *Gaddis* opinion corresponds to what is currently § 43-512.03(1)(a). *Gaddis* makes no reference to the other subsections of § 43-512.03, which include specific authority for the State to enforce child support orders. Accordingly, we read *Gaddis* to apply only to § 43-512.03(1)(a), and not to the other subsections of the statute.

Similarly, in *State ex rel. Cammarata v. Chambers*, 6 Neb. App. 467, 574 N.W.2d 530 (1998), the State brought an action, pursuant to § 43-512.03 et seq. (Reissue 1993, Cum. Supp. 1994 & Supp. 1995), seeking child support and medical coverage from a father, even though past orders for child support had been entered. This court said, "[i]n relevant part," the version of § 43-512.03 in effect at the time of trial provided as follows:

> (1) The county attorney or authorized attorney shall:
>
> (a) On request by the Department of Social Services . . . file a petition against a nonsupporting parent or stepparent in the district, county, or separate juvenile court praying for an order for child or medical support in cases when there is no existing child or medical support order.

State ex rel. Cammarata v. Chambers, 6 Neb. App. at 470, 574 N.W.2d at 532. Relying on the Supreme Court's holding in *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991), this court held that because there was an existing support order, the State was not authorized to file the petition and the district court did not have subject matter jurisdiction.

In *State ex rel. Cammarata v. Chambers, supra*, like in *State ex rel. Gaddis v. Gaddis, supra*, this court generally referred to § 43-512.03 in its analysis, although notably, the court only set forth and addressed one subsection of that statute, specifically § 43-512.03(1)(a). A complete reading of *State ex*

rel. Cammarata v. Chambers, supra, makes it clear that the holding only applied to § 43-512.03(1)(a). And the language of § 43-512.03(1)(a) at the time of the *Chambers* opinion corresponds to the current version of § 43-512.03(1)(a).

[6,7] Although the State in this case did not specify under which subsection of § 43-512.03 it was proceeding, because it was seeking to enforce an already existing child support order, the State's action falls under the authority of § 43-512.03(1)(c), and not § 43-512.03(1)(a). Subsection (1)(c) provides in relevant part that the county attorney shall enforce child support orders "by other civil actions or administrative actions, citing the defendant for contempt, or filing a criminal complaint." Since a contempt citation presumes the violation of a previous court order, the entirety of § 43-512.03 cannot be read to exclude cases where previous court orders already exist. See *Adair Asset Mgmt. v. Terry's Legacy*, 293 Neb. 32, 875 N.W.2d 421 (2016) (appellate court will try to avoid, if possible, statutory construction that would lead to absurd result). Accordingly, we read the holdings on subject matter jurisdiction in *State ex rel. Gaddis v. Gaddis, supra*, and *State ex rel. Cammarata v. Chambers, supra*, to apply only to what is currently § 43-512.03(1)(a), which pertains to the State's authority to initiate child support actions under that specific section of the statute, and not to the State's authority to bring child support enforcement actions under § 43-512.03(1)(c).

[8,9] Subject matter jurisdiction deals with a court's ability to hear a case; it is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. See *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005). In *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 675, 782 N.W.2d 848, 862 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012), the Nebraska Supreme Court said:

> We have stated that a court that has jurisdiction to issue an order also has the power to enforce it. A court can issue orders that are necessary to carry its judgment or decree into effect. Nebraska courts, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice. And this authority exists apart from any statutory grant of authority. We have recently explained that the power to punish for contempt is incident to every judicial tribune. It is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.

Because the district court had the power to enforce its previous child support order, it had subject matter jurisdiction over this contempt action.

Payment History.

Douglas argues the district court erred when it admitted the DHHS payment history report into evidence as a "valid bill of costs for child support without anyone attesting to, or signing off on, it." Brief for appellant at 8. He references several provisions of the Uniform Commercial Code in support of his argument. However, the Uniform Commercial Code, which governs commercial and business transactions, is not applicable here.

[10] The child support payment history received into evidence complied with the necessary requirements. Pursuant to § 42-358(3), "[t]he Title IV-D Division of [DHHS] shall maintain support order payment records pursuant to section 43-3342.01 . . . ." Neb. Rev. Stat. § 43-3342.01 (Reissue 2016) provides:

> (1) The responsibilities of the State Disbursement Unit shall include the following:
>
> (a) Receipt of payments, except payments made pursuant to subdivisions (1)(a) and (1)(b) of section 42-369, and disbursements of such payments to obligees, the department, and the agencies of other states;

(b) Accurate identification of payments;

(c) Prompt disbursement of the obligee's share of any payments;

(d) Furnishing to any obligor or obligee, upon request, timely information on the current status of support order payments; and

(e) One location for employers to send income withholding payments.

(2) The Title IV-D Division shall maintain records of payments for all cases in which support order payments are made to the central office of the State Disbursement Unit using the statewide automated data processing and retrieval system. . . .

(3) *A true copy of the record of payments, balances, and arrearages maintained by the Title IV-D Division is prima facie evidence, without further proof or foundation*, of the balance of any amount of support order payments that are in arrears and of all payments made and disbursed to the person or agency to whom the support order payment is to be made. Such evidence *shall be considered to be satisfactorily authenticated, shall be admitted as prima facie evidence of the transactions shown in such evidence, and is rebuttable only by a specific evidentiary showing to the contrary*.

(4) A copy of support payment records maintained by the Title IV-D Division shall be considered to be a true copy of the record when certified by a person designated by the division pursuant to the rules and regulations adopted and promulgated pursuant to this section.

(Emphasis supplied.)

In the instant case, the payment history report received into evidence as exhibit 1 contained a "Certification" that it was a "true copy of the official record of support order payments, balances, and arrearages maintained by the IV-D division, pursuant to Neb Rev Stat §43-3342.01." It was electronically signed by a "CSE Payment Records Specialist" on behalf of

"Byron Van Patten, IV-D Director." Accordingly, the payment history report was properly authenticated and the district court did not err when it received the report into evidence.

Modification.

Douglas also assigns, but does not specifically argue, that the district court was without jurisdiction to modify an existing child support order. However, the case did not involve the modification of an existing child support order; rather, it was a contempt action to enforce an existing child support order. And as previously discussed, the district court has jurisdiction over such actions.

"Willful" Contempt.

[11] Douglas argues that the district court erred when it found him to be in willful contempt despite his impoverished status. Pursuant to § 42-358(3), "[a] rebuttable presumption of contempt shall be established if a prima facie showing is made that the court-ordered child or spousal support is delinquent." The State put into evidence a certified copy of Douglas' child support payment history showing that as of November 9, 2015, he had an outstanding child support balance of $4,112.94 (delinquent, arrears, and interest). Because the State made a prima facie showing that Douglas' child support obligation was delinquent, there was a rebuttable presumption of contempt. The burden then shifted to Douglas to produce evidence rebutting the statutory presumption.

When a party to an action fails to comply with a court order made for the benefit of the opposing party, such an act is ordinarily a civil contempt, which requires willful disobedience as an essential element. *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012). "'Willful' means the violation was committed intentionally, with knowledge that the act violated the court order." *Id.* at 376, 808 N.W.2d at 873. We consider now whether Douglas introduced evidence sufficient to overcome the presumption that he was in willful contempt of the child support order.

Douglas provided limited factual information to the district court regarding why he should not be found in contempt. For his opening statement, Douglas said he wanted to "make a statement as to [his] indigence . . . and [his] inability to pay at this time, but, other than that, [he would] let the prosecution go forward." Later, after the State produced the payment history record establishing a prima facie case of contempt, Douglas was asked if he had anything to rebut the evidence that he was behind in his child support payments. Douglas told the district court:

> I am indigent. I've got, publicly declared, two poverty affidavits on the court record. I'm currently in the appellate court with a juvenile case. The custody of my daughter is up in the air. It — the juvenile case has been — my brief has just been accepted.
>
> I'm also — currently, the District Court is going to receive an appeal in which I was denied a substantial right during a special proceeding. I appealed that, also, Your Honor. And, you know, so my poverty affidavits in itself speak for themselves. I — I — I cannot pay right now. That's just — it's that simple. I'm indigent. I am under — I have nothing.

At the hearing, the court made a verbal finding that, based on the evidence, Douglas was in willful contempt of court. Douglas responded by saying, "How could I be in willful contempt when it's beyond my control? I am — I'm in a poverty status. I have no money. I have tools to my name. I have no property, tools."

While Douglas claimed to have poverty affidavits on "record" in other court cases, he provided no evidence of such to the district court in this case. He did not give testimony regarding his ability to work, his employment status, or any information regarding his income, or lack thereof, or why he had made no child support payments for an entire year. He simply stated that he could not pay, but provided no reason why, other than he has "nothing." We note that the show cause

order entered on May 12, 2015, ordered Douglas to bring income tax returns for the past 3 years and his last three wage statements; he failed to do so. In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court reviews the trial court's factual findings for clear error and its determinations of contempt for an abuse of discretion. By finding Douglas in willful contempt of court, the district court implicitly found that Douglas had not provided sufficient evidence to rebut the presumption of contempt. See *Hossaini v. Vaelizadeh, supra*. We agree and affirm the district court's finding that Douglas was in willful contempt of court.

CONCLUSION

For the reasons stated above, we affirm the decision of the district court.

Affirmed.

Jennifer deBoer, now known as Jennifer Dunford, appellee, v. Henk deBoer, appellant.

892 N.W.2d 879

Filed March 28, 2017. No. A-16-163.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
2. **Contempt.** Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party.
3. **Contempt: Presumptions: Proof.** Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence.
4. **Rules of Evidence: Contempt.** The Nebraska Evidence Rules apply generally to all civil and criminal proceedings, including contempt proceedings except those in which the judge may act summarily.
5. **Contempt: Proof: Stipulations.** In order to prove civil contempt, unless the alleged contemptuous acts occurred within the presence of the judge, or the parties stipulate otherwise, an evidentiary hearing is necessary so that the moving party can offer evidence to demonstrate both that a violation of a court order occurred and that the violation was willful.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Reversed and remanded for further proceedings.

C.G. (Dooley) Jolly, of Adams & Sullivan, P.C., L.L.O., for appellant.

No appearance for appellee.

Riedmann, Bishop, and Arterburn, Judges.

Arterburn, Judge.

INTRODUCTION

Henk deBoer appeals from an order of the district court dismissing his contempt actions against his ex-wife, Jennifer deBoer, now known as Jennifer Dunford, in the proceedings to modify their decree of dissolution of marriage. On appeal, Henk argues that the district court erred in dismissing his applications for contempt without holding a full evidentiary hearing and without providing him notice. Upon our review, we determine that the district court erred when it dismissed Henk's contempt actions without holding an evidentiary hearing. Accordingly, we reverse, and remand for an evidentiary hearing on Henk's applications for contempt.

BACKGROUND

Henk and Jennifer were married in 2002 and had two children during their marriage. They divorced in 2010. Pursuant to the decree of dissolution of marriage, Jennifer was awarded primary physical custody of the children, subject to Henk's parenting time. The terms of Henk's parenting time were set forth in a parenting plan agreed to by the parties, the details of which are not material to this appeal.

In October 2011, Jennifer filed a complaint to modify the decree of dissolution. In particular, Jennifer claimed that there had been a material change in circumstances in that Henk had failed to comply with the parenting time schedule, had failed to communicate with Jennifer regarding parenting time, had abused alcohol in front of the children, and had left the state with the children without providing notice to Jennifer. Jennifer sought a reduction of Henk's parenting time.

On October 31, 2011, Henk filed an answer to Jennifer's complaint to modify, denying the allegations therein. Henk also counterclaimed, seeking (1) custody of the minor children and (2) an order of contempt due to Jennifer's denying him his court-ordered parenting time. Later, in August and December, 2014, Henk also filed two separate applications for an order to show cause why Jennifer should not be held in contempt, claiming that Jennifer repeatedly denied his parenting time. The transcript also contains references to an application for contempt filed by Jennifer, but such a pleading is not contained in the record before us.

On December 15, 2014, the district court entered an order modifying the decree of dissolution. The order incorporated a modified parenting plan which the parties had agreed to in July 2013.

The same day the court issued its order of modification, it also issued an order to show cause why Jennifer should not be held in contempt for failing to abide by the parenting plan. The court set the contempt matter for hearing on March 18, 2015. No bill of exceptions from a March 18 hearing is contained in the record before us.

On July 17, 2015, the court issued an "Order on Contempt." The order states that the court held a hearing on Henk's and Jennifer's respective contempt actions on March 18, 2015. The order states that "[t]he matter was heard in chambers." The court held that "[n]either [Jennifer] nor [Henk] shall be found in willful and contumacious contempt at this time." The court made additional findings regarding summer parenting time, health care reimbursement, and psychological evaluations. The court ordered that the contempt actions filed by both Henk and Jennifer would be continued to September 24, 2015.

The same day the court issued the "Order on Contempt," it also issued an amended order of modification. The amended order states that it is being entered "[p]ursuant to [the] findings indicated in the Court's Order regarding contempt . . . ."

The court ordered custody and parenting time in accordance with a parenting plan agreed to by the parties.

Although the contempt matters were initially set to be heard on September 24, 2015, Henk filed a motion to continue the hearing. The court rescheduled the contempt hearing to December 15.

Before the rescheduled contempt hearing, Henk filed a motion to set aside the "'Order on Contempt'" entered on July 17, 2015. Henk argued that the hearing had been held off the record, the court made no findings in support of its order, the order included matters not before the court, and the order was entered nearly 5 months after the hearing. Jennifer opposed Henk's motion to set aside.

The court issued its last order on January 11, 2016. It was titled simply "Order" and stated, "THIS MATTER was before the Court for hearing on the 15th day of December, 2015, . . . on [Henk's] Motion to Set Aside." No bill of exceptions from a December 15 hearing is contained in the record before us, although one was requested in Henk's praecipe for bill of exceptions.

The January 11, 2016, order stated that its findings of fact and conclusions of law were "[b]ased upon the pleadings, [a]ffidavits submitted, and the arguments of counsel . . . ." The only finding of fact the court made was that it had jurisdiction over the parties and the subject matter of the action. The court ordered Jennifer not to interfere with Henk's parenting time and to provide Henk with monthly documentation of medical expenses. The court also dismissed the parties' respective contempt actions.

Henk appeals from the dismissal of his contempt actions.

ASSIGNMENTS OF ERROR

Henk argues, restated, that the district court erred in dismissing his contempt actions without a full evidentiary trial, without providing notice to him that it was considering

dismissing his contempt action, and based upon insufficient factual findings.

We note that Henk does not assert an argument with respect to his final assignment of error regarding the court's allegedly insufficient factual findings. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the party's brief. *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015). Accordingly, we do not address Henk's last assignment of error.

STANDARD OF REVIEW

[1] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion. *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

ANALYSIS

Henk asserts error based on the failure of the district court to conduct an evidentiary hearing on his contempt actions. Based on our review of the record, no evidentiary hearing was held on December 15, 2015, the hearing referenced by the January 11, 2016, order. That order did, however, dismiss Henk's contempt actions.

[2,3] Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party. *Martin v. Martin*, 294 Neb. 106, 881 N.W.2d 174 (2016). Willful disobedience is an essential element of contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order. *Id*. Outside of statutory procedures imposing a

different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence. *Id*.

[4,5] The Nebraska Evidence Rules "apply generally to all civil and criminal proceedings, including contempt proceedings except those in which the judge may act summarily." Neb. Rev. Stat. § 27-1101(2) (Reissue 2008). This leads us to the conclusion that in order to prove civil contempt, unless the alleged contemptuous acts occurred within the presence of the judge, or the parties stipulate otherwise, an evidentiary hearing is necessary so that the moving party can offer evidence to demonstrate both that a violation of a court order occurred and that the violation was willful. See *Martin v. Martin, supra*. Unless the alleged contemptuous acts occurred within the presence of the judge, or the parties stipulate otherwise, evidence must be adduced to prove both elements. See *id.*

While the order of the district court does recite that its findings are based upon the pleadings, affidavits submitted, and arguments of counsel, there is no indication in the record that any "evidence" was offered and received. Affidavits "submitted" do not necessarily equate to affidavits offered and received. And there is no indication in the record that the parties agreed to submit the contempt actions to the court without an evidentiary hearing. To the contrary, Henk's appeal is based upon the argument that no evidentiary hearing was permitted.

We are cognizant that in *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977), the Supreme Court reviewed a contempt finding wherein the hearing did not include sworn testimony. The court found, however, that the parties had agreed to submit the matter to the district court in summary fashion on the oral statements of counsel. There is nothing in the record of the present case indicating a similar agreement. Consequently, the rules of evidence did apply.

Because we determine that the contempt proceeding required proof of willful disobedience, the district court erred

in failing to hold an evidentiary hearing. Therefore, the order of dismissal must be reversed and the cause remanded for an evidentiary hearing on Henk's contempt actions.

Because we determine that the court's error in not conducting an evidentiary hearing on December 15, 2016, requires reversal, we need not reach the question of whether sufficient notice was given to Henk that the district court was considering the contempt actions for dismissal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

CONCLUSION

The district court's failure to conduct an evidentiary hearing relating to Henk's applications for contempt constitutes error. Accordingly, we reverse the district court's order dismissing Henk's contempt actions and remand the cause for an evidentiary hearing on the matter.

Reversed and remanded for further proceedings.

In re Interest of K.W., alleged to be a dangerous sex offender. K.W., appellant, v. Mental Health Board of the Fourth Judicial District and State of Nebraska, appellees.

895 N.W.2d 721

Filed April 11, 2017. No. A-16-684.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
2. **Judgments: Convicted Sex Offender: Appeal and Error.** In reviewing a district court's judgment under the Sex Offender Commitment Act, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.
3. **Mental Health: Convicted Sex Offender: Words and Phrases.** Under the Sex Offender Commitment Act, a dangerous sex offender is defined as a person who suffers from a mental illness which makes him likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his criminal behavior, or a person who has a personality disorder which makes him likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his criminal behavior.
4. **Convicted Sex Offender.** Possession of sexually explicit images of children does qualify as a sex offense for the Sex Offender Commitment Act purposes.
5. **Mental Health: Convicted Sex Offender: Proof.** The State has the burden of proving by clear and convincing evidence that neither voluntary hospitalization nor other alternative treatment less restrictive than inpatient treatment would prevent a dangerous sex offender from harming himself or others.

Appeal from the District Court for Douglas County: Horacio J. Wheelock, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Ryan T. Locke for appellant.

Eric W. Wells, Deputy Douglas County Attorney, for appellees.

Riedmann and Bishop, Judges.

Per Curiam.

I. INTRODUCTION

K.W. appeals from the order of the district court for Douglas County, affirming the decision of the Mental Health Board of the Fourth Judicial District (Board). The Board found K.W. to be a dangerous sex offender under the Sex Offender Commitment Act (SOCA), Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009), and ordered him to undergo inpatient treatment. On appeal, K.W. argues that the district court erred in affirming the Board's findings that he was a dangerous sex offender and that inpatient treatment was the least restrictive treatment alternative. We find no merit to K.W.'s arguments on appeal, and we affirm.

II. BACKGROUND

The Douglas County Attorney filed a petition with the Board, alleging K.W. was a dangerous sex offender within the meaning of SOCA. The petition was filed based on a psychological evaluation conducted on K.W. by Dr. Alan Levinson, a clinical psychologist employed by the Nebraska Department of Correctional Services. The evaluation was conducted during the period immediately preceding K.W.'s completion of a sentence imposed by the Douglas County District Court for 10 counts of possession of child pornography. A hearing before the Board was held in February 2016. Dr. Levinson testified regarding a psychological evaluation

of K.W. he conducted in October 2015. In order to formulate his opinions and diagnoses, Dr. Levinson reviewed K.W.'s institutional file, mental health file, police reports, and presentence investigation; interviewed K.W.; and utilized actuarial diagnostic tools.

At the time of Dr. Levinson's evaluation, K.W. was serving 10 sentences for possession of child pornography. K.W. had been sentenced to five concurrent terms of 20 months' to 5 years' imprisonment on counts I through V, and five additional concurrent terms of 20 months' to 5 years' imprisonment on counts VI through X. K.W.'s total sentence was therefore 40 months' to 10 years' imprisonment. According to court documents, K.W. sent an image of child pornography via text message to a woman in Ohio. The woman contacted the authorities who were able to trace the telephone number to K.W. Police then searched K.W.'s cellular phone and located over 100 additional images of child pornography.

Dr. Levinson's report also stated that K.W. had been convicted of "[w]indow peeping" on five different occasions in the 1990's. K.W. described to Dr. Levinson looking in windows at adolescent and adult females, as well as adult males, in different sexual situations and masturbating to what he saw.

Dr. Levinson also testified regarding K.W.'s treatment history. Dr. Levinson testified that the Department of Correctional Services offers three levels of sex offender treatment. Following an evaluation, K.W. was placed into the highest level of treatment, a 2- to 3-year program for higher risk sex offenders referred to as the inpatient "Healthy Lives" sex offender program (iHeLP). K.W. started participating in iHeLP in February 2012, but was put on probation in the program in August 2014 due to a lack of progress. A report from August 2014 indicated that K.W. did not adequately manage risk factors, had volatile relationships with treatment staff and peers, and inconsistently demonstrated awareness of his mental health issues. Additionally, K.W. did not cooperate with supervision, including blaming his therapist for a lack of

perceived personal success in the program, rather than accepting constructive feedback or taking responsibility for his behavior. The August 2014 report stated that K.W. regressed into a stage of "'late contemplation'" from a stage of "'preparation'" due to not following through on his treatment. The report concluded that K.W. had "'minimal personal conviction toward working on [his] issues.'"

In September 2014, K.W. was ultimately terminated from the iHeLP program without completing it. The reasons for K.W.'s termination were "'treatment-interfering behaviors, interfering in the treatment of others, and lack of motivation.'"

From his review of K.W.'s institutional records, Dr. Levinson identified specific risks, needs, and issues for K.W., including impulsivity, irresponsibility, antisocial behavior, general social rejection, negative emotionality, poor insight and judgment, sex drive, sex preoccupation, sex as coping, and deviant sexual preference. Dr. Levinson also expressed concern regarding K.W.'s lack of veracity and consistency in self-reporting.

In assessing whether K.W. is a dangerous sex offender, Dr. Levinson also utilized actuarial diagnostic tools, specifically the "Static-99-R," the "Stable-2007," the "Hare Psychopathy Checklist-Revised," and the "Sex Offender Risk Appraisal Guide" (SORAG). The Static-99-R is a list of 10 factors related to sexual recidivism. Static-99-R results tend to stay static and not change over time. K.W. scored an 8 out of 12, which places him at a high risk for committing future sex offenses relative to other sex offenders. A score of 8 equates to approximately a 31-percent chance of sexually reoffending within 5 years.

The Stable-2007 assesses risk level and treatment needs by utilizing 13 risk factors. The factors assessed by the Stable-2007 are dynamic. The risk associated with them tends to change over time, especially when the person receives treatment. K.W. scored a 15 out of 26, which places him at a high risk overall to reoffend and at a high-need level for

treatment. Dr. Levinson identified a number of areas of concern for K.W. based on the Stable-2007 results, including capacity for stable relationships, impulsivity, sex drive, sex preoccupation, deviant sexual preference, lack of cooperation with supervision, hostility toward women, lack of concern for others, poor problem-solving skills, negative emotionality, and "sex as coping."

K.W. had previously been administered the Stable-2007 in March 2013 by a different care provider and had also received a score of 15. Dr. Levinson testified that it was concerning that K.W.'s score remained the same from 2013 to 2015, because he would expect a score to lower as an offender made progress in treatment.

Dr. Levinson also combined the Static-99-R and Stable-2007 scores to provide a broader idea of overall risk of recidivism. K.W.'s combined score placed him in the "very high risk" category.

The "Hare Psychopathy Checklist-Revised" assesses factors related to psychopathy. Dr. Levinson described a psychopath as "someone who is self-centered, self-indulgent, not particularly concerned with other people or any kind of rules . . . and tends to have the ability to manipulate others." K.W. scored 11 out of 40, which placed him as not having psychopathic traits.

The SORAG is a 14-item scale that predicts an offender's likelihood of engaging in violent behaviors, including sexually violent behaviors. K.W.'s score placed him between the fifth and sixth of nine "bins" where a score in the ninth bin is the highest risk level. Statistically, K.W.'s score showed a 45-percent chance of committing a violent offense within a 7-year period, and a 76-percent chance within a 10-year period.

Dr. Levinson also evaluated K.W. pursuant to the "criteria outlined in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition [and] Fifth Edition." He diagnosed K.W. with "pedophilia, sexually attracted to both males and

females[,] nonexclusive type"; "paraphilia, not otherwise specified with voyeuristic and pornographic tendencies"; post-traumatic stress disorder; and alcohol abuse. Dr. Levinson explained that K.W.'s diagnoses met the definition of mental illness under SOCA because they occurred over time, affected his mood, and impaired his abilities to interact socially and operate normally in society. Dr. Levinson also testified that K.W. suffers from a "personality disorder not otherwise specified with antisocial and borderline traits."

Based on K.W.'s diagnoses, Dr. Levinson opined that K.W. has the propensity to "engage in repeat acts of sexual violence" that would result in serious harm to others. Dr. Levinson based his opinion on the fact that K.W. has displayed a pattern of concerning behavior which makes it difficult for him to exist in a normal social setting, has committed crimes, and has displayed escalating actions over time.

In Dr. Levinson's opinion, inpatient treatment was the least restrictive treatment alternative for K.W., because without such treatment, K.W. would have serious difficulty in controlling or resisting his desire to commit future sex offenses. According to Dr. Levinson, only inpatient treatment would provide K.W. with the necessary amount of structure and support.

Dr. Mary Paine, a licensed clinical psychologist who had met K.W. and reviewed Dr. Levinson's evaluation, also testified at the hearing. Dr. Paine agreed with Dr. Levinson's assessment that K.W. was a dangerous sex offender. However, Dr. Paine believed that K.W. was an appropriate candidate for outpatient treatment. Dr. Paine opined that K.W. would do well in her outpatient treatment program because he wants to accept help and has nearly 2½ years in the iHeLP program. Dr. Paine acknowledged that K.W. scored at a high risk of recidivism on the actuarial assessments Dr. Levinson performed, but she testified that other factors were important as well, such as K.W.'s lack of violent offenses, his good base of treatment, his cooperative attitude, and her ability

to transfer K.W. to a higher level of care if necessary. Dr. Paine testified that she had developed an individualized treatment program for K.W., which included individual and group therapy immediately upon release; housing at a Christian halfway house for male sex offenders; strict rules regarding alcohol, drugs, and pornography; case management services; and polygraph tests.

At the conclusion of the hearing, the Board found by clear and convincing evidence that K.W. was a dangerous sex offender. The Board relied on K.W.'s diagnoses for mental illnesses (pedophilia, paraphilia, post-traumatic stress disorder, and alcohol abuse), as well as his diagnosis of a personality disorder. The Board also emphasized the testimony regarding K.W.'s impulsivity, lack of success in the iHeLP program, interfering with others during treatment, lack of motivation, and treatment-interfering behaviors. The Board noted that K.W. had been convicted of 10 counts of possession of child pornography. Lastly, the Board concluded that K.W. required inpatient treatment in accordance with Dr. Levinson's recommendation.

K.W. appealed the Board's decision to the district court. The district court affirmed, finding that the Board's decision was supported by clear and convincing evidence.

K.W. appeals to this court.

III. ASSIGNMENTS OF ERROR

K.W. argues that the district court erred in affirming the Board's determination that K.W. is a dangerous sex offender and that inpatient treatment is the least restrictive alternative.

IV. STANDARD OF REVIEW

[1,2] The district court reviews the determination of a mental health board de novo on the record. *In re Interest of S.J.*, 283 Neb. 507, 810 N.W.2d 720 (2012). In reviewing a district court's judgment under SOCA, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment. See *id.*

V. ANALYSIS

1. Dangerous Sex Offender

K.W. first argues that he does not qualify as a dangerous sex offender because his convictions were for noncontact sexual crimes and he has no history of violent offenses. We find no merit to K.W.'s argument.

[3] Under SOCA, a dangerous sex offender is defined as a person who suffers from a mental illness which makes him likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his criminal behavior, or a person who has a personality disorder which makes him likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his criminal behavior. Neb. Rev. Stat. § 83-174.01(1) (Reissue 2014). The State, through Dr. Levinson, presented evidence that K.W. met both definitions of dangerous sex offender. Dr. Paine agreed with Dr. Levinson's assessment. Nonetheless, K.W. argues that the State has failed to meet its burden. Therefore, we will address the statutory elements in turn.

(a) Mental Illness or Personality Disorder

The first element the State was required to prove in order to show that K.W. is a dangerous sex offender is that he suffered from either a mental illness or a personality disorder which makes him likely to engage in repeat acts of sexual violence. See § 83-174.01(1). "Mentally ill" means having a psychiatric disorder that involves a severe or substantial impairment of a person's thought processes, sensory input, mood balance, memory, or ability to reason which substantially interferes with such person's ability to meet the ordinary demands of living or interferes with the safety or well-being of others. Neb. Rev. Stat. § 71-907 (Reissue 2009) and § 71-1203. "Person with a personality disorder" means an individual diagnosed with

a personality disorder. § 83-174.01(4). "Likely to engage in repeat acts of sexual violence" means that a "person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public." § 83-174.01(2).

The State introduced evidence that K.W. suffered from both mental illness and a personality disorder. In particular, Dr. Levinson testified that he had diagnosed K.W. with "pedophilia, sexually attracted to both males and females[,] nonexclusive type"; "paraphilia, not otherwise specified with voyeuristic and pornographic tendencies"; post-traumatic stress disorder; and alcohol abuse. Dr. Levinson explained that K.W.'s diagnoses met the definition of mental illness under SOCA because they occurred over time, affected his mood, and impaired his abilities to interact socially and operate normally in society. Dr. Levinson further diagnosed K.W. with a "personality disorder not otherwise specified with antisocial and borderline traits."

K.W. argues that because he has "no history of committing violent offenses," he is not likely to commit sexually violent acts in the future. Brief for appellant at 13. However, Dr. Levinson noted that K.W.'s behavior has escalated over time, from "[w]indow peeping" at adults and adolescents to downloading images of child pornography. Dr. Levinson testified that K.W. had a propensity to engage in repeat acts of sexual violence which would harm others because he had difficulty existing in normal social settings. Additionally, the SORAG placed K.W. at a 45-percent chance of committing a violent offense within a 7-year period, and a 76-percent chance within a 10-year period. As is discussed more fully in the next section, § 83-174.01(2) does not require that there be a predicate "contact" sex offense to classify a person as being "likely to engage in repeat acts of sexual violence." The testimony of both experts in this case established that K.W. qualified as a dangerous sex offender. Dr. Levinson concluded, based on K.W.'s poor performance in the iHeLP program, combined

with his testing results, that K.W. was likely to engage in repeat acts of sexual violence. We can find nothing in the pertinent statutes which would require a past "contact" offense as a necessary element to such a conclusion. Accordingly, we conclude there was clear and convincing evidence by which the Board could find that K.W. suffered from either a mental illness or a personality disorder which made him likely to engage in repeat acts of sexual violence.

(b) Convicted of Sex Offense(s)

The second element the State was required to prove in order to show that K.W. was a dangerous sex offender was that he had been convicted of at least one sex offense if he suffered from mental illness or at least two sex offenses if he suffered from a personality disorder. See § 83-174.01(1). The knowing possession of any visual depiction of sexually explicit conduct involving a child is a violation of Neb. Rev. Stat. § 28-813.01 (Supp. 2015) and qualifies as a sex offense under SOCA. Neb. Rev. Stat. § 29-4003 (Cum. Supp. 2014) and § 83-174.01(5). Therefore, K.W.'s 10 convictions for possession of child pornography are sex offenses for purposes of SOCA.

[4] K.W. argues that his convictions for possession of child pornography should not qualify because they are noncontact crimes and they were his first felony convictions. However, the Legislature has determined that possession of sexually explicit images of children does qualify as a sex offense for SOCA purposes. See § 29-4003. In light of the Legislature's express statutory intent, we are without authority to determine that K.W.'s offenses do not qualify as sex offenses as he argues. See *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014) (stating that appellate court will not look beyond statute to determine legislative intent when words are plain, direct, or unambiguous). The State presented clear and convincing evidence that K.W. had been convicted of at least two sex offenses as defined by SOCA.

(c) Substantially Unable to Control His Criminal Behavior

The third element the State was required to prove in order to show that K.W. was a dangerous sex offender was that he was substantially unable to control his criminal behavior. See § 83-174.01(1). Being substantially unable to control one's criminal behavior means having serious difficulty in controlling or resisting the desire or urge to commit sex offenses. See § 83-174.01(6).

Dr. Levinson testified that K.W. struggled with impulsivity, poor insight and judgment, and irresponsibility. Additionally, K.W. was terminated from the iHeLP program due, in part, to his poor attitude and failing to adequately manage risk factors. Additionally, K.W.'s history showed repeated incidents of sexual offenses, escalating from "[w]indow peeping" on five occasions in the 1990's to the current charges of possession of child pornography. This constituted clear and convincing evidence by which the Board could find that K.W. was substantially unable to control his criminal behavior.

2. Inpatient Treatment

Lastly, K.W. argues that the district court erred in affirming the Board's determination that an inpatient program was the least restrictive treatment alternative. K.W. argues that the actuarial assessments are not accurate, because they are not individualized, and that other Nebraska SOCA cases requiring inpatient treatment involved sexual contact offenses, not possession of child pornography. We find no merit to this assignment of error.

[5] In addition to establishing that K.W. was a dangerous sex offender, the State has the burden of proving by clear and convincing evidence that neither voluntary hospitalization nor other alternative treatment less restrictive than inpatient treatment would prevent a dangerous sex offender from harming himself or others. See, Neb. Rev. Stat. § 71-1209 (Reissue 2009); *In re Interest of G.H.*, 279 Neb. 708, 781 N.W.2d 438 (2010).

The evidence at the hearing showed that K.W. had previously been unsuccessful in treatment. In particular, K.W. was discharged from the iHeLP program due to a lack of progress. K.W. did not cooperate well with supervision in the iHeLP program, blamed his therapist for his lack of progress, failed to take responsibility for his behavior, and regressed from a stage of "'preparation'" to a stage of "'late contemplation.'" K.W. had "'minimal personal conviction toward working on [his] issues.'" Additionally, K.W.'s discharge was due to his treatment-interfering behaviors, interfering with the treatment of others, and a lack of motivation.

The numerous actuarial tests Dr. Levinson administered all showed that K.W. was at a high risk of recidivism. Additionally, K.W.'s score on the Stable-2007 did not change from 2013 to 2015, a period which covered most of K.W.'s time in the iHeLP program. Dr. Levinson found the lack of change in K.W.'s Stable-2007 score to be concerning because an offender in treatment would usually expect to lower his or her score over time. The evidence of K.W.'s aversion to past treatment efforts supports the Board's determination that anything less restrictive than inpatient treatment would not be effective.

K.W. argues that the actuarial tests were poor tools because they were not individualized assessments. However, Dr. Levinson's recommendation for inpatient treatment did not rely solely on K.W.'s high scores on the actuarial assessments, but also on K.W.'s lack of success in the iHeLP program and his need for structure and support. There was clear and convincing evidence that neither voluntary hospitalization nor other alternative treatment would prevent K.W. from harming himself or others.

K.W. also argues that there are no other SOCA cases in which an offender was committed to inpatient treatment based on a noncontact offense such as possession of child pornography. However, K.W. points to nothing in the SOCA statutes which prohibits inpatient treatment for offenders who commit

the possession of child pornography. Rather, the proper test, as set forth above, is whether inpatient treatment was the least restrictive option which would prevent K.W. from harming himself or others. The State met its burden of proving that it was.

VI. CONCLUSION

We conclude that clear and convincing evidence supports the Board's determinations that K.W. is a dangerous sex offender and that inpatient treatment is the least restrictive treatment alternative. We therefore affirm the district court's order affirming the Board's decision.

Affirmed.

Arterburn, Judge, participating on briefs.

Sheena Ammon, Special Administrator of the Estate of Patricia Cody, appellant, v. Stephen Nagengast, M.D., and General Surgery Associates, LLC, appellees.

895 N.W.2d 729

Filed April 18, 2017. No. A-15-1184.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
2. ____: ____. 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 and otherwise adversely affected a substantial right of the appellant.
3. **Negligence: Liability: Damages.** Generally, an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable for all damages, both economic and noneconomic, jointly and severally.
4. **Negligence: Tort-feasors: Liability: Damages.** Under joint and several liability, either tort-feasor may be held liable for the entire damage, and a plaintiff need not join all tort-feasors as defendants in an action for damages.
5. **Tort-feasors: Compromise and Settlement.** If a plaintiff settles with one of the jointly and severally liable tort-feasors, then the plaintiff's recovery against the remaining tort-feasors is reduced by the actual settlement amount.
6. **Parties: Time.** The proper timeframe to consider whether there are multiple defendants is when the case is submitted to the finder of fact.
7. **Tort-feasors: Liability: Damages.** Under the comparative fault statutory scheme in Nebraska, joint tort-feasors who are defendants in an action involving more than one defendant share joint and several liability to the claimant for economic damages.

8. **Tort-feasors: Compromise and Settlement: Liability.** When the claimant settles with a joint tort-feasor, the claimant forfeits that joint and several liability.
9. **Tort-feasors: Compromise and Settlement.** The claimant cannot recover from the nonsettling joint tort-feasor more than that tort-feasor's proportionate share in order to compensate for the fact that the claimant made a settlement with another that may prove to be inadequate.
10. **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.
11. **Jury Instructions.** The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.
12. **Waiver: Appeal and Error.** Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief or during oral argument.

Appeal from the District Court for Otoe County: Jeffrey J. Funke, Judge. Affirmed.

Greg Garland, of Greg Garland Law, Tara DeCamp, of DeCamp Law, P.C., L.L.O., Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., and Kathy Pate Knickrehm for appellant.

William L. Tannehill and John P. Weis, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees.

Moore, Chief Judge, and Inbody and Pirtle, Judges.

Pirtle, Judge.

INTRODUCTION

Sheena Ammon, the special administrator of the estate of Patricia Cody, brought a medical malpractice action against Denise Husen Murry; Murry's employer, Sleep Tight Anesthesia, P.C.; St. Mary's Community Hospital; Stephen Nagengast, M.D.; and Nagengast's employer, General Surgery Associates LLC (GSA). Ammon alleged that the defendants were professionally negligent and that their joint and several acts proximately caused injury to and the death of her mother, Cody.

Prior to trial, the claims against several of the defendants were resolved by settlement. The case was tried to a jury, which returned a verdict in favor of the remaining defendants, Nagengast and GSA. Ammon timely appealed. Finding no reversible error, we affirm.

BACKGROUND

The underlying facts of this case are not in dispute. Cody underwent a medical procedure to remove abdominal adhesions at St. Mary's Community Hospital in Nebraska City, Nebraska, on January 23, 2012. Nagengast, a board-certified general surgeon who has been licensed to practice medicine in Nebraska since 1991, was scheduled to perform the surgery.

A certified nurse anesthetist (CRNA), Murry, assisted Nagengast. Murry was employed as an independent practitioner at the time of the surgical procedure. Nagengast experienced "difficulty insufflating" Cody at the start of the laparoscopic procedure, and opted to change to an "open technique." Roughly 5 minutes into the procedure, Murry alerted Nagengast that Cody was doing poorly and that the procedure needed to be aborted.

Cody no longer had a pulse, and her condition did not improve once the "insufflation gas" was removed. Nagengast testified that he was not informed of any change in Cody's condition until she was in cardiac arrest. Oxygen was provided to Cody and the "advanced cardiac life support" protocol, including the administration of cardiopulmonary resuscitation (CPR), began immediately. The medical staff performed CPR for 15 minutes, and after Cody's cardiac status resumed, she was transferred to a hospital in Lincoln, Nebraska, where she died on January 24, 2012.

Ammon, the special administrator of Cody's estate, brought a medical malpractice action against Murry, Sleep Tight Anesthesia, St. Mary's Community Hospital, Nagengast, and GSA. Ammon alleged that Murry, Nagengast, and St. Mary's Community Hospital were professionally negligent and that

their joint and several acts proximately caused the injury to and the death of Cody.

On November 14, 2014, St. Mary's Community Hospital was dismissed from this action with prejudice. Prior to trial, Ammon, Murry, and/or Sleep Tight Anesthesia reached a confidential settlement agreement, and the claims against them were dismissed with prejudice. The only remaining parties at trial were Nagengast and GSA (hereinafter collectively appellees).

At trial, the issue before the jury was whether Nagengast was professionally negligent in "failing to place . . . Cody in the Trendelenburg position and the Durant's position upon being notified the laparoscopic procedure should be aborted."

Raymond J. Lanzafame, M.D., is a general surgeon licensed to practice medicine in the State of New York. Lanzafame's videotaped deposition was presented at trial, and the video and the deposition transcript were entered as exhibits. He testified that it would have been appropriate for Nagengast to reposition Cody in the Trendelenburg position and the Durant's position. The Trendelenburg position is "head down," relative to the patient's feet, and the Durant's position features the patient on her left side, or in the "left lateral decubitus" position. He testified that the purpose of repositioning the patient would be to release an "airlock [or] gas bubble" that could have accumulated in the heart, preventing the flow of blood into the pulmonary circuit. This would allow a bubble to rise to the top and allow gravity to move blood through the heart.

Lanzafame testified that after attempting to reposition the patient, if the situation warranted, it would be proper to institute the advanced cardiac life support protocol. Lanzafame testified that Nagengast did not follow this standard of care and that this breach directly caused Cody's injuries, the result of which was death by permanent brain damage due to lack of oxygen.

He testified that if Nagengast had known Cody's "end tidal" carbon dioxide level had dropped before the arrhythmia, it would have made a heart attack much less likely as the primary event. Lanzafame testified that information regarding a drop in end tidal carbon dioxide was not communicated by Murry to Nagengast and that this information would have aided Nagengast's diagnostic process.

Nagengast testified that at the time Cody was transferred to the hospital in Lincoln, the doctors had ruled out pneumothorax, but had not ruled out myocardial infarction, arrhythmia, pulmonary embolism, or venous air embolism. It is difficult to rule out these conditions in an emergency setting because the proper equipment is not available in an operating room. Nagengast testified that after seeing additional evidence and studies, which were not available at the time Cody was treated, he was able to rule out some of those causes. He testified that there was "no doubt in [his] mind that she died of a venous air embolism," which is a very rare, but recognized, complication related to the surgery he performed.

Nagengast stated that positional changes, such as placing the patient in the Durant's position, are to be used, unless the patient has had a cardiovascular collapse. He testified that when a patient is in cardiopulmonary arrest, even from a venous air embolism, it is recognized that "you should proceed with CPR and not positioning changes." The advanced cardiac life support protocol is used to treat myocardial infarction, ischemic arrhythmia, pulmonary embolism, or venous air embolism. Nagengast testified that he met the standard of care of a reasonable surgeon under the circumstances and that if he were placed in the same situation again, he would follow the same procedure he used with Cody.

Greg A. Fitzke, M.D., is a general surgeon practicing medicine in Lincoln. He became board certified in 2005, and he testified as an expert witness in this case. Fitzke opined that the most appropriate action under the circumstances was to initiate CPR, rather than positional changes, because Cody was

in cardiac arrest. He testified that, in his opinion, Nagengast provided the expected standard of care, in all respects, under the circumstances.

Ammon's counsel objected to jury instructions Nos. 2 and 24, and the objections were overruled.

Jury instruction No. 2 stated as follows:

STATEMENT OF THE CASE—NEGLIGENCE
I. Plaintiff's Claims
A. ISSUES

This is a medical malpractice or professional negligence action filed by Sheena Ammon, as Special Administrator of the Estate of Patricia Cody, deceased, against Stephen Nagengast, M.D. and General Surgery Associates, LLC ("GSA") arising out of a surgical procedure performed on Patricia Cody on January 23, 2012.

There are two Defendants in this lawsuit. The interests of Dr. Nagengast and GSA are the same. If you find in favor of one of them, you must find in favor of both of them. If you find against one of them, you must find against both of them.

Plaintiff claims that Defendant Dr. Nagengast was professionally negligent in the following way:

1. In failing to place Patricia Cody in the Trendelenburg position and the Durant's position upon being notified the laparoscopic procedure should be aborted.

Patricia Cody was pronounced deceased on January 24, 2012. Plaintiff claims Patricia Cody's death was a result of the alleged professional negligence and seeks a judgment against the Defendants for the damages which she alleges resulted from Patricia Cody's death.

Dr. Nagengast and GSA admit that Dr. Nagengast had a patient relationship with Patricia Cody and provided surgical treatment to Patricia Cody on January 23, 2012. They deny that Dr. Nagengast was negligent in his treatment of Patricia Cody and further deny that any alleged departure from the standard of care by him was a

proximate cause of her death or of the damages claimed. Dr. Nagengast and GSA claim that Dr. Nagengast acted in a reasonable manner and in full compliance with all appropriate standards of care. They also denied the nature and extent of Plaintiffs damages.

B. BURDEN OF PROOF

Before the Plaintiff can recover against Dr. Nagengast and GSA, Plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That Dr. Nagengast was professionally negligent in one or more of the ways claimed by the plaintiff.

2 That any such professional negligence of Dr. Nagengast was a proximate cause of decedent's death.

3. That the death of the decedent was a proximate cause of some damage to her "next of kin"; and

4. The nature and extent of any pecuniary losses sustained by the "next of kin" as a result of the decedent's death. "Next of kin" is defined for you in Instruction No. 11.

C. EFFECT OF FINDINGS

1. If the Plaintiff has not met her burden of proof with respect to the Defendants, then your verdict must be for the Defendants, and you will use Verdict Form No. 1 (in favor of Dr. Nagengast and GSA).

2. If the Plaintiff has met her burden of proof with respect to the Defendants, then you must consider the defendant's affirmative defense.

Defendant's Defense

A. Issues

In defense of Plaintiff's claim, Defendants allege that if any negligence occurred, it was committed by Denise Murry, CRNA, in the performance of the surgical procedure in the following way:

1. Failing to inform Dr. Nagengast that Patricia Cody's end tidal CO_2 dropped prior to Patricia Cody experiencing cardiac arrhythmias.

B. Burden of Proof

In connection with Defendants' claim that Denise Husen (Murry), CRNA, was negligent, the burden is upon the defendants by the greater weight of the evidence to prove both of the following:

1. That Denise Husen (Murry), CRNA, was negligent in one or more ways claimed by the defendants;

2. That this negligence on the part of Denise Husen (Murry), CRNA, was a proximate cause of plaintiff's damages.

C. EFFECT OF FINDINGS

1. If the plaintiff has met her burden of proof and the defendant has not met his burden of proof, then your verdict must be for the plaintiff.

2. If the Plaintiff has met her burden of proof with respect to the Defendants and the Defendants have not met their burden of proof with respect to Denise Husen (Murry), CRNA, then you must use Verdict Form No. 2.

3. If the Plaintiff has met her burden of proof with respect to the Defendants and the Defendants have met their burden of proof with respect to Denise Husen (Murry), CRNA, then you must use Verdict Form No. 3 allocating their negligence.

(Emphasis in original.)

Jury instruction No. 24 explained how the jury would calculate damages if the jury determined the damages should be allocated between appellees and Murry.

The jury returned a unanimous verdict for appellees, using verdict form No. 1. Ammon timely appealed.

ASSIGNMENT OF ERROR

Ammon asserts:

> The trial court erred by submitting Instructions number[s] 2 and 24 and Verdict Forms 2 and 3 to the jury concerning the negligence of Husen (Murry) and apportionment of damages and in failing to properly instruct the

> jury concerning [Appellees'] negligence relative to their defense that [Cody's] injuries and damages were the proximate result of the actions or in-actions of others over whom they had no control.

STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, which an appellate court independently decides. *RM Campbell Indus. v. Midwest Renewable Energy*, 294 Neb. 326, 886 N.W.2d 240 (2016).

[2] 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 and otherwise adversely affected a substantial right of the appellant. *Scheele v. Rains*, 292 Neb. 974, 874 N.W.2d 867 (2016).

ANALYSIS

Ammon argues the trial court erred in submitting jury instructions Nos. 2 and 24, as well as verdict forms Nos. 2 and 3 to the jury. However, we note that verdict forms Nos. 2 and 3 were not included in the record. Only verdict form No. 1 is found in the record presented to us in this appeal. Citing Neb. Rev. Stat. § 25-21,185.10 (Reissue 2016) and *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001), Ammon asserts that only one defendant remained at the time the case was submitted to the jury and that the jury should not have been permitted to allocate a percent of damages or negligence to the defendants who were no longer part of the proceedings. She asserts that because appellees were the only remaining defendants when the case was submitted to the jury, the instructions regarding an allocation of negligence to Murry and Sleep Tight Anesthesia incorrectly stated the law and were misleading. We disagree.

Ammon's only assignment of error relates to the appropriateness of the jury instructions provided in this case and, more specifically, to whether Murry's negligence should have

been submitted to the jury under any circumstance. However, to be able to determine whether the court erred in giving instructions regarding the allocation of negligence, we must examine the applicability of the comparative fault statutes governing joint and several liability in civil actions.

[3-5] The Nebraska Supreme Court has considered the applicability of § 25-21,185.10 and Neb. Rev. Stat. § 25-21,185.11 (Reissue 2016) in situations similar to the circumstances of this case. Generally, under Nebraska common law, an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable for all damages, both economic and noneconomic, jointly and severally. *Tadros v. City of Omaha*, 273 Neb. 935, 735 N.W.2d 377 (2007). Under such joint and several liability, either tort-feasor may be held liable for the entire damage, and a plaintiff need not join all tort-feasors as defendants in an action for damages. *Id.* Also, in accordance with the underpinnings of joint and several liability, our common law follows the traditional rule that if the plaintiff settles with one of the jointly and severally liable tort-feasors, then the plaintiff's recovery against the remaining tort-feasors is reduced by the actual settlement amount. *Id.*

[6] Ammon argues that the provisions of § 25-21,185.10 are inapplicable because there was only one defendant in this case at the time the case was submitted to the jury. In *Maxwell v. Montey, supra*, the Nebraska Supreme Court explained that if the action does not involve multiple party defendants, then § 25-21,185.10 is not applicable. The proper timeframe to consider whether there are multiple defendants is when the case is submitted to the finder of fact. See *id.* Because Murry was no longer a defendant in Ammon's action at the time the case was submitted to the jury, we agree that § 25-21,185.10 is inapplicable to the question of apportionment of liability between appellees and Murry. However, unlike in *Maxwell v. Montey, supra*, Murry was not merely dismissed as a party—she was dismissed pursuant to a settlement agreement.

In *Tadros v. City of Omaha, supra*, the Nebraska Supreme Court determined that § 25-21,185.11 abrogated common law with regard to the apportionment of liability between a party defendant joint tort-feasor and a nonparty settling tort-feasor.

Section 25-21,185.11 states in full:

> (1) 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 claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.
>
> (2) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall preclude that person from being made a party or, if an action is pending, shall be a basis for that person's dismissal, *but the person's negligence, if any, shall be considered* in accordance with section 25-21,185.09.

(Emphasis supplied.)

We note that Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016) dictates the effect that a claimant's contributory negligence has on the claimant's recovery. There was no allegation of any contributory negligence chargeable to Cody, so § 25-21,185.09 is not applicable to this case.

Ammon asserts that Neb. Rev. Stat. §§ 25-21,185.07 to 25-21,185.12 (Reissue 2016), the statutes which govern civil actions to which contributory negligence is a defense, apply only to cases in which contributory negligence of the *claimant* is at issue. She argues that because Cody's negligence was not at issue, these statutes, specifically § 25-21,185.11(2), do not apply in this case.

Traditionally, contributory negligence is defined as "[a] plaintiff's own negligence that played a part in causing the plaintiff's injury . . . ." Black's Law Dictionary 1196 (10th ed. 2014). However, it also can be defined as "[t]he negligence of

a third party — neither the plaintiff nor the defendant — whose act or omission played a part in causing the plaintiff's injury." *Id*. at 1197. In this case, appellees asserted the negligence of a settling third-party tort-feasor as a defense; thus, this is a "civil action to which contributory negligence was asserted as a defense," and the provisions of the comparative fault statutes, including § 25-21,185.11, are applicable.

As reflected above, § 25-21,185.11(1) plainly states that after the claimant settles with a joint tort-feasor, the claims against other persons "shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact."

[7-9] Under the comparative fault statutory scheme in Nebraska, joint tort-feasors who are "'defendants'" in an action "'involving more than one defendant'" share joint and several liability to the claimant for economic damages. See *Tadros v. City of Omaha*, 273 Neb. 935, 941, 735 N.W.2d 377, 382 (2007). But, when the claimant settles with a joint tort-feasor, the claimant forfeits that joint and several liability. *Id.* The claimant cannot recover from the nonsettling joint tort-feasor more than that tort-feasor's proportionate share in order to compensate for the fact that the claimant made a settlement with another that may prove to be inadequate. *Id.*

The "Special Note" which follows NJI2d Civ. 2.01 provides guidance to us in this case and states in part:

> (§ 25-21,185.10 does not operate until the finder of fact has determined liability and is apportioning damages; "Because the statute's effect is on only the apportionment of damages between multiple defendants after liability has been established, the proper timeframe to consider in determining whether there are, in fact, multiple defendants in a case is when the case is submitted to the finder of fact"; *presumably, the just quoted rule does not apply when at least one defendant has been discharged from a lawsuit by a release, a covenant not to sue, or a similar agreement entered into by a claimant and a*

person liable; all of this is discussed further at NJI2d Civ. 5.04, Comment).

(Emphasis supplied.)

In the comment to NJI2d Civ. 5.04, the following appears:

> VII. HOW DAMAGES ARE APPORTIONED WHEN THERE WAS MORE THAN ONE TORTFEASOR BUT THERE IS ONLY ONE DEFENDANT IN THE CASE WHEN IT IS SUBMITTED TO THE TRIER OF FACT.
>
> . . . .
>
> For purposes of the application of Nebraska's comparative negligence statute, there are two ways this can occur, each with a different solution. There are two different ways to handle this situation, two different ways the trier of fact must be instructed, depending how the situation has arisen.
>
> The first jury-instruction situation itself arises either when there was only ever one putative joint tortfeasor in the case or when there was more than one but all but the one remaining were dismissed for reasons of pleading or proof [(e.g., failure to state a cause of action, failure to prove a prima facie case, etc.)] (This was the situation in Maxwell v. Montey, 262 Neb. 160, 631 N.W.2d 455 (2001).) In this case, the applicable statutory section is Neb.Rev.Stat. § 25-21,185.10 (Reissue 2008). *In this situation, no instruction on apportionment of damages is called for (or allowed).*
>
> The second jury-instruction situation arises when there was more than one putative joint tortfeasor in the case—either because the claimant originally sued or later brought into the case more than one alleged joint tortfeasor or a defendant brought other putative joint tortfeasors into the case—*and all but the one remaining alleged tortfeasor have been dismissed from the case pursuant to a release, covenant not to sue, or similar agreement. This includes the putative tortfeasor dismissed pursuant to a*

> *settlement with the plaintiff.* (This was the situation in Tadros v. City of Omaha, 273 Neb. 935, 942, 735 N.W.2d 377, 381 (2007).) *In this case, the applicable statutory section is Neb.Rev.Stat. § 25-21,185.11 (Reissue 2008). In this situation, jury instruction on apportionment of damages is required.*

(Emphasis supplied.)

In this particular case, the jury was instructed to determine whether Nagengast was professionally negligent in "failing to place . . . Cody in the Trendelenburg position and the Durant's position upon being notified the laparoscopic procedure should be aborted." If the jury found that Ammon had not met her burden of proof with respect to appellees, verdict form No. 1 was to be used. If the jury found that Ammon met her burden of proof with respect to appellees, then the jury was instructed to consider appellees' affirmative defense that "if any negligence occurred, it was committed by . . . Murry" for failing to provide information to Nagengast that would have assisted him in diagnosing and treating Cody's complications during the surgical procedure.

The jury was instructed to use verdict form No. 2 if it found Ammon had met her burden of proof with respect to appellees, and appellees failed to meet their burden of proof with respect to Murry. The jury then was instructed to use verdict form No. 3 if Ammon met her burden of proof with respect to appellees and appellees met their burden with respect to Murry.

Because § 25-21,185.11 mandates reduction by the settling tort-feasor's proportionate share of liability as determined by the trier of fact, the court did not err in allowing the jury to allocate negligence between appellees and Murry if the jury determined that Ammon had met her burden of proof with regard to appellees.

Ammon also asserts the trial court erred in providing instruction No. 24, which explained how the jury should total the amount of damages *if* the jury determined Cody's

damages were caused by both Nagengast and Murry. From the outset of the case, Ammon asserted that Murry was negligent in the performance of her professional duties during Cody's procedure. However, at the time of trial, Ammon argued that language related to Murry was misleading and prejudicial. The trial court overruled Ammon's objection to instruction No. 24.

The court determined that an allocation instruction regarding Nagengast's alleged negligence compared to Murry's alleged negligence was warranted. The court recognized the obligation to correctly instruct the jury and give adequate instructions to explain the effects of an allocation of negligence. The court specifically stated:

> The Court, in reviewing the evidence — there's been evidence presented, first that . . . Murry . . . was a defendant in a case that was released and dismissed prior to trial and before this case is submitted to the trier of fact. The Court believes, as a result of that, that may entitle an issue of allocation. The Court believes that the evidence presented in, specifically, Dr. Lanzafame's testimony and Dr. Nagengast's testimony is that they would have expected, as the surgeon in charge of the OR, to be told positive findings, such as a drop in end-tidal CO_2, and that would have been a relevant factor to be made aware of and may have had some impact on how they proceeded in — Dr. Nagengast proceeded in treating . . . Cody.

The evidence shows that Nagengast and Murry had worked together professionally and that they were expected to share information vital to the treatment of the patient. Nagengast testified that he relied on Murry to provide him with necessary information without being asked.

Ammon's own expert witness, Lanzafame, testified that, based upon his review of the evidence, Murry did not communicate information to Nagengast that would have been helpful in diagnosing the complications Cody experienced during

the surgical procedure. Lanzafame was asked whether the two healthcare providers, Nagengast and Murry, misdiagnosed the issue that Cody experienced, and he opined that "they" misdiagnosed the cause of Cody's "emergent issue." Lanzafame testified that in his personal experience, he had relied upon his participating anesthetist to communicate a patient's drop in carbon dioxide levels and stated that this information is important to properly treat a patient.

Prior to the close of Ammon's case, appellees' counsel made an offer of proof regarding "allocation against a released and dismissed defendant, under Nebraska Revised Statute § 25-21,185.11," and Ammon's counsel agreed, without objection. As a result, it would appear that Ammon settled her case with a joint tort-feasor, with the knowledge that an issue of allocation of negligence would be forthcoming before the end of the trial.

[10,11] 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. *RM Campbell Indus. v. Midwest Renewable Energy*, 294 Neb. 326, 886 N.W.2d 240 (2016). Given the pleadings, Ammon's allegations of professional negligence by Nagengast and Murry, and the evidence and testimony presented at trial, an instruction regarding the potential allocation of negligence was warranted. We find the trial court correctly instructed the jury (over Ammon's objections), including jury instructions Nos. 2 and 24, all of which appear to have been taken directly from the Nebraska pattern jury instructions. The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used. *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

Further, and perhaps most importantly, at the conclusion of their deliberations, the jury unanimously entered its verdict using verdict form No. 1, finding Ammon had not met her burden of proof against appellees, thereby finding in favor of appellees. Even if jury instructions Nos. 2 and 24 were given

in error, Ammon cannot show, on these facts, that she was prejudiced by the instructions, because the jury found Ammon had failed to prove her underlying case against appellees. Thus, the jury never reached the issue of comparative fault and verdict forms Nos. 2 and 3 were not used. Hence, any error by the court in giving instructions Nos. 2 and 24, and in allowing the jury to consider verdict forms Nos. 2 and 3, was harmless.

[12] Finally, during oral argument, Ammon's counsel asserted that because there were no opinions offered by any expert witness regarding a breach of the applicable standard of care by Murry, there could be no basis to determine her negligence. Although this argument was made in Ammon's reply brief, it was not assigned as error nor was it argued in Ammon's initial brief filed in this appeal. Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief or during oral argument. See *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

CONCLUSION

We affirm the decision of the district court, entering an order of judgment in favor of appellees, pursuant to the jury verdict rendered in this case.

Affirmed.

Dianne Jones, individually and on behalf of McDonald Farms, Inc., a Nebraska corporation, appellant, v. McDonald Farms, Inc., a Nebraska corporation, et al., appellees.

896 N.W.2d 199

Filed May 9, 2017. No. A-15-777.

1. **Actions: Equity: Accounting.** A derivative action which seeks an accounting and the return of money is an equitable action.
2. **Actions: Equity: Corporations.** An action seeking corporate dissolution is an equitable action.
3. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Corporations: Courts.** Although the Business Corporation Act gives the courts the power to relieve minority shareholders from oppressive acts of the majority, the remedy of dissolution and liquidation is so drastic that it must be invoked with extreme caution.
5. **Corporations.** The ends of justice would not be served by too broad an application of the authority to dissolve and liquidate a corporation under the Business Corporation Act, for that would merely eliminate one evil by the substitution of a greater one—oppression of the majority by the minority.
6. ____. A corporation is not required to pay dividends to its shareholders.
7. **Corporations: Stock.** Stock transfer restrictions are generally enforceable under Nebraska law unless they are unreasonable.
8. ____: ____. A stock restriction provision providing for book value as determined by independent certified accountants for a company in

accordance with generally accepted accounting principles is sufficiently certain to be enforced.

9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Hamilton County: Rachel A. Daugherty, Judge. Affirmed.

Andre R. Barry and Jonathan J. Papik, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Daniel M. Placzek, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellees.

Moore, Chief Judge, and Riedmann and Bishop, Judges.

Riedmann, Judge.

INTRODUCTION

A minority shareholder of a closely held family farm corporation brought an individual and a derivative action against the corporation and the majority shareholders claiming breach of fiduciary duty, misappropriation of corporate assets, and corporate oppression. Essentially, the minority shareholder took issue with the corporation's failure to pay dividends, its refusal to purchase her shares at a price she thought was fair, and its payment of commodity wages to the majority shareholders. Following a bench trial, the district court for Hamilton County entered judgment in favor of the corporation and majority shareholders. Finding that the minority shareholder failed to prove oppressive conduct, misapplication or waste of corporate assets, or illegal conduct by the majority shareholders, we affirm.

BACKGROUND

McDonald Farms, Inc., was incorporated in 1976 by Charles McDonald and Betty McDonald. Charles and Betty were the parents of four children: Donald McDonald, Randall McDonald, Dianne Jones, and Rosemary Johns (Rosemary).

Donald and Randall began farming with Charles in the mid-1970's. Charles resigned as president of the corporation in 1989, at which time Randall became president and Donald became vice president. At the time McDonald Farms was incorporated, Charles and Betty held majority interests in the corporation and Donald and Randall each held a minority interest. Upon Betty's death in 2010, her shares were devised equally to her four children. In June 2012, Charles gifted his stock equally to Donald and Randall. As a result, Donald and Randall each currently own 42.875 percent of the shares and Jones and Rosemary each own 7.125 percent of the shares. Charles passed away in March 2014.

McDonald Farms' assets include approximately 1,100 acres of irrigated farmland and dry cropland. Since 1991, McDonald Farms has leased its land to two corporations: D & LA Farms, Inc., a corporation owned by Donald and his wife, and R & T Farms, Inc., a corporation owned by Randall and his wife. The land is leased on a 50-50 crop share basis, and Donald and Randall perform the farming duties such as planting, harvesting, and selling the crops.

McDonald Farms was initially incorporated as a subchapter S corporation under the Internal Revenue Code, but in 1993, Charles decided to convert it to a subchapter C designation. A subchapter C corporation pays its own taxes and is treated as an entity separate from its stockholders. Phillip Maltzahn, who has worked as McDonald Farms' certified public accountant since 1990, testified that he recommends that farmers put their farming operation under a C corporation but leave the land out of the corporation.

According to Maltzahn, as a C corporation employee, a farmer should receive wages for his work in planting, harvesting, and selling crops. There are two ways for an employee to receive wages from the corporation: cash, which would be subject to Social Security and Medicare taxes, or commodity wages. Commodity wages are paid by transferring grain or another such commodity from the corporation to the employee,

and at the time of the transfer, a wage is created. It is the corporation's choice whether to pay wages in cash or commodities, but if it chooses commodities, the corporation avoids paying Social Security and Medicare taxes. Maltzahn's recommendation is that the farming corporation pay its employees via commodity wages. He said that it is not unusual for farmers to be paid in commodity wages in central Nebraska and that in fact, "[a]ll of [his] farm clients do that."

Maltzahn explained that when Charles converted McDonald Farms to a C corporation, Charles' desire was to pay as little in taxes as possible in order to build the size of the corporation. Because the corporate tax rate on the first $50,000 of net income is 15 percent, Maltzahn's goal, and Charles' goal, was to keep the corporation's annual taxable income at $50,000. According to Maltzahn, all shareholders benefit from a C corporation designation because the book value for the corporation increases each year by $50,000, minus the 15-percent federal tax liability. Maltzahn testified that he works for at least 100 other C corporations and that they all share the same goal of keeping net income around $50,000 annually in order to take advantage of the 15-percent tax rate. He said that planning to reduce taxable income takes a lot of tax planning, including timing business functions such as paying crop inputs, replacing assets, and paying commodity wages.

According to Maltzahn, Charles could have received compensation every year he ran the corporation, but he did not because he wanted to keep the cash in the corporation and grow it as large as possible. Donald and Randall also could have taken annual compensation for working for McDonald Farms since the 1970's, but they did not. However, McDonald Farms paid Charles commodity wages worth $10,019 in 2004 and $8,355 in 2005. Then in 2010, 2012, and 2013, grain prices were high, and McDonald Farms needed to reduce its income, so it again decided to pay commodity wages. In 2010, prior to Betty's death, Charles received 13,100 bushels of corn at a value of $50,173. Although Donald and Randall

were minority shareholders at the time, they received no profits. In June 2012, Donald and Randall became majority shareholders and they, along with Charles, each received 10,000 bushels of corn worth $77,100 for that year. In 2013, Charles received 21,667 bushels of corn valued at $157,200, and Donald and Randall each received 16,667 bushels of corn worth $120,000.

When considering the number of years Charles, Donald, and Randall worked for the corporation, Maltzahn did not believe the commodity wages they have been paid were disproportional. He said the commodity wages paid to Charles, Donald, and Randall in 2010, 2012, and 2013 were reasonable because the amount of unpaid wages accrued since 1976 was much larger than the actual amounts paid. Maltzahn said that McDonald Farms was not legally obligated to pay wages to Charles, Donald, and Randall, but it was optional for the corporation to do so. He recommended the corporation do so, however, as part of its tax planning strategy. Jones' expert, Christopher Scow, had no opinion as to whether the commodity wages paid were appropriate.

Maltzahn also explained that paying compensation via commodity wages in the years after the compensation is earned does not fit the definition of deferred compensation as that term is used in the Internal Revenue Code. Under the code, deferred compensation means compensation earned in 1 year is spread out and paid over multiple years so it falls under a lower tax bracket and the employee pays less taxes. To the contrary, McDonald Farms took income earned over multiple years and paid it in a lump sum in 1 year, a strategy which works as a tax detriment to the employees because their tax bracket is higher in the years the income is actually paid.

Under McDonald Farms' articles of incorporation, before selling, giving, or transferring any shares of stock, a shareholder must first offer the shares to the board of directors for purchase by the corporation "at the book value of said stock as determined by the books of the corporation by regular and

usual accounting methods." In January and August 2012, Jones offered to sell her shares to the corporation for $240,650. She claimed the price offered was the fair market value of the shares based on a December 2010 valuation report prepared by a certified public accountant for purposes of Betty's estate. Donald and Randall declined Jones' offer, but offered to purchase her shares for $47,503.90, a sum which represented the shares' book value as of December 2011 minus $6,000 which they claimed was lost by the corporation due to Jones' failure to return a form to the Farm Service Agency. At one point, Donald and Randall offered Jones more than book value for her shares, but no agreement was ever reached.

Jones commenced this action on April 1, 2013. She sought an accounting, damages for breach of fiduciary duty and conflicting interest transactions, and judicial dissolution of the corporation based on oppressive conduct, misapplication and waste of corporate assets, and illegal corporate conduct. Trial was held in January and February 2015, and the district court subsequently issued an order denying Jones' requests for relief. Relevant to this appeal, the district court found that the corporation's subchapter C designation and tax strategy, the payment of commodity wages, and the corporation's purchase of expensive equipment were not unreasonable or inappropriate. In addition, the court determined that the failure to purchase Jones' shares at her requested price did not establish oppressive conduct. Jones now appeals to this court.

ASSIGNMENTS OF ERROR

Jones claims the court erred in failing to dissolve the corporation under Neb. Rev. Stat. § 21-20,162 (Reissue 2012) because Donald and Randall (1) denied her any economic benefit from her shares while attempting to force her to sell her shares below their fair value, (2) misapplied and wasted corporate assets by making improper payments to themselves and Charles, and (3) acted illegally by taking improper deductions for payments to themselves and Charles. She also alleges

the court erred by not requiring Donald and Randall to return to the corporation improper payments directed to themselves and Charles to reduce the corporation's net income and in failing to recognize its power to require Donald and Randall to pay her fair value for her corporate shares.

STANDARD OF REVIEW

[1,2] A derivative action which seeks an accounting and the return of money is an equitable action. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). An action seeking corporate dissolution is also an equitable action. *Id*.

[3] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

ANALYSIS

Although Jones' complaint asserted four causes of action, on appeal, she only challenges certain decisions made by the district court. She asserts that the court erred in failing to provide a remedy pursuant to § 21-20,162 for corporate oppression, misapplication and waste of corporate assets, and/or illegal conduct. She asks that we remand this cause to the district court with directions ordering Donald and Randall to purchase her shares for fair value. We decline to do so, because we agree with the district court that Jones was not entitled to a remedy under § 21-20,162.

[4,5] At the time this action was commenced, the Business Corporation Act provided in relevant part:

> [T]he court may dissolve a corporation:
>
> . . . .
>
> (2)(a) In a proceeding by a shareholder if it is established that:

. . . .

(ii) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent; [or]

. . . .

(iv) The corporate assets are being misapplied or wasted.

§ 21-20,162. Although the Business Corporation Act gives the courts the power to relieve minority shareholders from oppressive acts of the majority, the remedy of dissolution and liquidation is so drastic that it must be invoked with extreme caution. See *Woodward v. Andersen, supra*. The Supreme Court has stated that the ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by the substitution of a greater one—oppression of the majority by the minority. *Id*.

Through this action and her arguments on appeal, Jones is essentially challenging McDonald Farms' tax strategy. Rather than attempting to reduce net taxable income to $50,000 per year in various ways such as paying commodity wages and timing the purchase of new assets, Jones argues the corporation should maximize its income and pay dividends to its shareholders. She claims its failure to do so constitutes oppressive conduct, misapplication or waste of corporate assets, and/or illegal conduct. The evidence presented at trial established that there is nothing inherently inappropriate about McDonald Farms' tax strategy or decision not to pay dividends.

[6] A corporation is not required to pay dividends to its shareholders. See Neb. Rev. Stat. § 21-2050(1) (Reissue 2012) (board of directors *may* authorize and corporation *may* make distributions to its shareholders subject to certain restrictions). The articles of incorporation specifically make payment of dividends discretionary. Jones argues, however, that the failure to pay dividends constitutes oppressive behavior. She claims that the corporation has over $13 million in

assets and no debt; therefore, it had the resources to pay a dividend.

The evidence reveals, however, that McDonald Farms has never paid dividends. Instead, management has chosen to operate the business in a manner that best reduces its taxation. Its accountant, Maltzahn, recommends farming corporations operate under a subchapter C designation with the goal of keeping taxable income around $50,000 in order to reduce its tax burden. Charles made the initial decision to select a subchapter C designation, and his desire was always to pay as little in taxes as possible in order to build the size of the corporation. Donald and Randall have continued to run the business as Charles had run it. Because Charles never paid dividends to shareholders, Donald and Randall never elected to do so either.

In order to reduce its taxable income each year, McDonald Farms strategically times the purchase of new equipment, the sale of crops, and the payment of commodity wages. Randall testified that although the corporation would strategically time major purchases, it never purchased assets for the sole purpose of reducing taxable income. In the several years leading up to this action, McDonald Farms replaced irrigation pivots, installed a new irrigation system, and replaced a "[grain] dryer and a leg." The expenditures were large, but as the district court determined, the evidence demonstrates that the purchases were thought out and necessary. The irrigation pivots replaced equipment that was more than 30 years old. The irrigation system was purchased after a drought year in which water restrictions were discussed for the area, and McDonald Farms applied for and received grants toward its purchase. The evidence established that the new system would provide long-term benefits and cost savings to the corporation.

When commodity prices were high and net income would have exceeded the $50,000 limit, Charles paid himself commodity wages upon the recommendation of Maltzahn. This first occurred in 2004 and 2005, before Jones was a shareholder.

Donald and Randall were both minority shareholders at the time, and no profits were distributed to them. Again, in 2010, Charles paid himself commodity wages. At the time, Donald and Randall were still minority shareholders and Jones had not yet received her shares. Neither of the minority shareholders received profits in 2010. In mid-December 2010, Jones and Rosemary became minority shareholders, and in 2012, Donald and Randall became majority shareholders. In 2012 and 2013, commodity wages were paid to Charles, Donald, and Randall.

As Maltzahn explained, payment of commodity wages is common for farming corporations, and although the amount paid in wages was determined by the corporation's desire to reduce its income to $50,000, Maltzahn was not concerned that the wages paid were unreasonable or excessive when considering the number of years Charles, Donald, and Randall had worked without pay. The payments equate to $302,747 to Charles and $197,100 each to Donald and Randall for their 35-plus years of work. Jones' own expert, Scow, could not opine whether the wages paid were appropriate, and he also conceded that an annual farm management fee of 7 percent to 10 percent of gross income would be reasonable. Maltzahn testified that using either the 7½-percent rate or the 10-percent rate, Donald and Randall still have not been fully compensated. Although the dissent states that "[t]he commodity wages paid to Randall, Donald, and Charles for alleged unpaid (and undocumented) past services are an unfair and unjustified business decision that was disguised as an acceptable tax reduction policy," no such opinion was offered at trial by any expert to contradict Maltzahn's testimony.

The only commodity payments made while Jones was a shareholder were the payments made in 2012 and 2013. The question before us is whether payment of those wages constitutes oppressive acts by the majority shareholders. Given Maltzahn's uncontroverted testimony that the payments were reasonable; the number of years Charles, Donald, and Randall

worked without compensation; and Scow's admission that an annual management fee of 7 to 10 percent of gross income would be reasonable, we find nothing illegal, fraudulent, or oppressive in either the decision to pay commodity wages or in the amount of the wages paid.

The dissent argues that the payment of commodity wages denies the minority shareholders their reasonable expectations of sharing in the profits. It relies upon *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663 (Iowa 2013), in which the Iowa Supreme Court adopted the reasonable expectations of a minority shareholder standard to assess minority shareholder claims of oppression. It is questionable whether the reasonable expectation standard applies to minority shareholders who have acquired their interest by gift or devise, because the test involves assessing the reasonable expectations held by minority shareholders "'in committing their capital to the particular enterprise.'" See, e.g., *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233, 256, 885 A.2d 365, 378 (2005); *Ford v. Ford*, 878 A.2d 894 (Pa. Super. 2005); *Mueller v. Cedar Shore Resort, Inc.*, 643 N.W.2d 56 (S.D. 2002). See, also, *Gimpel v. Bolstein*, 125 Misc. 2d 45, 477 N.Y.S.2d 1014 (1984) (explaining reasonable expectations test was not entirely appropriate where corporation had been in existence for many years and complaining shareholder had received share by gift or devise).

To the extent the reasonable expectations test may apply, "'oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the [minority shareholder's] decision to join the venture.'" *Matter of Wiedy's Furniture Clearance Center Co.*, 108 A.D.2d 81, 84, 487 N.Y.S.2d 901, 903 (1985). Accordingly, even *Fox v. 7L Bar Ranch Co.*, 198 Mont. 201, 209-10, 645 P.2d 929, 933 (1982), relied upon by the dissent, states that when defining oppression using the reasonable expectation standard, it must be done "'in light of the

particular circumstances of each case'" and that "'courts will proceed on a case-by-case basis.'" The court in *Fox* continued, stating that "[b]ecause of the special circumstances underlying closely held corporations, court[s] must determine the expectations of the shareholders concerning their respective roles in corporate affairs. These expectations must be gleaned from the evidence presented. . . . That is the province of the District Court . . . ." *Id.* at 210, 645 P.2d at 933.

The Montana Supreme Court addressed the reasonable expectations of a minority shareholder who claimed it was oppressive for the closely held corporation to deny dividends. Rejecting the argument, the court stated:

> [Plaintiff] complains that the Corporation pays no dividends, but he is well aware from his long involvement with the Corporation that it has historically not paid dividends. While failing to issue dividends to shareholders could be an oppressive tactic, the mere non-issuance of dividends is not oppressive in all circumstances. Here, the District Court concluded that neither [minority shareholder] had any capital investment—having received their shares as gifts—which would lead to an expectation of profits . . . .

Whitehorn v. Whitehorn Farms, Inc., 346 Mont. 394, 401, 195 P.3d 836, 842 (2008).

Likewise, in the present case, Jones did not have any capital investment—her shares were devised to her by her mother, Betty. She received her shares in December 2010 and sought to have the corporation buy her shares out in January 2012. During this 13-month duration, no commodity wages were paid, which makes suspect the dissent's claim that her reasonable expectations were violated as a result of payment of commodity wages. And based upon the history of the corporation, the minority shareholders had no reasonable expectation that profits would be paid out to them. Never, in the history of this corporation that was established in 1976, has a minority shareholder ever been paid profits.

That is not to say that the majority shareholders can retain all profits to themselves if doing so constitutes oppression; indeed, after determining that the evidence did not establish that the majority shareholders deprived Jones of any return on her share, the district court cautioned that "[i]t is quite possible that continuation of payment of commodity wages without the payment of dividends to shareholders would result in that finding, but based upon the evidence as was presented, the evidence at this time does not support a finding of oppression." This conclusion implies that the district court found Maltzahn's uncontroverted testimony credible that the amounts paid thus far as commodity wages were not disproportionate to back wages and, therefore, did not constitute oppressive behavior.

The dissent contends that payment of back wages in the form of commodity payments is "incredulous" in part because Donald and Randall were already "handsomely rewarded when they ultimately received 86 percent of a corporation with approximately 1,100 acres of farmland and other assets appraised at over $9 million in 2012." It claims the exclusion of profits to the minority shareholders "fails to consider the decision made by their parents to give each of the sisters a 7.125-percent share of the corporation. Presumably that decision was intended to confer some benefit on the sisters."

As correctly noted by the dissent, the value of the corporation was appraised at over $9 million when Jones was devised her 7.125-percent share in the corporation. The dissent attempts to shame Donald and Randall for the shares their parents obviously believed they deserved, stating:

> Receiving almost $4 million in farmland and other assets might be considered a fairly substantial "payment" for the brothers' efforts. The brothers have been generously rewarded for their loyalty to the family's farm operation, as signified by Charles' transferring his remaining stock to only Randall and Donald in June 2012.

But it disregards the fact that despite Jones' total lack of involvement in the family farm, her 7.125 percent equated to $641,250 in 2012 and continues to grow each year. It is not within the province of this court to judge the estate planning decisions of Charles and Betty. And it is important to remember that Charles, one of the incorporators of McDonald Farms, not only acquiesced, but also initiated and partook in the decision to pay commodity wages to the majority shareholders as a tax planning strategy beginning in 2004 when he first paid wages to himself. Jones has the ability to realize the benefit her mother, Betty, intended to bestow on her via the buyout provision in the articles of incorporation, but Jones is dissatisfied with the buyout formula.

Jones asserts that the payment of commodity wages was illegal deferred compensation, but as Maltzahn explained, the wages paid to McDonald Farms' employees were actually the opposite of the Internal Revenue Code's definition of deferred compensation.

Jones also claims that the corporation's refusal to pay fair value for her shares constitutes corporate oppression. The price Jones believes is fair for her shares is based on a valuation of McDonald Farms that had been performed for Betty's estate. However, McDonald Farms' articles of incorporation require that shares be offered for sale to the corporation "at the book value of said stock as determined by the books of the corporation by regular and usual accounting methods." Jones relies on *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663 (Iowa 2013), to argue that we should disregard the provision contained in the articles of incorporation because it does not provide fair compensation for minority shareholders. We agree with Jones that in *Baur*, the Iowa Supreme Court found that the specific provision in the bylaws of a closely held farming corporation regarding stock transfers was problematic because it potentially prevented the minority shareholder from receiving fair value for his shares. However, we note the limitations of *Baur*, in that the court expressed no view on whether the

price offered was outside the range of fair value and incompatible with the minority shareholder's reasonable expectations given a history of not having received dividends for several decades.

In *Baur v. Baur Farms, Inc., supra*, the original corporate bylaws included restrictions on transfers of the company's stock and established a stock redemption price of $100 per share. The bylaws were amended in 1984 to include a buyout provision. Under this provision, a shareholder wishing to sell his shares was required to first offer to sell them to the corporation or the other shareholders. If a different price was not agreed upon, the purchase price of the stock was set at the "'book value per share of the shareholders' equity interest in the corporation as determined by the Board of Directors, for internal use only, as of the close of the most recent fiscal year.'" *Id.* at 665. The 1984 amendment established a book value of $686 per share.

The minority shareholder attempted to sell his stock to the corporation for more than 20 years, but the parties were never able to come to a mutually agreed upon price in order to abide by the provision in the bylaws. Thereafter, the minority shareholder filed suit, requesting, among other forms of relief, payment of the fair value of his ownership interest. On appeal, the Iowa Supreme Court concluded that the record was not adequate to determine whether the price offered by the corporation for the purchase of the minority shareholder's shares was "so inadequate under the circumstances as to rise—when combined with the absence of a return on investment—to the level of actionable oppression." *Id.* at 677.

With respect to the stock transfer restriction contained in the bylaws, the Iowa Supreme Court noted that the parties had not been able to come to a mutually agreed-upon price, and the book value option was also problematic from the minority shareholder's perspective. Notably, the price per share ratified in 1984 was never formally revisited or revised, and according to the Iowa Supreme Court, the language of the book value buyout provision failed to address several important

questions: (1) whether book value must be set by express resolution of the board or may be determined from an inspection of the books of the corporation without formal action by the directors or shareholders; (2) whether annual determination of the book value for purposes of the bylaw provision was intended; and (3) whether the board, when setting the book value under the provision, must use asset values that are reasonably related to actual or fair market values and be based on generally accepted accounting principles. Essentially, the parties in *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663 (Iowa 2013), could not agree on how to calculate the book value of the stock under the corporation's bylaws.

The issue in the present case is different. Contrary to *Baur*, the issue in the instant case is not how to calculate the book value of Jones' shares, but, rather, whether limiting redemption to book value is so disproportionate to fair value as to constitute corporate oppression. The provision in McDonald Farms' articles of incorporation provides that the shares must be offered to the corporation for purchase at the book value of the stock as determined by the books of the corporation by regular and usual accounting methods. So the three questions raised by the provision in *Baur v. Baur Farms, Inc., supra*, are not present here, and Jones does not challenge the method by which book value is calculated. She does not contend that Donald and Randall's offer to buy her shares at $47,503.90 does not actually constitute book value. Instead, she claims that the book value of her shares is not fair, because the land owned by McDonald Farms was appraised at over $13 million. However, Maltzahn testified that book value includes capital stock, paid-in capital, and retained earnings. The real estate is included in the amount of paid-in capital only to the extent of its cost basis. To include the appreciation of the land in Jones' buyout number would require us to disregard the plain language of the transfer restriction.

[7,8] Stock transfer restrictions are generally enforceable under Nebraska law unless they are unreasonable. See, Neb.

Rev. Stat. § 21-2046 (Reissue 2012); *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006); *Elson v. Schmidt*, 140 Neb. 646, 1 N.W.2d 314 (1941). The Nebraska Supreme Court has determined that a stock restriction provision providing for book value as determined by independent certified accountants for a company in accordance with generally accepted accounting principles was sufficiently certain to be enforced. See *F.H.T., Inc. v. Feuerhelm*, 211 Neb. 860, 320 N.W.2d 772 (1982).

In *Elson v. Schmidt, supra*, after determining that a stock restriction requiring the stockholders to first offer the stock to the remaining stockholders at par value was not an unreasonable restraint upon the transfer of property, the Nebraska Supreme Court enforced the restriction as written. In doing so, it stated: "There is no merit in the contention of the appellant as to fraud, and his further contention that the amount received for the stock is unconscionable, as compared with the offer made by him is not an issue, when [the restriction] is held to be a valid contract." *Id*. at 653, 1 N.W.2d at 317.

In the present action, the stock transfer restriction is a valid contract; in accepting the stock, the shareholders agreed to the provisions contained in the articles of incorporation as to the value of redemption. Jones argues that the articles of incorporation should not govern the purchase of shares because Donald and Randall did not comply with them when Charles transferred his shares to them instead of first offering them to the corporation for purchase. We note, however, that Jones received her shares as a result of a testamentary devise upon Betty's death, an event that likewise would have required that they first be offered to the corporation for purchase.

Having found that the transfer restriction is enforceable as written, we conclude that Donald and Randall did not engage in oppressive conduct in rejecting Jones' offers.

[9] Based on the foregoing, we find that the district court did not err in finding insufficient evidence to establish oppressive conduct, misapplication or waste of corporate assets, or

illegal conduct. Jones also assigns that the district court erred in failing to require Donald and Randall to return to McDonald Farms the commodity wages paid to themselves and Charles and in failing to recognize its power to require Donald and Randall to pay fair value for her shares. However, we need not address those arguments, because we have determined that the payment of commodity wages was not inappropriate and that Donald and Randall were not obligated to purchase Jones' shares at her requested price. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016). Accordingly, we affirm the district court's decision.

CONCLUSION

We conclude that the district court did not err in finding that Jones failed to establish a basis for judicial dissolution of McDonald Farms based on oppressive conduct, misapplication or waste of corporate assets, or illegal conduct. We therefore affirm.

Affirmed.

Bishop, Judge, dissenting.

Shareholders may reasonably expect to share in a corporation's profits. However, in this case, the majority shareholders intentionally excluded the minority shareholders from receiving any portion of $628,500 in corporate profits (from 2012 and 2013) under the guise of "[c]ommodity [w]ages" they claimed were owed to them for their unpaid past services to McDonald Farms. This claim is incredulous for several reasons. First, there was no agreement between McDonald Farms and the majority shareholders to pay any wages for any work performed as an officer, director, or employee. Second, to the extent the brothers were entitled to some added benefit over their sisters because of their personal involvement with the corporation, they were handsomely rewarded when they ultimately received 86 percent of a corporation with approximately

1,100 acres of farmland and other assets appraised at over $9 million in 2012. Receiving almost $4 million in assets each might be considered a fairly substantial catch-up "payment" for the brothers' efforts. Finally, the notion that the commodity wages had to be paid as part of a tax strategy is not persuasive in light of reasons one and two. Although the district court concluded that the "evidence at this time does not support a finding of oppression," the court also stated, "It is quite possible that continuation of payment of commodity wages without the payment of dividends to shareholders would result in that finding . . . ." I dissent because the evidence does support finding the payment of commodity wages constituted oppressive conduct, and I would reverse, and remand for the district court to consider ordering equitable alternatives to dissolution of the corporation, as discussed later.

EVIDENCE RELEVANT TO COMMODITY WAGES

No Agreement or Other Documentation to Support Compensation for Past Services.

There was no evidence of any agreement between McDonald Farms and any shareholder for the payment of wages as an officer, director, or employee. Randall and Donald both testified they had no expectation of receiving wages from McDonald Farms, and neither could account by recollection, nor by any documentation whatsoever, as to the amount of time spent on McDonald Farms' business as opposed to the time each worked for his own farming corporation. Each brother represented he was spending 100 percent of his time working for his own farming corporation (R & T Farms, Inc., and D & LA Farms, Inc.), as reflected in the tax returns, the brothers' joint venture agreement, and/or each brother's employment agreement with his own corporation. In fact, Donald acknowledged that devoting 100 percent of his time to D & LA Farms included the time that he spent on McDonald Farms, "because it was all part of

the same thing." Indeed, the actual farming of the land owned by McDonald Farms was done by Randall and Donald through their respective corporations. Instead of paying rent for the land, they simply shared the harvested crop on a 50-50 basis with McDonald Farms. McDonald Farms, in turn, provided irrigation equipment and grain bins, and it shared equally the costs for seed, fertilizer, and other expenses associated with the crop. Randall acknowledged that the "tenant" made decisions about when to plant and what seed to purchase.

Further, although Randall testified that he did not know whether Charles held any positions as an officer of McDonald Farms after his resignation as president in 1989, the schedule E in the 2009 and 2010 corporate tax returns provides for compensation of officers, and the schedule shows Charles, Betty, Randall, and Donald all listed as officers. The schedule E further shows that during both those years, Charles devoted 100 percent of his time to McDonald Farms, Betty devoted only 10 percent of her time, Randall devoted only 10 percent of his time, and Donald devoted only 10 percent of his time. Accordingly, the evidence shows that Charles was still primarily running the corporation at least until 2010 and that not a significant amount of Randall's or Donald's time was spent running McDonald Farms. Additionally, when Randall was questioned about what his responsibilities were with regard to managing McDonald Farms, he had difficulty describing his duties. The following colloquy took place:

> [Counsel for Jones]: What were you doing on behalf of McDonald Farms when you became president?
>
> [Randall]: Um, paying bills, whatever needed to be done, I did.
>
> [Counsel for Jones]: What else needed to be done besides pay bills for McDonald Farms?
>
> [Randall]: Whatever it took to operate the corporation.
>
> [Counsel for Jones]: What, other than paying bills, did it take to operate the corporation?
>
> [Randall]: Whatever it takes.

[Counsel for Jones]: Okay. Do you have anything specific in mind under "whatever it takes" other than paying bills?

[Randall]: To operate the corporation?

[Counsel for Jones]: Right.

[Randall]: No, I guess not.

[Counsel for Jones]: There's nothing that needs to be done to operate McDonald Farms other than pay bills?

[Randall]: Well, operate — do what — to operate McDonald Farms?

[Counsel for Jones]: Right.

[Randall]: Pay taxes. Um, yeah, I don't know what else to say, I guess.

[Counsel for Jones]: So in order to operate McDonald Farms, you need to pay taxes, correct?

[Randall]: Well, have to pay taxes, yes.

[Counsel for Jones]: And pay other bills?

[Randall]: Correct.

[Counsel for Jones]: And there's nothing else that needs to be done to operate McDonald Farms?

[Randall]: I'm sure there is.

[Counsel for Jones]: You're the president, right?

[Randall]: Right.

[Counsel for Jones]: Tell me what it is.

[Randall]: Whatever needs to be done.

Randall also testified that his mother, Betty, continued to keep the corporate checkbook even after Randall became president. Randall took custody of the corporate checkbook "[p]robably after [his father, Charles,] g[a]ve up his shares in 2012." Upon questioning from his own attorney, Randall indicated that as employees and officers of McDonald Farms, he and Donald serviced irrigation pivots, grain bins, and equipment. Randall said that he and Donald also spread fertilizer, purchased liability and crop insurance, and made sure McDonald Farms was participating in government programs. When asked how he knew when he was working for

McDonald Farms and when he was working for his own farming business, Randall said, "If I'm working on McDonald Farms' grain bins, their pivots, if I'm maintaining wells, engines, anything McDonald Farms owns, I'm working for McDonald Farms." When asked if he expected McDonald Farms to compensate him, Randall responded, "I guess I never thought about it a whole lot, so probably not." When asked how much more he thought he was owed in back wages, Randall said, "I have no idea." And when asked if he had even started to calculate that, Randall replied, "No," and he had "[n]o idea" whether he was done paying back wages to Donald and himself.

The accountant for McDonald Farms, Phillip Maltzahn, opined that the commodity wages paid to Charles, Randall, and Donald were reasonable "[b]ecause the amount of unpaid wage from 1976 through 2010, '11, '12, '13, would have been much, much larger than the actual amounts paid." Maltzahn acknowledged that he referred to the commodity wages as deferred compensation when his depositions were taken in 2014. He explained that his use of the deferred compensation terminology was to explain it was not a legal obligation for McDonald Farms to pay Randall and Donald, but that "[m]orally it was owed to them . . . ." Apparently, Maltzahn was not aware that deferred compensation had to be treated differently today than when he worked for the Internal Revenue Service in the 1970's. Maltzahn also admitted that commodity wages were not properly noted on the 2012 tax return and that nothing had been done to correct that—no amended return had been filed, nor was he planning to file one. He explained that filing an amended return was unnecessary, since there would be no net income increase because it would show additional income (commodity wages) but would also deduct the same amount. There was no testimony by Maltzahn regarding any kind of accounting record maintained to track past services rendered by Charles, Randall, or Donald, for which payment would later be expected.

Brothers' Efforts Already Compensated Through Ownership Interests.

Randall and Donald justified distributing commodity wages only to themselves rather than sharing the profits with their sisters because their sisters had not "done anything" for McDonald Farms. This explanation suggests that Randall and Donald believe they are entitled to take all the profits from the corporation due to their personal involvement with the family farming business. Randall testified:

> [Counsel for Jones]: And when you paid commodity wages to yourself, did you consider paying those out as dividends to the minority shareholders?
>
> [Randall]: No.
>
> [Counsel for Jones]: Why not?
>
> [Randall]: They weren't — they hadn't worked anything — it was a wage. It was back wages is what we did. They hadn't done anything for the corporation.
>
> [Counsel for Jones]: So you considered that was back wages, and they hadn't done anything for the corporation, so the shareholders weren't entitled to that?
>
> [Randall]: Correct.

This explanation, however, fails to consider the decision made by their parents to give each of the sisters a 7.125-percent share of the corporation. Presumably that decision was intended to confer some benefit on the sisters. The entitlement (to all profits) position further strains credulity in light of Randall and Donald together receiving 86 percent of the corporation's stock from their parents—a corporation appraised at over $9 million in 2012. Receiving almost $4 million in farmland and other assets might be considered a fairly substantial "payment" for the brothers' efforts. The brothers have been generously rewarded for their loyalty to the family's farm operation, as signified by Charles' transferring his remaining stock to only Randall and Donald in June 2012.

McDonald Farms owns approximately 1,100 acres of irrigated (pivot, gravity, and drip) and dry cropland with building improvements. Building improvements include a grain storage facility with an estimated capacity of 305,000 bushels, two Quonset buildings, three machine sheds, a barn, a garage, and a home. An appraisal in 2012 placed a value of $9,195,000 on the land, bins, and irrigation pivots. Randall acknowledged this to be "a fair number at the time [he] sat down with . . . Maltzahn in 2012." McDonald Farms generates revenue in one way—by leasing farmland, and it always leases that land to R & T Farms and D & LA Farms.

Despite being given 86-percent ownership of this $9 million entity, the brothers nevertheless suggest they are entitled to receive additional payments for past unpaid services given to the corporation; services for which they can barely describe and have no agreements or records to support.

Tax Strategy Cannot Justify Random, Unsupported Payments to Only Majority Shareholders.

The explanation provided by the majority shareholders and the corporation's accountant for how they arrived at the amount of commodity wages to be paid had nothing to do with any accounting of time and services provided to the corporation by each shareholder; rather, it was solely about paying out any profits to reduce the corporation's taxable income to $50,000. McDonald Farms was in the business of leasing farmland, with its primary asset being the corporation's ownership of approximately 1,100 acres of land; the corporation had no debt. In order to reduce McDonald Farms' taxable income to $50,000 each year, excess profits were used to purchase new equipment, prepay expenses for the next year, and pay commodity wages.

When Randall was asked about paying his father, Charles, $50,173 in commodity wage payments in 2010, the following exchange took place:

[Counsel for Jones]: That payment was not based on a calculation of [Charles'] contributions to the management of the company?

[Randall]: I don't know how [Maltzahn] c[a]me up with it.

[Counsel for Jones]: So you didn't come up with the calculation?

[Randall]: No.

[Counsel for Jones]: You didn't make a decision about what [Charles] had contributed to the company in making that payment?

[Randall]: No.

[Counsel for Jones]: And the same would be true of the commodity wage payments that were made to [Charles] in 2012?

[Randall]: Correct.

[Counsel for Jones]: You didn't make any calculation on what he had contributed to the company to justify those payments?

[Randall]: Correct.

[Counsel for Jones]: Now, the commodity wage payments to you and Don in 2012 and 2013 are the same, right?

[Randall]: Correct.

[Counsel for Jones]: And when you made those payments, you did not consider the specific services that each of you provided to McDonald Farms?

[Randall]: It was wages for McDonald Farms — from McDonald Farms. I don't know if we specified specific things that we did to earn them wages.

. . . .

[Counsel for Jones]: You didn't have any time sheets or other records of work actually performed when you did this, did you?

[Randall]: No.

> [Counsel for Jones]: You didn't look at what others who provide similar services for other corporations did, did you?
>
> [Randall]: No.
>
> [Counsel for Jones]: Did you consider what an independent investor would consider reasonable in terms of what the commodity wages were?
>
> [Randall]: No.
>
> [Counsel for Jones]: You didn't consider what Rosemary or [Jones] might think of the commodity wages?
>
> [Randall]: No.
>
> [Counsel for Jones]: Certainly didn't consult with them?
>
> [Randall]: They don't know what we've done for the corporation.
>
> [Counsel for Jones]: You didn't go to them and say this is what we've done and what we think we deserve?
>
> [Randall]: No.
>
> [Counsel for Jones]: And it didn't even cross your mind to do that?
>
> [Randall]: No.

Randall acknowledged that if it looked like McDonald Farms was going to realize more than $50,000 in income, then he would sit down with the accountant and try to figure out ways to get the net income down to $50,000. The decision on how to do that was not based on any prior corporate planning; rather, the decisions appeared fairly random. Sometimes commodity wages were paid. Sometimes fertilizer was prepaid. And sometimes, new equipment was purchased. As an example, the 2009 profit and loss worksheet was showing the corporation's net income was likely to be $477,450 that year, so to get that net income down to $50,000, McDonald Farms bought a new "[grain] dryer and a leg" ($210,228), even though the brothers had planned to make that purchase through their corporations. While this purchase added value to McDonald Farms, it obviously was a significant personal

savings to the brothers by not having to make that investment through their own corporations. The same could be said for the irrigation systems purchased by McDonald Farms in 2012 ($174,043) and 2013 ($173,716). And although there is some merit to Jones' arguments about possible conflicts of interests between the brothers acting in their personal capacities for their own farming corporations versus acting in their capacities as majority shareholders of McDonald Farms when making these purchasing decisions, this dissent focuses only on the oppressive nature of the commodity wages.

ANALYSIS

Payment of Commodity Wages for Undocumented Past Services Is Oppressive Conduct.

The majority states, "Through this action and her arguments on appeal, Jones is essentially challenging McDonald Farms' tax strategy." I do not see Jones' arguments being limited in this way. Although Jones does take issue with how the corporation's tax strategy deprives minority shareholders of any profits, she largely takes issue with how the corporation has elected to take corporate profits and distribute them as commodity wages (for past services) to some shareholders instead of paying dividends to all shareholders. Of the $628,500 paid in commodity wages from 2012 to 2013, each sister would have been entitled to 7.125 percent of those profits if they had been distributed as dividends. (Although Jones and her sister acquired their interest in the corporation upon the passing in 2010 of their mother, Betty, this dissent addresses only the 2012 and 2013 commodity wage distributions which were made when the brothers had become majority shareholders.)

Most of the testimony at trial was focused more on the payment of commodity wages for past services than it was on the equipment purchases or other expenses paid for by the corporation. Jones, for example, did not object to the corporation's

purchase of the irrigation pivots. She argues that when considering capital improvements, a corporation should also consider paying dividends. Further, any increase in the value of the corporation from capital improvements did not benefit her because Randall and Donald "have refused to pay her fair value for her shares." Brief for appellant at 27. Both she and her sister, Rosemary, testified they had not received any economic benefit from their shares in the corporation. Rosemary did, however, have the benefit of living "on the homeplace" which is located on McDonald Farms' land. She does not pay rent for the house, barn, and two lots there; however, she testified that it is "very stressful living there" because "they [presumably her brothers] don't want me there."

So the primary issue is not the general concept of trying to keep the corporation's taxable income at $50,000 to stay within the 15-percent tax bracket, as there are certainly equipment investments and prepaid business costs that improve the overall business operation and add value. Rather, the problem arises when an arbitrary figure is created to pay out remaining net income only to the majority shareholders, and that figure is based on accounting practices that were speculative (no agreements on past wages, no records of specific services rendered, no time records), or even nonexistent (commodity wages paid in 2012 were not reported on the corporation's tax return). So the issue is not by itself the goal of reducing the corporation's taxable income to $50,000; rather, it is whether Randall and Donald exercised their fiduciary duty of good faith and fair dealing with Jones and Rosemary when they made the decision to distribute profits only to themselves under the guise of commodity wages instead of distributing those profits in proportionate shares to all shareholders.

An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders, and is treated by the courts as a trustee. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). Although the burden is ordinarily upon the party seeking an accounting to produce

evidence to sustain the accounting, when another person is in control of the books and has managed the business, that other person is in the position of a trustee and must make a proper accounting. *Id*. The burden of proof is upon a party holding a confidential or fiduciary relation to establish the fairness, adequacy, and equity of a transaction with the party with whom he or she holds such relation. *Id*. As noted in *Woodward*, once the fiduciary relationship between the parties is established and evidence is presented that certain transactions existed that allegedly breached a fiduciary duty, the burden shifts. In this case, the burden shifted to Randall and Donald to prove the fairness, adequacy, and equity of the commodity wage distribution to themselves and their father, Charles. In my opinion, they failed to meet this burden.

Randall and Donald failed to provide any reliable authority, nor a proper factual basis, to demonstrate the appropriateness or fairness in the distribution of commodity wages in the manner present here. The notion that majority shareholders can simply pay themselves any amount of money for past services without the existence of any agreement with the corporation, without any expectation that wages would ever be paid, and without any documentation or specificity of past services performed, belies the concept of fair dealing with other shareholders. It is clear the district court had some concern about the evidence presented, but was perhaps hesitant to compel dissolution of this family farming corporation. That is understandable. It has been widely observed that courts are reluctant to apply the drastic remedy of statutory dissolution, especially in proceedings by a shareholder; and because dissolution and liquidation is so drastic, it must be invoked with extreme caution. See *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013). The district court in the present case concluded:

> Based upon the evidence presented at trial as set forth above, the Court finds that the evidence does not establish the conduct of the majority shareholders was such

> as to deprive [Jones] of any return on her shares. It is quite possible that continuation of payment of commodity wages without the payment of dividends to shareholders would result in that finding, but based upon the evidence as was presented, the evidence at this time does not support a finding of oppression.

There is no clear authority in Nebraska as to exactly what might constitute oppression; thus, it is unclear on what basis the district court reached its conclusion that the evidence did not support a finding of oppression. We know that oppression does not include simply being unkind or mistrusting, see *Detter v. Miracle Hills Animal Hosp.*, 12 Neb. App. 480, 677 N.W.2d 512 (2004), *overruled in part on other grounds, Detter v. Miracle Hills Animal Hosp.*, 269 Neb. 164, 691 N.W.2d 107 (2005); nor does it include the failure to hold shareholders' meetings or appoint a second director, see *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). Further, neither the Business Corporation Act applicable in this case, nor the new Nebraska Model Business Corporation Act, § 21-201 et seq. (Cum. Supp. 2016) (operative January 1, 2017), provide any guidance on what constitutes oppressive conduct. Therefore, it is helpful to consider decisions in other states which involve alleged oppressive conduct in closely held farming or ranching corporations.

In *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663 (Iowa 2013), the Iowa Supreme Court similarly noted the absence of any definition of oppressive or oppression in Iowa's Business Corporations Act. *Baur Farms, Inc.* observed that its court of appeals had examined the decisions of other jurisdictions and "concluded oppression is 'an expansive term used to cover a multitude of situations dealing with improper conduct which is neither illegal nor fraudulent.'" 832 N.W.2d at 670. *Baur Farms, Inc.* quoted from an Oregon case as an example of oppression:

> "[T]he case of the shareholder-director-officers refusing to declare dividends, but providing high compensation

> for themselves and otherwise enjoying to the fullest the 'patronage' which corporate control entails, leaving minority shareholders who do not hold corporate office with the choice of getting little or no return on their investments for an indefinite period of time or selling out to the majority shareholders at whatever price they will offer."

832 N.W.2d at 670.

Baur Farms, Inc. further noted:

> Other jurisdictions have developed several sometimes overlapping standards for evaluating minority shareholders' claims of oppression in closely held corporations. Some have concluded oppression is "'burdensome, harsh and wrongful conduct' . . . or 'a visible departure from the standards of fair dealing and a violation of fair play on which every shareholder who entrusts his money to a corporation is entitled to rely.'" . . . Other courts have linked oppression to the derogation of the fiduciary duty "of utmost good faith and loyalty" owed by shareholders to each other in close corporations. . . .
>
> A third approach, now perhaps the most widely adopted, links oppression to the frustration of the reasonable expectations of the corporation's shareholders. . . .
>
> Courts applying the reasonable expectations standard have granted relief when the effect of a majority shareholder's conduct is to deprive a minority shareholder of any return on shareholder equity.

832 N.W.2d at 670-71 (citations omitted).

Baur Farms, Inc. also addressed oppression in the context of stock transfer price restrictions, stating, "[s]ome courts have declined to enforce transfer price restrictions determined by formulas producing transfer prices so small in relation to the true value of the shares as to make the restrictions unconscionable or oppressive." 832 N.W.2d at 671. The Iowa Supreme Court adopted a "reasonableness standard" for evaluating minority shareholder claims of oppression, noting that

"[m]anagement-controlling directors and majority shareholders of such corporations have long owed a fiduciary duty to the company and its shareholders." *Id*. at 673-74. Further, this duty "encompasses a duty of care and a duty of loyalty to the corporation" as well as a duty to "conduct themselves in a manner that is not oppressive to minority shareholders." *Id*. at 674. The Iowa Supreme Court held that "majority shareholders act oppressively when, having the corporate financial resources to do so, they fail to satisfy the reasonable expectations of a minority shareholder by paying no return on shareholder equity while declining the minority shareholder's repeated offers to sell shares for fair value." *Id*. With regard to determining fair value, the court stated:

> Where stock transfer restrictions have provided for purchase by a corporation at book value, some courts have concluded the restrictions may be enforced if the value has been determined in accordance with generally accepted accounting practices. [Citations omitted.] Significant discrepancies between market value and book value have cast doubt on the enforceability of provisions requiring transfers at book value. [Citations omitted.] Courts will thus consider whether the accounting methods used in establishing book value are fair and equitable to all the parties involved, and where arbitrary valuations appear on the books, courts have substituted values derived from acceptable accounting procedures.

Baur v. Baur Farms, Inc., 832 N.W.2d 663, 675-76 (Iowa 2013).

As in the case before us, *Baur Farms, Inc.* also involved a closely held corporation in which the minority shareholder "has no access to an active market in its shares that might allow his realization of a return on his equity position." 832 N.W.2d at 676. And like the minority shareholder in *Baur Farms, Inc.*, Jones lacks the "voting power to force the board of directors to set a book value that is reasonably related to the fair value of the company's assets." 832 N.W.2d at 676.

Because the district court in *Baur Farms, Inc.* had dismissed the case after the minority shareholder's presentation of evidence, the Iowa Supreme Court reversed, and remanded for the district court to take any additional evidence to determine the fair value of minority shareholder's equity interest in the corporation, and to apply the reasonable expectation standard it adopted in its opinion to determine if the corporation had acted oppressively. And, notably, if the conduct was determined to be oppressive, *Baur Farms, Inc.* acknowledged the district court's equitable authority to be "flexib[le] in resolving the dispute." 832 N.W.2d at 677.

Another state has carefully considered the issue of oppression in a closely held ranching corporation. The Montana Supreme Court has stated, "Oppression may be more easily found in a close-held, family corporation than in a larger, public corporation." *Skierka v. Skierka Bros., Inc.*, 192 Mont. 505, 519, 629 P.2d 214, 221 (1981). And in *Fox v. 7L Bar Ranch Co.*, 198 Mont. 201, 209, 645 P.2d 929, 933 (1982), it stated, "Shares in a closely held corporation are not offered for public sale. Without readily available recourse to the market place, a dissatisfied shareholder is left with severely limited alternatives if one group of shareholders chooses to exercise leverage and 'squeeze' the dissenter out." The Montana Supreme Court also noted that while many courts hold that "'oppression suggests harsh, dishonest or wrongful conduct,'" there are other courts that "find it helpful to analyze the situation in terms of the 'fiduciary duty' of good faith and fair dealing owed by majority shareholders to the minority." *Id.* And "'other commentators have developed a definition for oppression in terms of "the reasonable expectations of the minority shareholders in light of the particular circumstances of each case." . . .'" *Id.* at 209-10, 645 P.2d at 933.

Fox v. 7L Bar Ranch Co., supra, involved a closely held family corporation (7L Bar Ranch) consisting of 17,600 acres of largely grazing land which was being leased at considerably less than its market value. The 7L Bar Ranch corporation

was interrelated to two other family corporations, one of which was the sole user of 7L Bar Ranch's grazing land. A dispute arose between two brothers. One brother claimed that the cashflow of the corporation in which he had a 50-percent interest was controlled by one in which he had a 25-percent interest; the complaining brother never received any dividend or remuneration of any kind from any of the corporations even though two of the businesses showed retained earnings of over $400,000 and one of them had cash assets that exceeded $400,000. The Montana Supreme Court agreed that this interrelationship of corporations allowed one brother to control whether a profit was made by any corporation in which the other brother held stock. The court noted:

> "Although dividend withholding is used as a squeezeout technique and is used in corporations of all sizes, this technique (indeed practically all squeeze techniques) is applied most frequently in close corporations . . . . 'Most of the abuses in the field of dividend policy have occurred among the smaller corporations, especially in cases where there is a concentrated control in a single family.' . . ."

Id. at 211, 645 P.2d at 934. The court went on to say:

> "The enterprise before us is a 'close corporation' in the strictest sense, that is, one in which, regardless of the distribution of the shareholdings, 'management and ownership are substantially identical' . . . . In such a case, it seems almost self-evident, the fiduciary obligation of the majority to the minority extends considerably beyond what would be its reach in the context of a larger or less closely held enterprise. Here the relationship between the shareholders is very much akin to that which exists between partners or joint venturers."

Fox v. 7L Bar Ranch Co., 198 Mont. 201, 213, 645 P.2d 929, 935 (1982).

The Montana Supreme Court observed that "[t]his is a case where control of a set of corporations, designed to be run by

one person, brought to boil an already bitter family struggle between people with a demonstrated inability to get along." *Id*. at 214, 645 P.2d at 936. The court concluded the excluded brother "had a reasonable expectation of sharing in his inheritance." *Id*. The Montana Supreme Court affirmed the district court's finding of oppression (and deadlock in voting power) and its order dissolving 7L Bar Ranch corporation.

Fortunately in the case before us, there does not appear to be a bitter family struggle or an inability to get along; however, there has been a denial of the two minority shareholders' reasonable expectation of sharing in their inheritance. Applying the legal principles set forth in Iowa and Montana, majority shareholders act oppressively when, having the corporate financial resources to do so, they fail to satisfy the reasonable expectations of a minority shareholder by paying no return on shareholder equity while declining the minority shareholder's repeated offers to sell shares for fair value. The majority shareholders in this case, however, might suggest that corporate financial resources are not available because the net income has been reduced by payment of commodity wages (to which they claim entitlement for payment of past services) in an effort to control taxable corporate income. I do not find this position persuasive for the reasons already stated. Additionally, even if the use of commodity wages may be a preferred method of income distribution for an agriculture-based corporation, its availability does not by itself justify the use of commodity wages to avoid sharing profits with other shareholders.

I agree with the following: Commodity wages can be paid in lieu of actual wages; commodity wages may be preferred over actual wages, because the corporation can avoid payment of payroll taxes; and minimizing a corporation's taxable income is a worthy goal. However, paying corporate profits to only certain shareholders and calling them commodity wages for unpaid past services does not, in my opinion, pass muster. There is no question that attempting to minimize the payment

of taxes through various tools and exceptions allowed under the tax code is a common pursuit. As Judge Learned Hand has been often quoted to say:

> [A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose[s], to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.

Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934). By all appearances in *Gregory*, a shareholder's alleged corporate reorganization was on the surface consistent with applicable laws, and that shareholder was able to accomplish the sale of certain stock at a lower taxable rate as part of that process. However, the *Gregory* court went on to conclude that the shareholder in that case had engaged in "an elaborate scheme to get rid of income taxes" which did not properly fall within the intention of the corporate reorganization laws. 69 F.2d at 810.

My reference to the *Gregory* case is not to suggest any "elaborate scheme" to avoid income taxes took place here; rather, the point is that just because the tax code allows the use of commodity wages does not mean that commodity wages were intended to be used in the way they were used here—as an alternative method of deferred or catch-up or gratuitous or "morally" owed compensation—especially when there is no evidence documenting any agreement or other obligation by the corporation to pay wages of any type (as officers, directors, or employees) to any of the shareholders in this case.

The majority opinion seems to suggest that the commodity wages paid here are justified because Maltzahn said they were reasonable and "Jones' own expert, Scow, could not opine whether the wages paid were appropriate, and he also conceded that an annual farm management fee of 7 percent to 10 percent of gross income would be reasonable." However,

Christopher Scow made it clear that he could not say whether the commodity wages paid in this case were appropriate because he did not know "what activities Charles was providing and being paid for." Scow said the same thing regarding commodity wages paid to Randall and Donald: "I cannot make a determination if it's appropriate, because I do not know what services they actually provided." Further, it is not particularly relevant to the case before us that farm managers for absentee owners are paid 7 to 10 percent of the gross income produced on a farm. This case does not involve absentee owners; in fact, the familial relationship between the owners and farm tenants in this case would have significantly minimized the need for much of the work provided by a farm management company. Absentee farm owners are obviously agreeing in advance to pay that 7- to 10-percent farm management fee; when grain is sold and income is received, Scow said "we will deduct the percentage of our fee at that time." Scow testified that he sat in meetings with prospective clients, most often with the farm manager, to explain the services provided, such as bookkeeping and accounting and insuring the property. Scow's company generated monthly or quarterly reports, and it had its own accounting and bookkeeping staff. There is no evidence in the present case of any verbal or written agreements regarding fees or wages for any particular services, nor, according to Randall's own testimony, was there any expectation that such fees or wages would be paid. Notably, when Scow was asked if he had heard of "other farm managers receiving income in years after the services for which it was performed," he responded, "I've not heard of that, no. I've not heard of anyone else doing that."

The commodity wages paid to Randall, Donald, and Charles for alleged unpaid (and undocumented) past services are an unfair and unjustified business decision that was disguised as an acceptable tax reduction policy. Under this tax practice, Randall and Donald can indefinitely pay themselves unlimited commodity wages for past services, because there

is no agreement or other documentation to support the timing or the value of those services. It can be any amount, for any vaguely described service, rendered at no specific time. When asked how much more he thought he was owed in back wages, Randall said, "I have no idea." And when asked if he had even started to calculate that, Randall replied, "No," and he had "[n]o idea" whether he was done paying back wages to Donald and himself. Further, Randall's own testimony made it clear that no consideration was ever given to sharing any portion of the corporation's net profits with the minority shareholders because "[t]hey hadn't done anything for the corporation."

The majority opinion inappropriately characterizes this dissent's discussion of the commodity wage issue as an "attempt[] to shame Donald and Randall for the shares their parents obviously believed they deserved." To the contrary, this dissent has focused on Randall and Donald operating under a mistaken (not shameful) impression that they were entitled to keep all of McDonald Farms' profits, because they did the farming and their sisters did not. Understandably, the idea of having to share those profits with their sisters was new to Randall and Donald, because the brothers had only recently acquired their majority interest in the corporation in June 2012. And further, because the farm economy was good at that time (high commodity prices), they found themselves in the fortunate position of having large amounts of corporate profits available for distribution, another new concept for them as new majority shareholders of McDonald Farms. But just because they were inexperienced in finding themselves in such a situation does not justify the decision they made to completely exclude their sisters from a share of those profits.

The majority opinion also says that Charles "not only acquiesced, but also initiated and partook in the decision to pay commodity wages to the majority shareholders as a tax planning strategy." However, Randall testified that after Charles fell and hit his head in July 2012, he did not make

any financial decisions for himself. Randall acknowledged that Charles did not participate in the conversations with Maltzahn about payment of commodity wages in 2013 (totaling $397,200) and that Charles "probably was not" part of those conversations for the 2012 commodity wages (totaling $231,300) either. Randall also acknowledged that after Charles "went into the hospital and Riverside Lodge" (following his fall in July 2012), Randall handled Charles' affairs pursuant to a power of attorney.

The majority states that this "dissent's claim that [Jones'] reasonable expectations were violated as a result of payment of commodity wages" is "suspect," because commodity wages were not even paid between December 2010 (when Jones received her shares) and January 2012 (when Jones sought to be bought out). However, commodity wages were paid in 2010, so the practice of distributing net income by that method rather than dividends was a practice Jones would have known to exist upon acquiring her shares in the corporation. Additionally, Jones did not file a lawsuit until April 1, 2013, after the 2012 commodity wages ($231,300) were paid to the majority shareholders and no dividends were issued to the minority shareholders. The sisters' reasonable expectations of benefiting from their inheritance either by dividends or by having their interest in the corporation bought out commenced upon acquiring their shares. Further, the issue is not just that commodity wages were distributed only to some shareholders for alleged unpaid past services, the issue is that profits were not being shared with all shareholders in a good faith, fair manner, as became more evident with the 2012 and 2013 commodity wage payments. And contrary to the majority's implication, this dissent is not invading the province of the estate planning decisions made by Charles and Betty; nor is it disregarding Jones' "total lack of involvement in the family farm." Rather, the focus of this dissent is on the reasonable expectations of shareholders in a corporation. And just because the sisters did not pay for their shares (notably, neither did Randall or Donald), nor contribute

to the farm labor, does not mean that they should be excluded from corporate profits being enjoyed by other shareholders. Randall and Donald failed to exercise their fiduciary duty of good faith and fair dealing with Jones and Rosemary when they made the decision to distribute profits only to themselves under the guise of commodity wages for past unpaid services instead of distributing those profits in proportionate shares to all shareholders; or alternatively, by failing to consider a reasonable buyout of Jones' shares for fair value. Under any standard for evaluating a minority shareholder's claim of oppressive conduct, as discussed previously, this should qualify as oppressive conduct.

Alternatives to Dissolution of Corporation.

Having concluded the evidence supports a finding of oppressive conduct, I also agree that dissolution is a drastic measure and should be invoked with extreme caution. See *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). Even Jones says it is not her "preference to force a dissolution of McDonald Farms. Rather, she wants simply to be paid fair value for her shares and leave Rand[all] and Don[ald] to run the business of McDonald Farms." Brief for appellant at 39. Jones suggests it is within the district court's equitable authority to order a buyout of Jones' shares at fair value. I agree that a district court has the authority to fashion equitable alternatives to a corporate dissolution in order to avoid such a drastic measure; in this case, there may also be other alternatives to dissolution or a buyout. Nebraska Supreme Court cases provide some guidance on this issue.

Beginning with the notion that an officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and is treated by the courts as a trustee, our Supreme Court has stated:

> An officer or director must comply with the applicable fiduciary duties in his or her dealings with the corporation

> and its shareholders. . . . Where a director has acted in complete good faith and breached no fiduciary duties, he or she is not liable for mere mistakes in judgment. . . . However, a violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach.

Trieweiler v. Sears, 268 Neb. 952, 973, 689 N.W.2d 807, 830-31 (2004) (citations omitted).

Trieweiler also tells us that "[e]quity is not a rigid concept, and its principles are not applied in a vacuum, but instead, equity is determined on a case-by-case basis when justice and fairness so require." 268 Neb. at 980, 689 N.W.2d at 835. And when "a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation." *Id*. at 980, 689 N.W.2d at 835-36. Finally, "[w]here relief may be granted, although no precedent may be found, the court will so proceed," *id*. at 980, 689 N.W.2d at 836, and "[e]quity will always strive to do complete justice[,]" *id*. at 981, 689 N.W.2d at 836. *Trieweiler* permitted a minority shareholder to individually recover money in his corporate derivative action based on misappropriation of money by the corporation, among other things. Our Supreme Court noted that "there are circumstances in which individual damages may be appropriately awarded in connection with a derivative action." *Id*. at 971, 689 N.W.2d at 829. In the case at hand, for example, one alternative to dissolution or a forced buyout might be to require the brothers to pay the sisters their proportionate share of the $628,500 in corporate profits that were distributed as commodity wages in 2012 and 2013.

To the extent a buyout is the preferred alternative, it is clear that a determination of the fair value of a corporation's shares should comply with some established legal principles. See *F.H.T., Inc. v. Feuerhelm*, 211 Neb. 860, 320 N.W.2d 772 (1982) (book value is determined by generally accepted accounting

principles; as applied to corporate stock, book value ordinarily means net value shown on corporate books of account of all assets of corporation after deducting all liabilities); *Trebelhorn v. Bartlett*, 154 Neb. 113, 47 N.W.2d 374 (1951) (actual value of corporate stock of closely held corporation is ordinarily determinable from then net worth of corporation divided by number of bona fide shares issued and outstanding; for that purpose, evidence of factors and elements, such as assets, liabilities, and all other matters pertinent to value of particular corporation involved, may be admitted and considered); *Shuck v. Shuck*, 18 Neb. App. 867, 806 N.W.2d 580 (2011) (to determine value of closely held corporation**,** trial court may consider nature of business, corporation's fixed and liquid assets at actual or book value, corporation's net worth, marketability of shares, past earnings or losses, and future earning capacity; method of valuation used for closely held corporation must have acceptable basis in fact and principle).

Also, as previously noted in *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663 (Iowa 2013), when stock transfer restrictions have provided for purchase by a corporation at book value, some courts have concluded the restrictions may be enforced if the value has been determined in accordance with generally accepted accounting practices; however, significant discrepancies between market value and book value should cast doubt on the enforceability of such a provision. Courts should consider whether the accounting methods used in establishing book value are fair and equitable to all the parties involved, and where arbitrary valuations appear on the books, courts can substitute values derived from acceptable accounting procedures. *Id.*

Based on these legal principles, there are alternative equitable measures that can be taken to avoid corporate dissolution while providing some relief to Jones as a result of her brothers' oppressive conduct in denying her a proportionate share of the corporation's net profits or, alternatively, refusing to buy out her shares at fair value.

CONCLUSION

In conclusion, I refer to the 2012 Census of Agriculture: Nebraska State and County Data, 1 Geographic Area Series Pt. 27, U.S. Dept. of Agric., Pub. No. AC-12-A-27 (May 2014), which reveals that the total number of farms in Nebraska at that time was 49,969, comprising 45,331,783 acres of land. A family or individual owned 42,543 of those farms; 2,974 were owned by partnerships; 3,784 were owned by corporations (of which 3,580 were family held corporations); and a small number were held by others such as estates, trusts, and cooperatives. *Id.* The average age of the principal operators of the family-held farming corporations was 57. *Id.* What this tells me is that there are thousands of family farm corporations approaching possible transfers of ownership, which we can only hope will not end up in litigation as occurred here. The drain on family and community resources, and more importantly, the deterioration of family relationships that such disagreements may cause, can be minimized if the Legislature and the courts provide adequate guidance and alternatives for resolving such conflicts. This is an important issue, and this dissent is not the place for an exhaustive discussion of that issue. Dissolution of a family farming corporation is an extreme remedy and is rightly disfavored absent extreme circumstances. I agree with the district court's decision to refrain from ordering dissolution in this case; however, I do think the law authorizes district courts to consider equitable alternatives, as discussed. I would have reversed, and remanded for the district court's further consideration of those alternatives.

Stacey L. Komar, appellant,
v. State of Nebraska
et al., appellees.
897 N.W.2d 310

Filed May 9, 2017. No. A-16-127.

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 conclusion irrespective of the determination made by the court below.
2. **Tort Claims Act.** Tort claims brought against the State must be brought in accordance with the provisions of the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2014).
3. **Tort Claims Act: Limitations of Actions.** A claimant who could have withdrawn a claim from the State Claims Board prior to the expiration of the 2-year statute of limitations should be given an additional 6 months from the time the claimant could have withdrawn the claim from the State Claims Board, rather than an additional 6 months from the time the claimant actually withdrew the claim, to file a complaint in the district court.
4. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When judicial interpretation of a statute has not evoked a legislative amendment, an appellate court presumes that the Legislature has acquiesced in the court's interpretation.
5. **Estoppel: Fraud: Limitations of Actions.** The equitable doctrine of estoppel in pais may be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Denise E. Frost, of Johnson & Mock, P.C., L.L.O., for appellant.

Brien M. Welch and John A. McWilliams, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

Pirtle, Bishop, and Arterburn, Judges.

Arterburn, Judge.

INTRODUCTION

Stacey L. Komar filed a complaint in the district court pursuant to the provisions of the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2014), against the State of Nebraska, the Board of Regents of the University of Nebraska, and Nebraska Medicine (collectively the State). The district court dismissed Komar's complaint, finding that the allegations contained in the complaint were time barred. Komar appeals from the district court's dismissal of her complaint. Upon our review, we affirm the district court's decision to dismiss Komar's complaint because it was filed after the statute of limitations had expired.

BACKGROUND

On July 15, 2015, Komar filed a complaint against the State. In the complaint, she alleged that various employees of the State had accessed her medical records without her permission and without a proper purpose, in violation of both federal and state laws. Specifically, Komar alleged that a pediatrician employed by the State had improperly viewed Komar's medical records on July 3, 2012. Komar alleged that she did not learn of this incident until January 15, 2013. Komar also alleged that a second employee of the State had improperly viewed Komar's medical records on multiple dates between July 16, 2012, and January 9, 2013. Komar alleged that she did not learn of these incidents until January 8, 2014.

In her complaint, Komar indicated that on June 27, 2014, she filed an "administrative notice" of the matters discussed

in her complaint with the "State of Nebraska Division of Risk Management State Claims Board" (the Board). Having received no disposition of her claim from the Board or the risk manager, Komar indicated that she withdrew her claim from the Board on July 14, 2015, just 1 day prior to filing her complaint in the district court.

In response to Komar's complaint, the State filed a motion to dismiss "pursuant to Nebraska Court Rule § 6-1112(b)(6) for the reason that [Komar's] Complaint fails to state a claim upon which relief can be granted."

The district court ultimately sustained the State's motion to dismiss Komar's complaint. The court found that Komar's action was barred by the relevant statute of limitations. While the court's decision was based on the date that Komar discovered the first improper access of her records, the court noted, "The fact [Komar] later discovered that more employees improperly accessed her information does not affect the statute of limitations in this action, as it is pled." We note that, in her brief on appeal, Komar does not specifically assign error to the district court's decision concerning the subsequent improper accesses of her records. Moreover, during oral argument, Komar's counsel declined the opportunity to argue that the subsequent improper accesses of the records constituted claims that could be severed from the claim concerning the initial access.

ASSIGNMENTS OF ERROR

On appeal, Komar asserts that the district court erred in (1) wrongly computing the last date for filing the action and (2) failing to find that even if she filed her complaint too late, the State was estopped from asserting the time bar.

STANDARD OF REVIEW

[1] The issues presented by this appeal are controlled by statute. Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach

an independent conclusion irrespective of the determination made by the court below. *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), *overruled on other grounds, Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002).

ANALYSIS

[2] Tort claims brought against the State must be brought in accordance with the provisions of the State Tort Claims Act, § 81-8,209 et seq. See *Hullinger v. Board of Regents, supra*.

Statute of Limitations Under State Tort Claims Act

Komar's first assignment of error, that the district court wrongly computed the last date by which her complaint must have been filed in the district court, is controlled by §§ 81-8,213 and 81-8,227(1). Section 81-8,213 provides:

> No suit shall be permitted under the State Tort Claims Act unless the Risk Manager or State Claims Board has made final disposition of the claim, except that if the Risk Manager or board does not make final disposition of a claim within six months after the claim is made in writing and filed with the Risk Manager in the manner prescribed by the board, the claimant may, by notice in writing, withdraw the claim from consideration of the Risk Manager or board and begin suit under such act.

Section 81-8,227(1) provides, in relevant part:

> [E]very tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the Risk Manager in the manner provided by such act. The time to begin suit under such act shall be extended for a period of six months from the date of mailing of notice to the claimant by the Risk Manager or State Claims Board as to the final disposition of the claim or from the date of withdrawal of the claim under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.

In her complaint, Komar indicates that she filed her claim with the Board, not the risk manager. In *Coleman v. Chadron State College*, 237 Neb. 491, 498, 466 N.W.2d 526, 531 (1991), *overruled on other grounds, Collins v. State, supra*, the Nebraska Supreme Court held that the 2-year statute of limitations discussed in § 81-8,227(1) applies to both the time for filing a claim with the Board and the filing of "lawsuits" in the district court.

In this case, the district court found that Komar's cause of action accrued on January 15, 2013, when she discovered that a pediatrician employed by the State had improperly accessed her medical records. Komar does not assign as error the district court's determination of the date her cause of action accrued. Accordingly, in our analysis of the timeliness of Komar's district court complaint, we will use January 15, 2013, as the date her cause of action accrued. Because Komar's cause of action accrued on January 15, 2013, the 2-year statute of limitations to file the action expired on January 15, 2015, unless the time for filing Komar's claim was extended in some way.

In her complaint, Komar alleged that she filed her claim with the Board on June 27, 2014, a little more than 17 months after her claim accrued, but still within the 2-year statute of limitations. Pursuant to the language of § 81-8,213, Komar could have withdrawn her claim from the Board and filed her complaint in the district court as early as December 28, 2014. On December 28, there remained approximately 19 days before the expiration of the 2-year statute of limitations for Komar's claim. If Komar had withdrawn her claim during these 19 days, she would have had an additional 6 months from the date of her withdrawal to file her complaint in the district court, pursuant to the language of § 81-8,227(1). However, Komar did not withdraw her claim from the Board until July 14, 2015, almost 6 months after the 2-year statute of limitations had expired.

The district court, relying on the Supreme Court's holding in *Hullinger v. Board of Regents*, 249 Neb. 868, 546

N.W.2d 779 (1996), *overruled on other grounds, Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002), found that the 2-year statute of limitations for filing Komar's complaint was extended by 6 months from the date she could have withdrawn her claim from the Board. In *Hullinger v. Board of Regents*, the Nebraska Supreme Court analyzed the interplay between §§ 81-8,213 and 81-8,227(1), and interpreted them together to provide:

> "[A] claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within the 2-year statute of limitations, has 6 months from the first day on which the claim may be withdrawn from the claims board in which to begin suit."

249 Neb. at 871-72, 546 N.W.2d at 783. Based on the decision in *Hullinger v. Board of Regents, supra*, the district court found that Komar had until 6 months from the first day on which her claim could have been withdrawn from the Board, or until June 28, 2015, to file her complaint with the district court. Komar did not file her complaint until July 15, 2015. The district court concluded that Komar's complaint was time barred.

We note that the Supreme Court has modified its decision in *Hullinger v. Board of Regents, supra*, to some extent. In *Collins v. State, supra, disapproved on other grounds, Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007), the Supreme Court found that when a claimant allows the Board to actually reach a decision on a claim, the claimant has 6 months to file suit after notice of the denial of the claim is mailed by the Board. The *Collins* court specifically held, "The reasoning of *Coleman* and *Hullinger* does not apply to claims that are decided by the claims board." 264 Neb. at 272, 646 N.W.2d at 621. This limited modification to the court's decision in *Hullinger v. Board of Regents, supra*, does not apply in this case because Komar chose to withdraw her claim from the Board prior to the Board's actually deciding her claim.

Accordingly, we conclude that the Supreme Court's reasoning in *Hullinger v. Board of Regents, supra*, governs the decision in this case. However, we note that this case presents a slightly different factual scenario than that presented by *Hullinger v. Board of Regents, supra*. In that case, the Supreme Court was presented with a claimant who had filed a claim with the Board more than 18 months after his claim had accrued, but within the 2-year statute of limitations. Because the claim had been filed more than 18 months after the claim had accrued, the claim could not have been withdrawn from the Board before the 2-year statute of limitations had expired. In this case, Komar filed her claim with the Board prior to 18 months after the claim had accrued. As such, she could have withdrawn her claim prior to the expiration of the 2-year statute of limitations. As we discussed above, Komar had approximately 19 days prior to the expiration of the statute of limitations to withdraw her claim, and if she had done so, she would have had an additional 6 months from the date of that withdrawal to file a complaint in the district court. However, Komar did not withdraw her complaint prior to the expiration of the statute of limitations. As such, we are presented with the question of when Komar had to file her complaint in the district court, given that she could have withdrawn her claim from the Board prior to the 2-year statute of limitations, but chose not to.

We conclude that, despite the minor difference in the factual circumstances of our case, the rationale of the Supreme Court's decision in *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), *overruled on other grounds, Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002), still applies. Accordingly, the time for Komar to file her complaint with the district court was extended by 6 months from the time she could have withdrawn her claim from the Board.

In *Hullinger v. Board of Regents*, the Supreme Court reasoned that in order to interpret §§ 81-8,213 and 81-8,227(1) "'in a consistent and commonsense fashion,'" a "'fourth-quarter

claimant[]'" must be provided with an additional 6 months from the date he or she could have withdrawn a claim from the Board to file a complaint in the district court. 249 Neb. at 872, 546 N.W.2d at 783, quoting *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), *overruled on other grounds, Collins v. State, supra*. The court noted that the 6-month extension should begin accruing from the first day on which the claim may be withdrawn, rather than from the day it was actually withdrawn, because a claimant should not be permitted to

> file a claim with the claims board just before 2 years after the accrual of the cause of action, wait however long until just before final disposition of the claim by the claims board to withdraw the claim, and then receive an additional 6 months in which to file suit in the district court.

Hullinger v. Board of Regents, 249 Neb. at 873, 546 N.W.2d at 783.

We read the Supreme Court's rationale in *Hullinger v. Board of Regents, supra*, to suggest that a claimant should not be permitted to delay the action indefinitely by his or her own actions or inactions. In fact, in *Collins v. State*, 264 Neb. at 272, 646 N.W.2d at 621, the Supreme Court specifically indicated that a claimant should not be permitted to "allow a claim to remain undecided by the board for as long as possible as a way for the claimant to delay the filing of an action in district court." However, the court also indicated that "[w]hen a claimant allows the claims board to reach a decision, any delay in the process is beyond the control of the claimant." *Id*.

[3] Given the Supreme Court's decision in *Hullinger v. Board of Regents, supra*, we conclude that a claimant, who could have withdrawn a claim from the Board prior to the expiration of the 2-year statute of limitations, should be given an additional 6 months from the time the claimant could have withdrawn the claim from the Board, rather than an additional 6 months from the time the claimant actually withdrew the

claim, to file a complaint in the district court. However, also given the rationale of *Hullinger v. Board of Regents, supra*, and *Collins v. State, supra*, Komar could not delay the expiration of the statute of limitations by choosing to delay the withdrawal of her claim from the Board. The delay in this case is attributable to Komar's decision to delay the withdrawal of her claim. Therefore, the rationale of *Hullinger v. Board of Regents, supra*, is applicable.

Komar had until June 28, 2015, to file her complaint with the district court. She did not file her complaint until July 15. Accordingly, Komar's complaint was time barred and we affirm the decision of the district court dismissing her complaint.

[4] We acknowledge the apparent harshness of this result. However, as the Supreme Court explained in *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007), it is our duty to strictly construe the provisions of the State Tort Claims Act in favor of the State and against the waiver of sovereign immunity. In addition, we note that since the Supreme Court's decision in *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), *overruled on other grounds, Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002), the Legislature has amended the State Tort Claims Act, but has not seen fit to make any modifications which would address the decision in that case. When judicial interpretation of a statute has not evoked a legislative amendment, an appellate court presumes that the Legislature has acquiesced in the court's interpretation. See *Nebuda v. Dodge Cty. Sch. Dist. 0062*, 290 Neb. 740, 861 N.W.2d 742 (2015).

Estoppel

Komar's second assignment of error is that the district court erred in failing to find that even if her complaint was filed after the statute of limitations had expired, the State is estopped from asserting the time bar as a defense. Upon our review, we conclude that Komar's assertion lacks merit.

[5] The equitable doctrine of estoppel in pais may be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present. See *Hullinger v. Board of Regents, supra*.

The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. *Id*.

Komar argues in her brief on appeal that the State should be estopped from asserting the statute of limitations as a defense because of the Board's delay in hearing her case. Although she filed her claim with the Board in June 2014, by June 2015, the Board still had not set a hearing for her claim. As such, Komar indicates that she withdrew her claim from the Board in order that her complaint could be filed in the district court.

We first note that it is not clear from our record whether Komar argued before the district court that the State should be estopped from asserting the statute of limitations defense. It is clear that the district court, in its February 2016 order, does not discuss or rule on the issue of estoppel. Generally, an appellate court will not consider for the first time on appeal issues not properly raised in the pleadings nor litigated at trial.

Leseberg v. Meints, 224 Neb. 533, 399 N.W.2d 784 (1987). However, we conclude that in this case, even if we were to rule on the merits of Komar's estoppel argument, her argument would fail. Komar chose to withdraw her claim from the Board on July 14, 2015. There is nothing to suggest that the Board took any action to influence Komar's decision to withdraw the claim or to make her believe that it would not raise the statute of limitations as a defense. Komar could have chosen to wait for the Board to rule on her claim. Had she chosen to do so, then she would have had an additional 6 months from the date of that ruling to file her complaint in the district court. In that instance, any delay in the proceedings would have been attributed to the Board, rather than to Komar. See *Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002).

CONCLUSION

We affirm the decision of the district court. Komar's complaint was not timely filed in the district court, and as a result, her cause of action is time barred.

Affirmed.

Public Association of Government Employees, appellee, v. City of Lincoln, Nebraska, appellant.

896 N.W.2d 630

Filed May 16, 2017. No. A-16-007.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing an appeal from the Commission of Industrial Relations in a case involving wages and conditions of employment, an order or decision of the commission may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Labor and Labor Relations.** It is a prohibited practice for any employer, employee, employee organization, or collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.
3. ____. Mandatory subjects of bargaining include the scale of wages, hours of labor, or conditions of employment.
4. ____. Management prerogatives, such as the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments, are not mandatory subjects of bargaining.
5. ____. A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative.
6. ____. Ordinarily, mandatory subjects of bargaining must be negotiated between the parties, and as such, an employer may not alter a term or condition of employment unless it has bargained with regard to the issue.

7. ____. No bargaining is required before altering a mandatory subject of bargaining if the issue is covered by the collective bargaining agreement.
8. ____. When parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules—a new code of conduct for themselves—on that subject.
9. **Contracts.** Because of the fundamental policy of freedom of contract, parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of the courts to interfere with the parties' choice.
10. **Labor and Labor Relations: Contracts.** Where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, the contract will control, and under the contract coverage rule, if the issue was covered by the collective bargaining agreement, then the parties have no further obligation to bargain the issue.

Appeal from the Commission of Industrial Relations. Affirmed.

John C. Hewitt, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Gary L. Young and Thomas P. McCarty, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Inbody and Riedmann, Judges.

Riedmann, Judge.

INTRODUCTION

The City of Lincoln, Nebraska (the City), appeals from a decision of Nebraska's Commission of Industrial Relations (CIR), which determined that when the City unilaterally changed employee shifts and standby staffing without bargaining with the Public Association of Government Employees (PAGE), it violated Nebraska's Industrial Relations Act (IRA). See Neb. Rev. Stat. §§ 48-801 through 48-842 (Reissue 2010 & Cum. Supp. 2016). Finding no error in the CIR's decision, we affirm.

BACKGROUND

PAGE is a labor union which represents various employees of the City, including street maintenance employees. PAGE and the City were operating under a collective bargaining agreement (CBA) that was effective from August 14, 2014, through August 31, 2016. Relevant to the matter at hand, the CBA provides:

> ARTICLE 3 - MANAGEMENT RIGHTS
>
> . . . .
>
> Section 2. The Union acknowledges the concept of inherent management rights. These rights, powers, and authority of the City include, but are not limited to the following:
>
> . . . .
>
> C. The right to establish, allocate, schedule, assign, modify, change, and discontinue City operations and work shifts, so long as changes in days off, shifts, and working hours, other than in emergencies, which shall include but not be limited to, unplanned absences, are made only after the order for such change has been posted for seven (7) calendar days; except in instances which affect a single work crew or a single employee, the City will make a good faith attempt to deliver such notice.
>
> . . . .
>
> ARTICLE 18 - HOURS OF WORK AND DUTY SHIFTS
>
> Section 1. Eight (8) consecutive hours, exclusive of lunch, shall constitute a day[']s work and five (5) consecutive calendar days shall constitute a week[']s work. From time to time, ten (10) hour working shifts are available, the option, within demand constraints, to work these shifts will be made available to employees working eight (8) hour shifts. When an employee elects to change his work shift to either an eight (8) or ten (10) hour work shift, he may not, without management consent, again

> change his work shift from eight (8) to ten (10) hours or from ten (10) to eight (8) hours.
>
> Section 2. Each employee shall be entitled to two (2) or three (3) days off each week which shall be consecutive, unless in conflict with shift or other assignments.
>
> . . . .
>
> Section 4. All employees who are regularly assigned to second and third shifts shall be paid an additional fifty-two (52) cents per hour for second shift and seventy (70) cents per hour for third shift. . . .
>
> . . . .
>
> ARTICLE 19 - OVERTIME, CALL BACK, AND STAND-BY PAY
>
> . . . .
>
> Section 5. ALTERATION OF ORDINARY SHIFT[.] Except for those employees that are on paid on-call or standby status, an employee may be called into work on a shift that is not his or her regular shift on a mandatory basis only when there is an emergency.

In January 2015, after meeting with PAGE representatives on several occasions, the City unilaterally implemented changes to employee work schedules, including imposing a mandatory standby staffing plan. Previously, employees worked 8-hour shifts with 2 consecutive days off or could elect to work 10-hour shifts with 3 consecutive days off. They were also able to volunteer for standby status during winter months, which permitted them to be called into work during inclement weather. Under the new standby plan, street maintenance workers were mandatorily placed on standby status where they were required to report for duty if called upon, and if called to duty, they were required to work on a 7-day-per-week basis subject to 12-hour shifts or face disciplinary action.

In July 2015, PAGE filed a prohibited practice petition in the CIR alleging that in implementing the new standby plan, the City engaged in a prohibited practice in violation

of § 48-824(1) and (2)(e) based upon its "unilateral change to, and refusal to negotiate in good faith over, a mandatory subject of bargaining." The City filed an answer generally denying the allegations and asserting that the CIR lacked jurisdiction over the matter, the changes implemented by the standby plan were not mandatory subjects of bargaining, and the changes were covered by the terms of the CBA.

After conducting a trial, the CIR entered an order finding that because the facts of the case constituted a viable prohibited practice claim, it had jurisdiction to adjudicate the matter. The CIR concluded that the employee work schedule changes the City implemented were mandatory subjects of bargaining, because they would "'vitally affect' the hours and terms and conditions of employment" and the past practice of voluntary standby duty had been in place for at least 20 years such that employees could reasonably expect the practice to continue. As such, the City had a duty to bargain in good faith with PAGE regarding implementation of the plan, and because it failed to do so, its unilateral implementation of the plan was a "per se violation of the [IRA] and a prohibited practice." The City appeals.

ASSIGNMENTS OF ERROR

The City assigns, restated and renumbered, that the CIR erred in (1) finding the City's standby plan constituted a mandatory subject of bargaining under the IRA and not a management prerogative, (2) failing to find the City's standby plan was covered by the parties' CBA and therefore not subject to a duty to bargain under the IRA, (3) finding the implementation of the standby plan constituted a per se violation of the IRA and a prohibited practice, and (4) finding it had jurisdiction to determine whether the City committed a prohibited practice.

STANDARD OF REVIEW

[1] In reviewing an appeal from the CIR in a case involving wages and conditions of employment, an order or decision

of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. *Service Empl. Internat. v. Douglas Cty. Sch. Dist.*, 286 Neb. 755, 839 N.W.2d 290 (2013).

ANALYSIS

The City argues that the CIR erred in finding that the standby plan was a mandatory subject of bargaining rather than a management prerogative. We disagree.

[2-5] It is a prohibited practice for any employer, employee, employee organization, or collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining. *Service Empl. Internat., supra*. See, also, § 48-824(1). Mandatory subjects of bargaining include the scale of wages, hours of labor, or conditions of employment. *Service Empl. Internat., supra*. Management prerogatives, such as the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments, are not mandatory subjects of bargaining. *Id*. A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. *Id*.

The City argues that the changes implemented by the mandatory standby plan were solely to employee work schedules and therefore fall within management prerogative. We agree that scheduling work is not a mandatory subject of bargaining; however, the changes to standby staffing were not simply scheduling employees to work. Rather, the mandatory plan would force employees to work 12-hour shifts

instead of 8- or 10-hour shifts and would require employees to forgo their weekends off, working 7 consecutive days rather than 4 or 5 days with 2 or 3 consecutive days off. These are matters of employee work hours—a mandatory subject of bargaining.

In addition, employees would no longer have a set schedule, but instead, they would be placed on mandatory standby status with little notice. As the CIR concluded, the plan implemented by the City would vitally affect the hours and terms and conditions of employment and was therefore a mandatory subject of bargaining. Indeed, the significant change in lifestyle required by the mandatory standby plan constitutes a matter of fundamental, basic, or essential concern to an employee's personal concern and therefore may be considered as involving working conditions. The CIR's conclusion is not contrary to law, and we therefore find no error in its decision classifying the changes as mandatory subjects of bargaining.

[6,7] Ordinarily, mandatory subjects of bargaining must be negotiated between the parties, and as such, an employer may not alter a term or condition of employment unless it has bargained with regard to the issue. See *Service Empl. Internat. v. Douglas Cty. Sch. Dist.*, 286 Neb. 755, 839 N.W.2d 290 (2013). However, no bargaining is required before altering a mandatory subject of bargaining if the issue is "'covered by'" the CBA. *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, 284 Neb. 109, 115, 817 N.W.2d 250, 255 (2012).

[8-10] Generally, when parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules—a new code of conduct for themselves—on that subject. *Douglas Cty. Health Ctr. Sec. Union, supra*. Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of the courts to interfere with the parties' choice. See *id*. Therefore,

where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, the contract will control, and under the contract coverage rule, if the issue was covered by the collective bargaining agreement, then the parties have no further obligation to bargain the issue. See *id*.

In *Douglas Cty. Health Ctr. Sec. Union, supra*, the Supreme Court concluded that the issue of subcontracting of bargaining unit jobs was clearly covered by the applicable CBA, because the CBA specifically noted the steps that the county needed to follow when the contracting out or subcontracting of bargaining unit work had the effect of eliminating bargaining unit jobs, and the elimination of bargaining unit jobs was at issue in the dispute. The steps included notifying the union of the impending changes and providing the union with an opportunity to discuss with the county the necessity and effect on employees. The Supreme Court therefore concluded that the issue of subcontracting of bargaining unit jobs was covered by the CBA.

Similarly, in *Dept. of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992), cited by the Supreme Court in *Douglas Cty. Health Ctr. Sec. Union, supra*, the D.C. Circuit Court of Appeals held that the reassignment of employees and establishment of new performance standards were covered by the CBA. The court relied on the fact that the CBA contained provisions covering the implementation of both actions, including detailed provisions concerning the procedures for temporarily reassigning employees or modifying performance standards. The CBA defined when employee "details" would be implemented, to what kinds of positions an employee may be detailed, how long a detail may last, and what effect a detail would have on an employee's salary and liability for union dues. 962 F.2d at 51. Similarly, the CBA established comprehensive procedures that the agency must follow when it modified performance criteria—including advance notice to employees, an opportunity for employee

participation in the creation of performance standards, and an overarching requirement that the standards implemented be fair and reasonable. Accordingly, the appellate court held that under any reasonable definition of the term "covered by," the impact and implementation matters related to employee details and performance criteria were covered by the CBA.

In the present case, the main change at issue is the modification of the procedure for standby staffing, which in turn alters employees' work hours, days, and overtime status. The parties' CBA refers to the hours and shifts employees work, contemplating three separate work shifts and 8- or 10-hour shifts. Thus, under article 3 of the CBA, the City retained the right to change employee work shifts, meaning, for example, it could move employees from first shift to second shift, so long as 7 days' notice was provided. The CBA is silent on the issue of voluntary standby staffing (except as to the issue of pay) and says nothing about the steps the City would need to follow to make standby staffing mandatory—thereby imposing mandatory overtime on employees and altering their work hours and days off. Article 19 of the CBA contemplates mandatorily calling employees into work on a shift that is not a regular shift but applies only in the case of an emergency, which does not affect the changes at issue here. We therefore cannot find that the changes implemented by the City are covered by the CBA. As a result, the parties were required to negotiate prior to implementing any changes to the standby staffing procedures.

Because we conclude that the changes the City implemented were not covered by the CBA, we also reject PAGE's argument that the issues became moot with the expiration of the CBA. We additionally find no merit to the City's argument that the CIR lacked jurisdiction over the matter because, instead of a prohibited practice claim, the matter was actually a breach of contract claim over which the CIR does not have jurisdiction. See *Lamb v. Fraternal Order of Police Lodge No. 36*, 293 Neb. 138, 876 N.W.2d 388 (2016) (CIR

has no jurisdiction over breach of contract claims, but for claims involving determination of prohibited practice under IRA, jurisdiction lies with CIR). Because we determined that the claim was, in fact, a prohibited practice, we conclude that the CIR did not err in exercising its jurisdiction over PAGE's claim.

CONCLUSION

We conclude that the City's implementation of changes to standby staffing, employee work hours, and days off was a mandatory subject of bargaining that was not covered by the CBA. Therefore, the City had a duty to negotiate the changes with PAGE prior to implementation. Because the City failed to do so, it committed a prohibited practice under the IRA. Accordingly, we affirm the decision of the CIR.

Affirmed.

Graylin Gray, appellant, v. Nebraska Department of Correctional Services et al., appellees.

Graylin Gray, appellant, v. Nathan Flood, appellee.

898 N.W.2d 380

Filed May 23, 2017. Nos. A-16-482, A-16-590.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis under Neb. Rev. Stat. § 25-2301.02 (Reissue 2016) is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.
2. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
3. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeals from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Reversed and remanded for further proceedings.

Graylin Gray, pro se.

No appearance for appellees.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Pirtle, Judge.

I. INTRODUCTION

Graylin Gray appeals the orders of the district court for Lancaster County denying his requests to proceed in forma pauperis in cases Nos. A-16-482 and A-16-590. These matters have been consolidated on appeal. For the reasons that follow, we reverse, and remand for further proceedings.

II. BACKGROUND

1. Case No. CI 16-184

On January 15, 2016, Gray filed a motion to proceed in forma pauperis in the Lancaster County District Court in case No. CI 16-184. He filed the associated complaint, and on January 25, the court entered an order sustaining Gray's motion to proceed in forma pauperis.

On February 9, 2016, the Attorney General's office filed a motion, on behalf of the defendants, to reconsider the decision to sustain Gray's motion. The State cited Neb. Rev. Stat. § 25-3401(2)(a) (Reissue 2016), which states:

> A prisoner who has filed three or more civil actions, commenced after July 19, 2012, that have been found to be frivolous by a court of this state or a federal court for a case originating in this state shall not be permitted to proceed in forma pauperis for any further civil actions without leave of court. A court shall permit the prisoner to proceed in forma pauperis if the court determines that the person is in danger of serious bodily injury.

The defendants referred the court to "three or more civil actions, commenced after July 19, 2012, that have been found frivolous by a court of this state," namely:

> "**a.** *Gray v. Gage*, in the Johnson County District Court, case number [CI] 13-143;
>
> "**b.** *Gray v. Kenney*, in the Lancaster County District Court, case number CI 14-866; [and]
>
> "**c.** *Gray v. Gage*, in the Johnson County District Court, case number CI 15-94."

The defendants alleged that Gray had received three "'strikes,'" and the district court should reverse the decision to sustain Gray's motion to proceed in forma pauperis. In support of its motion to reconsider, the State attached orders from each of the three cases cited in its motion. Each of the three orders denied Gray's motions to proceed in forma pauperis, and in each case, the judge found the petition Gray had proposed to file appeared to be frivolous on its face.

A hearing on the defendants' motion was held on March 4, 2016, and Gray appeared telephonically. The court referred to § 25-3401(2)(a) and found the defendants' motion referred to "three civil actions commenced by [Gray] after July 19, 2012 that have been found frivolous by a court of this State." The court took judicial notice of the orders filed in cases Nos. CI 13-143, CI 14-866, and CI 15-94 and found that the defendants' motion to reconsider should be sustained. Gray was given 30 days from the date of the order to pay the filing fees in CI 16-184, "or the matter [would] be dismissed without further notice."

On March 24, 2016, Gray filed a motion for reconsideration urging the court to determine that cases Nos. CI 13-143, CI 14-866, and CI 15-94 should not count as "strike[s]" against him in determining whether to grant in forma pauperis status in CI 16-184. He argued that an appeal of CI 15-94 was pending before the Nebraska Supreme Court, so consideration of this action was premature. He argued that CI 14-866 should not be considered as a "strike" because he never paid the filing fee after the district court denied in forma pauperis status. He argued that CI 13-143 should not have been considered as

a "strike" because the district court never reached the merits of his writ of habeas corpus.

A hearing on Gray's motion was held on April 20, 2016, with Gray appearing telephonically, without the assistance of a lawyer. In addition to the arguments cited in his motion, Gray argued that each of the actions considered by the trial court were habeas corpus actions, and that "'a dismissal in a habeas corpus action is not a strike,'" citing *Andrews v. King*, 398 F.3d 1113 (9th Cir. 2005). He also argued that cases Nos. CI 13-143, CI 14-866, and CI 15-94 were not "commenced" after the effective date of the statute, July 19, 2012, because summonses were never properly served on the named defendants.

In its order, filed April 22, 2016, the district court for Lancaster County denied Gray's motion to reconsider. Gray timely appealed and was granted leave to file the appeal in case No. A-16-482, in forma pauperis. No appellee brief was filed on behalf of the defendants.

2. Case No. CI 16-1373

On April 20, 2016, Gray filed a motion to proceed in forma pauperis in the Lancaster County District Court in case No. CI 16-1373. On May 17, the district court for Lancaster County filed an order denying Gray's request. The district court took judicial notice of the order filed in case No. CI 16-184. The court found that since July 19, 2012, Gray, a prisoner, had "brought three cases that were dismissed for being frivolous." Gray timely appealed and was granted leave to file this appeal, in case No. A-16-590, in forma pauperis. No appellee brief was filed on behalf of the defendant.

III. ASSIGNMENTS OF ERROR

Gray asserts the district court erred and abused its discretion by denying his motion for reconsideration in case No. A-16-482. He asserts the district court erred and abused its

discretion in denying his application to proceed in forma pauperis in case No. A-16-590.

IV. STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis under Neb. Rev. Stat. § 25-2301.02 (Reissue 2016) is reviewed de novo on the record based on the transcript of the hearing or written statement of the court. *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017). The district court denied in forma pauperis in this case pursuant to § 25-3401, but we see no reason why the same standard of review should not apply.

[2,3] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Id.*

V. ANALYSIS

1. Plain Error

(a) Case No. A-16-482

In response to the defendants' motion to reconsider, Gray argued that cases Nos. CI 13-143, CI 14-866, and CI 15-94 were each habeas corpus actions and "dismissal in a habeas corpus action is not a strike." Gray does not argue this assertion on appeal; however, this court may, at its option, notice plain error. We review the plain language of § 25-3401, which allows certain limits to be placed upon prisoners who have previously filed multiple civil actions which have been found to be frivolous.

[4,5] 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. *State v. Raatz*, 294 Neb.

852, 885 N.W.2d 38 (2016). In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.*, citing *State v. Mucia*, 292 Neb. 1, 871 N.W.2d 221 (2015).

Section 25-3401(2)(a) states:

> A prisoner who has filed three or more civil actions, commenced after July 19, 2012, that have been found to be frivolous by a court of this state or a federal court for a case originating in this state shall not be permitted to proceed in forma pauperis for any further civil actions without leave of court. A court shall permit the prisoner to proceed in forma pauperis if the court determines that the person is in danger of serious bodily injury.

Section 25-3401(1)(a) states that, for purposes of this section, a civil action means "a legal action seeking monetary damages, injunctive relief, declaratory relief, or any appeal filed in any court in this state that relates to or involves a prisoner's conditions of confinement. *Civil Action does not include a motion for postconviction relief or petition for habeas corpus relief*." (Emphasis supplied.)

By the definition of civil action in § 25-3401(1)(a), the Legislature expressly excluded petitions for habeas corpus relief from consideration for purposes of determining, under § 25-3401(2)(a), whether a prisoner has filed three or more civil actions that have been found to be frivolous.

The defendants submitted orders from cases Nos. CI 13-143, CI 14-866, and CI 15-94 to the district court in support of the motion for reconsideration. At the hearing before the district court, Gray argued that each of the three cases presented originated as petitions for habeas corpus relief. The court found that "since July 2012, [Gray] has brought three cases, while incarcerated, that were dismissed for being frivolous."

It is true that in each of the orders submitted by the defendants, the respective district courts denied Gray's requests

to proceed in forma pauperis because the underlying action appeared to be frivolous. However, upon our review of the record, it appears that at least one of the alleged strikes, case No. CI 14-866, originated as a petition for habeas corpus relief. In case No. CI 14-866, the order of the district court stated "[t]he evidence demonstrates that the issues presented in the petition for habeas corpus filed by [Gray] have previously been considered and overruled in three prior cases . . . ." Because petitions for habeas corpus relief are not included in the definition of "civil actions" in § 25-3401, case No. CI 14-866 must be excluded from consideration. Therefore, we find that the district court plainly erred in applying § 25-3401(2)(a) to deny Gray's request to proceed in forma pauperis based upon the three cases cited by the defendants.

(b) Case No. A-16-590

In case No. CI 16-1373, the district court took judicial notice of the order in case No. CI 16-184. The court relied on the prior determination that Gray, "a prisoner, has brought three cases that were dismissed for being frivolous" in concluding that Gray's application to proceed in forma pauperis should be denied based upon the provisions of § 25-3401(2)(a). The court made no additional findings regarding any other previous actions which could be counted as "civil actions" according to § 25-3401(1)(a). Having found that the court's findings in case No. CI 16-184 were in error, we must also find that the court's findings in case No. CI 16-1373 were in error.

(c) Conclusion

In reversing the orders of the district court, we note that the district court is not precluded from denying Gray's requests to proceed in forma pauperis should it be determined that the legal positions asserted by the applicant are frivolous or malicious, or there are other reasons the applications should be denied pursuant to § 25-2301.02. See *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

2. Commencement of Action

[6] In both cases Nos. A-16-482 and A-16-590, Gray asserts the district court erred in finding he had "commenced" three or more civil actions after July 19, 2012, that have been found to be frivolous by a court of this state or a federal court. Having found that the district court committed reversible error by determining that each of the three cases presented to the district court for consideration qualified as "strikes" pursuant to § 25-3401(2)(a), these appeals are resolved. Therefore, we elect to not consider Gray's assigned errors regarding when an action is deemed to have been "commenced" for purposes of § 25-3401. See *Gray v. Kenney*, 290 Neb. 888, 863 N.W.2d 127 (2015) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

VI. CONCLUSION

We find the district court erred in denying in forma pauperis status in cases Nos. CI 16-184 and CI 16-1373 based upon the provisions of § 25-3401. Therefore, we reverse, and remand for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

State of Nebraska, appellee, v.
Judson L. Sack, appellant.
897 N.W.2d 317

Filed May 23, 2017. No. A-16-851.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
2. ____: ____. 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.

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

Chelsey R. Hartner, Chief Deputy Madison County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Moore, Chief Judge.

INTRODUCTION

Judson L. Sack appeals from his plea-based conviction in the district court for Madison County for theft by shoplifting, third offense. Sack challenges the district court's use of two prior convictions for enhancement purposes. Finding no error, we affirm.

BACKGROUND

In June 2016, Sack was charged by information with theft by shoplifting ($500 or less), third offense, a Class IV felony. The offense occurred on March 5, 2016, after the effective date of 2015 Neb. Laws, L.B. 605, which changed the grading of theft. Sack filed a plea in abatement, arguing that his two prior convictions occurred before L.B. 605 modified the maximum value of theft from $200 to $500, see Neb. Rev. Stat. § 28-518(4) (Cum. Supp. 2014 & Reissue 2016), and therefore could not be used to enhance the current offense. The district court overruled the plea in abatement, and thereafter, Sack entered a plea of no contest to the charge pursuant to a plea agreement in which the parties agreed that if the court found that Sack had two prior convictions which were suitable for enhancement, the State would recommend a sentence of 1 year.

On August 9, 2016, an enhancement and sentencing hearing was held. The State offered into evidence two prior convictions of theft by shoplifting of goods worth less than $200 in 2009 and 2013. Sack again challenged the use of these prior convictions. The district court found the prior convictions to be suitable for enhancement under § 28-518(6) (Reissue 2016) and found Sack guilty of theft by shoplifting, third offense, a Class IV felony. Sack was sentenced to imprisonment for a determinate term of 1 year with the Nebraska Department of Correctional Services.

ASSIGNMENT OF ERROR

Sack assigns that the district court erred in enhancing his conviction to a third offense.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017).

ANALYSIS

Sack argues that his two prior convictions occurred before the effective date of L.B. 605, which amended § 28-518(4), and thus were not suitable for enhancement.

Prior to the amendments contained in L.B. 605, § 28-518(4) (Cum. Supp. 2014) provided that theft constituted a Class II misdemeanor when the value of the thing involved was $200 or less. Following the amendments, § 28-518(4) (Reissue 2016) now provides that theft constitutes a Class II misdemeanor when the value is $500 or less. Section 28-518(6) provides that for any third or subsequent conviction under subsection (4), the person so offending shall be guilty of a Class IV felony. Subsection (6) remained unchanged following L.B. 605.

Sack does not contest that he was twice previously convicted under the prior version of § 28-518(4); rather, he argues that the value range change enacted by L.B. 605 modified the subsection so significantly that a conviction under subsection (4) as it existed prior to the amendment cannot be considered to be a conviction under subsection (4) of the present statute. We disagree.

[2] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Chacon, supra.* The plain language of § 28-518(6), which did not change, makes a third theft conviction under § 28-518(4) a Class IV felony.

Sack relies upon the cases of *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980), and *State v. Sundling*, 248 Neb. 732, 538 N.W.2d 749 (1995), in support of his argument. In *Suhr*, the defendant was convicted of issuing a bad check under Neb. Rev. Stat. § 28-611 (Reissue 1979). On appeal, the defendant assigned error to the trial court's use of a prior conviction for writing a no-account check, under the predecessor statute, Neb. Rev. Stat. § 28-1212 (Reissue 1975), for purposes of enhancing his sentence in the later charge. The Supreme Court

agreed, finding that the language of the new statute was substantially different than its predecessor and essentially redefined the offense of issuing a bad check. The court also noted that § 28-611 affirmatively declared that for an offense to be a second or subsequent offense, it must be a prior conviction under § 28-611 (not § 28-1212).

This case is distinguishable from *State v. Suhr, supra*. First, while the grade of the offense was amended in § 28-518(4) by changing the maximum value for a Class II misdemeanor from $200 to $500, there was not a substantial difference in the language of the amended statute or a redefinition of the offense of theft by shoplifting contained in Neb. Rev. Stat. § 28-511.01 (Reissue 2016). Second, the language of § 28-518(6) was not amended to affirmatively declare that for an offense to be a third or subsequent conviction, it had to be under subsection (4) as amended.

State v. Sundling, supra, supports the decision of the district court in the present case. In *Sundling*, the court found that the statutory amendments to the driving while intoxicated statutes from chapter 39 to chapter 60 did not preclude use of prior convictions under chapter 39 for sentence enhancement of convictions under chapter 60. In reaching this conclusion, the court noted that there was not a substantive departure from Neb. Rev. Stat. § 39-669.07 (Cum. Supps. 1990 & 1992) when the statute was renumbered to Neb. Rev. Stat. § 60-6,196 (Reissue 1993). The court further noted that the same standard remained for enhancement as each statute provided that a person is guilty of driving while intoxicated, third offense, if such person "'has had two or more convictions under *this section*.' (Emphasis supplied.)" *State v. Sundling*, 248 Neb. at 735, 538 N.W.2d at 751. The same rationale is present in the instant case as § 28-518(6) provides that a person is guilty of a Class IV felony for "any third or subsequent conviction under subsection (4) of *this section*." (Emphasis supplied.)

We conclude that the district court did not err in finding that Sack's two prior convictions under § 28-518(4) were

suitable to use for enhancement to a third offense under § 28-518(6). And, as noted by the district court, the amendment to § 28-518(4) was of no import as applied to this case, because Sack's prior convictions would have been classified under this subsection under either the old or the new version of the statute; the change in value made no difference.

CONCLUSION

The district court did not err in enhancing Sack's conviction of theft by shoplifting to a third offense as a result of his two prior convictions under § 28-518(4), which convictions occurred prior to the amendment to that section.

Affirmed.

Sonia Becher, appellee and cross-appellant, v. Mark A. Becher, appellant and cross-appellee.

897 N.W.2d 866

Filed June 6, 2017. No. A-16-054.

1. **Appeal and Error: Waiver.** Whether a party waived his or her right to appellate review is a question of law.
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. **Judgments: Proof: Waiver: Affidavits: Appeal and Error.** In order to establish whether a party has so dealt with a judgment or other order appealed from as to have waived any right to review, it is permissible to present affidavits foreign to the record thereto.
4. **Judgments: Appeal and Error.** An appellant may not voluntarily accept the benefits of part of a judgment in the appellant's favor and afterward prosecute an appeal or error proceeding from the part that is against the appellant.
5. **Divorce: Judgments: Appeal and Error.** A spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review.
6. **Verdicts: Evidence: Appeal and Error.** Recommended factual findings of a special master have the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence.

7. **Judgments: Appeal and Error.** Where parties consent that the report of a referee containing the evidence taken by said referee, and his findings of fact and conclusions of law, shall be submitted to the court, together with the objections and exceptions thereto, for determination on the merits by the court, they are precluded by such submission from assigning error by the court in setting aside the report and findings of the referee, and substituting therefor the findings of the court.
8. ____: ____. Where parties consent that the report of a referee containing the evidence taken by said referee, and his findings of fact and conclusions of law, shall be submitted to the court, together with the objections and exceptions thereto, for determination on the merits by the court, an appellate court will only consider the correctness of the findings and judgment of the district court.
9. **Trial: Witnesses: Testimony.** Witness credibility and the weight to be given a witness' testimony are questions for the trier of fact.
10. **Judgments.** A trial court may only set aside or modify the report of a referee issued pursuant to Neb. Rev. Stat. § 25-1129 et seq. (Reissue 2016) upon a determination that the referee's findings were clearly against the weight of the evidence.
11. **Divorce: Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
12. ____: ____. Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance.
13. **Divorce: Courts: Property Division.** The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's ability to determine how the property should be divided in an action for dissolution of marriage.
14. **Divorce: Property Division.** In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.
15. **Property Division: Proof.** The burden of proof rests with the party claiming that property is nonmarital.

16. **Modification of Decree: Child Support.** The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.
17. **Rules of the Supreme Court: Child Support.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.
18. **Child Support.** Use of earning capacity to calculate child support is useful when it appears that the parent is capable of earning more income than is presently being earned.
19. **Child Support: Evidence.** Generally, 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.
20. **Child Support.** In calculating child support, the court must consider the total monthly income, defined as income of both parties derived from all sources.
21. **Divorce: Alimony.** In considering alimony, a court should weigh four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the party seeking support to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
22. ____: ____. In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2016), a court should consider the income and earning capacity of each party and the general equities before deciding whether to award alimony.
23. **Divorce: Property Division: Alimony.** The statutory criteria for dividing property and awarding alimony overlap, but the two serve different purposes and courts should consider them separately.
24. **Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
25. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in Neb. Rev. Stat. § 42-365 (Reissue 2016) make it appropriate.
26. **Divorce: Alimony.** In weighing a request for alimony, the court may take into account all of the property owned by the parties when entering the decree, whether accumulated by their joint efforts or acquired by inheritance.
27. **Divorce: Attorney Fees.** In a marital dissolution action, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

28. ____: ____. A dissolution court deciding whether to award attorney fees should consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed as modified.

David P. Kyker and Brad Sipp for appellant.

Sally A. Rasmussen, of Mattson Ricketts Law Firm, for appellee.

Moore, Chief Judge, and Riedmann and Bishop, Judges.

Moore, Chief Judge.

I. INTRODUCTION

In this dissolution of marriage action, the parties agreed to trial before a referee. The referee's report was filed with the district court for Lancaster County, and the parties filed exceptions to the report. The court subsequently entered a decree of dissolution from which the parties have appealed. Mark A. Becher assigns error to the manner in which the district court reviewed and modified the referee's report. Mark challenges certain findings of the court regarding the classification, valuation, and division of the parties' assets and debts; custody and parenting time; child support; alimony; and attorney fees. In her cross-appeal, Sonia Becher assigns error to the court's allocation of Christmas holiday parenting time and the court's failure to classify certain property as nonmarital. Sonia also seeks summary dismissal of Mark's appeal based upon Mark's acceptance of the benefits of the decree. For the reasons that follow, we affirm as modified, vacating and setting aside certain findings of the district court.

II. BACKGROUND

The parties were married in December 1991. They have three children: Daniel Becher, born in 2000; Cristina Becher, born in 2002; and Susana Becher, born in 2008.

On February 1, 2013, Sonia filed a complaint for dissolution of marriage in the district court, and Mark thereafter filed an answer. Both parties sought custody of the children, child support, alimony, attorney fees, and an equitable division of the parties' property.

The parties entered into a stipulation with respect to temporary matters. On April 19, 2013, the district court approved the stipulation and awarded the parties temporary joint legal custody of the children. Temporary physical custody of the children was awarded to Sonia, subject to Mark's rights of parenting time as set forth in the attached parenting plan. The court ordered Mark to pay temporary child support of $4,000 per month beginning May 1 and spousal support of $6,000 per month. The court also ordered Mark to pay the "school tuition and matriculation fees" for the minor children to attend a particular elementary school and temporary attorney fees on behalf of Sonia of $2,000.

Soon thereafter, Mark filed a motion to modify both temporary custody and support. In his motion, Mark alleged that Daniel's primary physical custody had been maintained with Mark since May 2013. Mark alleged that the temporary child support award should be adjusted to reflect this split custody arrangement. Mark also alleged that the children were attending a different school than that contemplated in the April 2013 temporary order, at a significantly higher cost, and that "[s]upport should be adjusted to reflect the increased education expense."

On November 25, 2013, the district court entered another temporary order. The court awarded Mark temporary custody of Daniel and awarded Sonia parenting time with Daniel. The court denied Mark's motion for a reduction in his child support obligation and reserved that issue for trial. The court

also ordered the parties to complete a custody evaluation by a psychologist, with each party paying one-half of any necessary expenses.

On December 10, 2014, the parties filed a stipulation agreeing to a trial before a referee due to the complex financial and business valuation issues involved in their divorce as well as the issues of parenting time, child support, and alimony. The district court approved the stipulation and appointed a referee.

Trial was held before the referee on multiple dates from December 11, 2014, to July 23, 2015. The voluminous trial record contains more than 2,300 pages of testimony and nearly 200 exhibits. We have set forth the evidence relevant to the parties' assignments of error in the corresponding sections below.

On October 20, 2015, the referee's report and the parties' exceptions thereto were filed with the district court. The referee's detailed and thorough report is 34 pages, excluding the attached parenting plan, child support worksheets, and spreadsheet of the property valuation and division. We have discussed specific findings of fact, analyses, and recommendations made by the referee as necessary in the analysis section below.

On November 4, 2015, the district court received into evidence the transcribed trial testimony and exhibits from the trial before the referee for purposes of reviewing the record. The court heard Sonia's arguments in support of her exceptions to the referee's report. Mark withdrew his exceptions to the referee's report, but he asked the court to modify the payment schedule for the equalization payment to Sonia. Mark's counsel informed the court that Mark was "am[en]able to having joint custody of his children" but asked the court to change his support obligation accordingly if joint custody was awarded. Finally, he asked the court "to adopt the report with the exception that [he] believe[d] that the court may fashion a different parenting plan or one that the court believes is more in the best interest of these children."

On December 21, 2015, the district court entered a detailed 25-page decree. We have discussed specific findings in the decree in the analysis section below.

Mark filed a motion to determine supersedeas bond. On January 26, 2016, the district court entered an order finding that during the pendency of any appeal by either party, each party shall manage, operate, and control the real estate awarded to that party pursuant to the decree and be entitled to collect and receive all rents due and payable with regard to the real estate awarded. The court also found that during the pendency of any appeal, Sonia shall be entitled to collect and receive all rents due and payable with regard to the three commercial properties awarded to her and each party shall service the debt obligation on the real estate allocated in the decree. Finally, the court found that upon Mark's posting a supersedeas bond of $600,000 to be approved by the court, Mark shall not be required during the pendency of any such appeal to transfer to Sonia any ownership interest he might have in the real estate awarded to Sonia. The record does not show that Mark ever filed a supersedeas bond.

On July 1, 2016, after Mark had perfected his appeal, Sonia filed a motion for summary dismissal of Mark's appeal with this court. She asserted that Mark had accepted the benefits of the decree and had forfeited his right to appeal all issues except those pertaining to the children. We overruled Sonia's motion without prejudice, and we have addressed the issue of acceptance of the benefits in this opinion. On December 14, just prior to oral argument in this case, Sonia filed a renewed motion to dismiss, and we address Sonia's renewed motion as well in the analysis section below.

III. ASSIGNMENTS OF ERROR

Mark asserts, restated, that the district court erred in (1) modifying the referee's report without determining whether the referee's findings were clearly against the weight of the evidence; (2) setting aside certain property to Sonia as

nonmarital; (3) awarding Sonia three commercial properties; (4) valuing Sark Tile, Inc., Lamp & Lighting of Lincoln, Inc. (Lamp & Lighting), and Grab It Hardware; (5) dividing the parties' personal property; (6) treating Sark Tile's shipping containers as personal property; (7) determining marital debt; (8) setting forth conflicting custodial arrangements for Susana; (9) determining the parties' incomes for purposes of child support; (10) failing to prepare a "worksheet 3" in calculating child support; (11) improperly crediting Mark for overpayment of temporary child support; (12) requiring Mark to pay private school tuition; (13) awarding alimony; and (14) awarding attorney fees.

On cross-appeal, Sonia asserts that the district court erred in (1) allocating parenting time over the Christmas holiday; (2) failing to characterize a life insurance policy purchased by Sonia's father as nonmarital; and (3) failing to award her nonmarital equity in Capitol Park, LLC, Lamp & Lighting, and certain residential rental property.

IV. ANALYSIS

1. Sonia's Motions to Dismiss

[1,2] Before addressing the merits of Mark's assigned errors on appeal, we first address whether he waived his right to appeal from the decree by accepting the benefits of the judgment. Whether a party waived his or her right to appellate review is a question of law. *Edwards v. Edwards*, 16 Neb. App. 297, 744 N.W.2d 243 (2008). 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. *Devney v. Devney*, 295 Neb. 15, 886 N.W.2d 61 (2016).

[3] Although Mark has not argued that Sonia has waived her right to cross-appeal, for the sake of completeness, we have also addressed the effect of Sonia's acceptance of certain benefits on her right to cross-appeal. In addressing the issue of acceptance of benefits by the parties, we have reviewed

both of Sonia's motions to dismiss and her supporting affidavits. The Nebraska Supreme Court has held that in order to establish whether a party has so dealt with a judgment or other order appealed from as to have waived any right to review, it is permissible to present affidavits foreign to the record thereto. See *Phelps v. Blome*, 150 Neb. 547, 35 N.W.2d 93 (1948).

(a) Sonia's First Motion to Dismiss

In the affidavit in support of her first motion to dismiss, Sonia stated that following entry of the decree and Mark's failure to post a supersedeas bond, she and Mark both took full ownership and control over the residential and commercial properties awarded to them by the district court. She stated that during the appeal, the parties have executed and recorded quitclaim deeds transferring their ownership interests in each other's properties. Sonia also stated that Mark has created a new corporation, John Galt Development, LLC, which now holds title to the properties awarded to him. Sonia attached copies of the quitclaim deeds executed and recorded by the parties and certified copies of the certificate of organization and proof of publication for John Galt Development filed by Mark with the Nebraska Secretary of State. Sonia also stated that Mark had refinanced the loans associated with his properties, releasing her as guarantor and her properties as collateral for those notes. She attached copies of recorded deeds of reconveyance releasing her properties as collateral.

In her affidavit, Sonia stated that during the appeal, Mark has utilized rents and receipts from Sark Tile, one of the businesses awarded to him, to pay personal expenses. She attached documentation showing that checks from Sark Tile had been used to pay postdecree judgments to the district court for garage door openers and for the children's health care expenses.

Finally, Sonia attached additional documents and outlined steps she had taken with respect to the commercial and residential property awarded to her; detailed her attempts to refinance

a loan associated with a building housing a Dollar General store; and stated that, like Mark, she had utilized rents and receipts from the properties awarded to her to pay both business and personal expenses.

(b) Sonia's Renewed Motion to Dismiss

In the affidavit attached to her renewed motion to dismiss, Sonia stated that since submission of her first affidavit, both parties had independently obtained refinancing for those commercial properties awarded to each of them, that a former "blanket loan" which was cross-collateralized by both parties' properties had been satisfied, and that she had renegotiated the terms and conditions for a loan on her commercial properties only and was making the loan payments pursuant to those terms and conditions. Finally, Sonia stated that she had sold Mini Storage, one of the commercial properties awarded to her, in an arm's-length sale to a third party. Sonia stated that she no longer owns any part of Mini Storage and has "no say" in how that business is operated.

(c) Relevant Case Law

[4] Under the general acceptance of benefits rule, an appellant may not voluntarily accept the benefits of part of a judgment in the appellant's favor and afterward prosecute an appeal or error proceeding from the part that is against the appellant. *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006). There are, however, exceptions to this general rule.

An exception to the acceptance of benefits rule exists where the outcome of the appeal could have no effect on the appellant's right to the benefit accepted. See *Kassebaum v. Kassebaum*, 178 Neb. 812, 135 N.W.2d 704 (1965) (appellant who withdrew $200 from former jointly held account assigned by divorce decree to him not estopped from appealing from decree on ground that property division awarded him was insufficient).

[5] In *Liming v. Liming, supra*, the Nebraska Supreme Court held that in a dissolution action, a spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review. The court in *Liming* observed:

> The reasoning for these exceptions is that to preclude appeal by the acceptance of the benefits of a divorce judgment, the acceptance of benefits must be of such a nature as to clearly indicate an intention to be bound by the divorce decree. . . . There must be unusual circumstances, demonstrating prejudice to the appellee, or a very clear intent to accept the judgment and waive the right to appeal, to keep an appellate court from reaching the merits of the appeal.

272 Neb. at 543, 723 N.W.2d at 96-97 (citations omitted).

Given Sonia's arguments in her brief in support of her first motion to dismiss, some discussion of the Nebraska Supreme Court's holding in *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993), is warranted. The holding in *Giese* (along with the holding in *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992)), was disapproved of to a certain extent by the court in *Liming v. Liming, supra*, but Sonia argues that the court's holding in *Giese* still has some applicability in the present case.

In *Giese v. Giese, supra*, the wife claimed that the husband waived his right to appeal because he had accepted various aspects of the property settlement, had taken possession of a drycleaning business awarded to him, and had used the drycleaning business' assets to pay personal expenses and satisfy other obligations under the decree. The Nebraska Supreme Court in *Giese* noted its prior rulings in both *Kassebaum* and

Shiers and observed that the court-ordered sale of certain joint assets and equal division of the proceeds did not confer a right which did not exist in the parties prior to the judgment and was permitted under *Kassebaum*. However, the *Giese* court determined that the husband's acceptance of the drycleaning business did not fall under the *Kassebaum* exception. The court concluded that in taking sole possession of the drycleaning business, which had been a joint asset of the parties, and using its assets, the husband waived his arguments except for those with respect to child support.

The Nebraska Supreme Court in *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006), characterized the holding in *Giese* as a departure from the exception to the acceptance of benefits rule set forth in *Kassebaum v. Kassebaum*, 178 Neb. 812, 135 N.W.2d 704 (1965). The *Liming* court noted that while it had not previously revisited the holding in *Giese* (and *Shiers*), this court, in *Paulsen v. Paulsen*, 11 Neb. App. 362, 650 N.W.2d 497 (2002) (relying on exception that if outcome of appeal could have no effect on appellant's right to benefit accepted, its acceptance does not preclude appeal), allowed an appellant to challenge an alimony award although the appellant had accepted the benefits of the property settlement. The Supreme Court in *Liming* went on to reiterate the acceptance of benefits rule set forth in *Kassebaum* and stated further, "When there is no possibility that an appeal may lead to a result showing that the appellant was not entitled to what was received under the judgment appealed from, the right to appeal is unimpaired by the acceptance of benefits." 272 Neb. at 542, 723 N.W.2d at 96. The court then held to the extent that *Giese* (and *Shiers*) limit the exceptions to the acceptance of benefits rule in a dissolution of marriage action to issues affecting the interests and welfare of children, they are disapproved.

Sonia argues that while the Nebraska Supreme Court in *Liming* disapproved of *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993), to the extent that it limited exceptions to

the acceptance of benefits rule to issues with respect to children, it did not overturn the *Giese* court's determination that under *Kassebaum*, the husband accepted the benefits of the decree and waived his right to appeal when he took control of the parties' drycleaning business and treated it as his own. In other words, she relies on this determination from *Giese* to support her argument that by taking control of the properties awarded to him in this case and using them as his own, Mark is precluded from appealing all issues except those relating to the parties' children. We disagree. The Nebraska Supreme Court's discussion of the *Kassebaum* exception in *Liming v. Liming, supra*, makes it clear that acceptance of a benefit does not preclude appeal where the outcome of the appeal can have no effect on the appellant's right to the benefit accepted. Here, while Sonia's affidavits support a conclusion that both Mark and Sonia have accepted certain benefits as outlined above, we must examine each party's assignments of error to determine whether the outcome of the appeal with respect to those issues can have any effect on the right to the benefits accepted by that party. If there is no possibility that the appeal of a particular issue will lead to a result showing that party was not entitled to the benefits he or she accepted, that party's right to appeal that issue is not waived. We proceed to consider both party's assignments of error in light of this and the other exceptions set forth above to determine which, if any, issues can be addressed on the merits.

(d) Issue Relating to Parties' Children Not Waived

With respect to the parties' children, Mark asserts that the district court erred in setting forth conflicting custodial arrangements for the parties' youngest child, Susana; determining the parties' incomes for purposes of child support; failing to prepare a "worksheet 3" in calculating child support; improperly crediting Mark for overpayment of temporary child support; and requiring Mark to pay private school tuition. By

his assumption of control and ownership of the properties awarded to him, Mark has not waived his right to appeal these issues. See *Reynek v. Reynek*, 193 Neb. 404, 227 N.W.2d 578 (1975). Likewise, by Sonia's assumption of control and ownership of the properties awarded to her, she has not waived her right to cross-appeal the district court's allocation of parenting time over the Christmas holiday, because that is an issue affecting the children's interests.

(e) Other Issues Not Waived

Mark asserts that the district court erred in its valuation of Sark Tile, Lamp & Lighting, and Grab It Hardware. Sonia does not challenge the award of these properties to Mark, and his alleged error with respect to the valuation of these properties could have no effect on his right to the ownership and operation of Sark Tile and Lamp & Lighting (Grab It Hardware closed in 2014). Mark has not waived his right to appeal the issue of the valuation of these businesses.

Similarly, Mark has not waived his right to appeal the district court's division of the parties' personal property or the court's treatment of Sark Tile's shipping containers as personal property. Sonia has not challenged these awards on cross-appeal, and the outcome of this appeal with respect to those issues can have no effect on Mark's assumption of ownership and use of the business, residential, and commercial properties awarded to him.

Mark asserts that the district court erred in setting aside the mortgage payoff on the marital residence to Sonia as nonmarital property. Although he signed a quitclaim deed with respect to the marital residence, his doing so is not inconsistent with his position with respect to the mortgage payoff. In this assignment of error, Mark does not challenge the award of the marital residence to Sonia; rather, he challenges the court's determination that Sonia was entitled to this particular set off of nonmarital funds gifted by her father. Mark has not waived his right to appeal this issue.

Mark asserts that the district court erred in determining marital debt with respect to "$150,000.00 in loans made to Mark from Craig Smith," brief for appellant at 67, and loans relating to Sark Tile and the Dollar General building. We determine that Mark has not waived his right to appeal the determination of marital debt to the extent he is asking that these debts be included in the overall division of the marital estate.

Finally, Mark has not waived his right to appeal the awards of alimony and attorney fees, which awards Sonia has not challenged on cross-appeal. Again, the outcome of this appeal with respect to the awards of alimony and attorney fees can have no effect on Mark's assumption of ownership and use of the business, residential, and commercial properties awarded to him.

On cross-appeal, Sonia asserts that the district court erred in failing to characterize a life insurance policy purchased by her father as nonmarital. The court included the life insurance policy in the marital estate and awarded it to Sonia at a cash value of $104,600. Mark does not challenge the award of the life insurance policy to Sonia, and her assumption of full ownership and control of the residential and commercial properties awarded to her can have no effect on the issue of whether the policy should have been included in the marital estate. Sonia has not waived the right to cross-appeal this issue.

Sonia also asserts that the district court erred in failing to award her nonmarital equity in Capitol Park, Lamp & Lighting, and certain residential rental property. She signed quitclaim deeds with respect to Capitol Park and the residential rental property identified in this assignment of error. She also signed quitclaim deeds with respect to certain other real property not identified in this assignment of error. Sonia's signing of the quitclaim deeds with respect to the relevant residential rental property and Capitol Park is not inconsistent, however, with her position on cross-appeal. Sonia does not directly challenge the award to Mark of the assets identified in this assignment of error; rather, she argues that she traced certain funds gifted

from her father to these assets and was thus entitled to some sort of compensation for the traced nonmarital funds. Sonia has not waived her right to cross-appeal this issue.

(f) Issues Waived by Mark

Mark asserts that the district court erred in awarding Sonia three commercial properties, namely, the Dollar General building, Sun Valley, and Mini Storage. Mark signed a quitclaim deed transferring to West O Development, LLC, his interest in the Dollar General building. West O Development was awarded to Sonia by the district court. Mark also signed a quitclaim deed transferring his interest in Sun Valley and Mini Storage to Sonia as trustee of the Becher Trust. Mark's voluntary signing of the quitclaim deeds evidences an intent to be bound by the decree with respect to the award of these properties to Sonia, and he has thus waived his right to appeal this award. See *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006). However, Mark has not waived the right to appeal the district court's determination that the West O Development/Dollar General building should be set aside to Sonia as her nonmarital property. Mark's position that this asset should be considered as marital property does not affect Sonia's receipt of this asset; rather, it impacts the final division of the marital estate and the amount of the monetary judgment.

2. Review of Referee's Report

Mark asserts that the district court erred as a matter of law or otherwise abused its discretion in reviewing and modifying the referee's report without determining whether the referee's findings were clearly against the weight of the evidence.

We first note Sonia's argument that Mark cannot appeal from the referee's report because he withdrew his exceptions. See *Corn Belt Products Co. v. Mullins*, 172 Neb. 561, 110 N.W.2d 845 (1961) (where no exceptions are filed to findings of fact of referee prior to confirmation by trial court, findings of fact are binding on all parties). However, to the extent that

the court's decree altered the referee's findings, Mark is not prohibited from appealing those changes in the decree.

The parties in this case stipulated to trial before a referee, in accordance with Neb. Rev. Stat. § 25-1129 (Reissue 2016), which provides, "All or any of the issues in the action, whether of fact or law, or both, may be referred to a referee upon the written consent of the parties or upon their oral consent in court entered upon the journal." With respect to trial before a referee, Neb. Rev. Stat. § 25-1131 (Reissue 2016) provides:

> The trial before referees is conducted in the same manner as a trial by the court. They have the same power to summon and enforce the attendance of witnesses, to administer all necessary oaths in the trial of the case, and to grant adjournments, as the court upon such trial. They must state the facts found and the conclusions of law, separately, and their decision must be given, and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict.

Mark's first assignment of error asks this court to consider whether the district court erred by making its own findings without first explicitly determining that the referee's findings were clearly against the weight of the evidence.

[6] The Nebraska Supreme Court has previously addressed a standard of review for reports on factual recommendations from a special master appointed by the court. *Mid America Agri Products v. Rowlands*, 286 Neb. 305, 835 N.W.2d 720 (2013), involved a mandamus action in which the defendant sought disqualification of the plaintiff's counsel in the underlying civil case on the ground that plaintiff's counsel had retained an expert witness who, before being retained, had consulted with the defendant's counsel on the same matter. In

the mandamus action, the Nebraska Supreme Court appointed a special master who made factual findings about the relationships and communications involved in the dispute. The Supreme Court stated:

> We review the findings of the special master to determine whether such findings are clearly against the weight of the evidence. Recommended factual findings of a special master have the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence.

Id. at 320, 835 N.W.2d at 731. The Supreme Court determined that the special master's finding that the expert witness did not convey the confidential information at issue to the plaintiff's counsel was not clearly against the weight of the evidence.

The Nebraska Supreme Court applied this same standard of review in considering the factual findings of a special master it had appointed in *Larkin v. Ethicon, Inc.*, 251 Neb. 169, 556 N.W.2d 44 (1996). In that case, the plaintiff appealed from a trial court decision granting summary judgment in favor of the defendant. Before oral argument, the Supreme Court appointed a special master to take evidence on the issue of the defendant's conduct during discovery and make recommended factual findings. On appeal, the Supreme Court considered the special master's findings in determining whether to reverse the summary judgment and remand the cause for further proceedings. The court noted that recommended factual findings of a special master are given the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence. *Id.* The court determined that the special master's factual findings were not clearly against the weight of the evidence and adopted those findings before proceeding to consider whether summary judgment had been properly entered.

While *Mid America Agri Products* and *Larkin* involved the Nebraska Supreme Court's review of factual findings of

a special master appointed directly by the Supreme Court, in *Brown v. O'Brien*, 4 Neb. 195 (1876), the Supreme Court reviewed a referee's factual findings after trial before the referee and confirmation of the referee's report and dismissal of the case by the trial court. In that case, which involved a contract dispute over a partnership with respect to certain cattle and grain, all issues of both fact and law were referred to and tried before a referee. The plaintiff took several exceptions to the report which were overruled by the trial court. The trial court confirmed the referee's report and dismissed the case. On appeal, the Supreme Court in *Brown* noted:

> The referee who finds there is no partnership between [the plaintiff and one of the defendants] in the grain in controversy, has heard the witnesses and is the best judge as to what the truth of the matter really is. The report is only to be set aside when the finding is clearly against the weight of the evidence.

4 Neb. at 198. The Supreme Court determined that the main question for its consideration was whether the plaintiff's exceptions were well taken. The Supreme Court observed, "As to all the questions of fact, submitted to the referee, his report thereupon must have the same effect and be treated in all respects as the verdict of a jury." *Id.* at 199. The Supreme Court further observed, "The court has no right to set it aside unless it be manifestly against the weight of the evidence." *Id.* After reviewing the evidence, the Supreme Court found nothing to support reversal and affirmed.

[7,8] The Nebraska Supreme Court also considered a trial court's findings with respect to a referee's report in *Hodges v. Graham*, 71 Neb. 125, 98 N.W. 418 (1904). In that case, the parties consented to trial before a referee. The referee filed a report containing his findings of fact and conclusions of law, which were in favor of the plaintiff. The defendant filed objections to the referee's report and a motion for new trial, after which the trial court set aside the referee's findings of fact and conclusions of law and awarded a new trial. The subsequent

proceedings are somewhat confusing, but apparently the parties eventually decided against having a new trial and agreed to resubmit the matter to the trial court on the evidence previously taken before the referee and to have the trial court make findings on the merits as it deemed proper. Subsequently, the trial court again set aside the referee's findings and conclusions and entered its own findings in favor of the defendant. In setting aside the referee's findings, the trial court found that the referee's findings were contrary to the clear weight of the evidence. On appeal, the Nebraska Supreme Court determined that because the parties had in fact agreed that the trial court should make its own findings upon the evidence previously submitted, the only issue for its consideration was whether the trial court erred in its findings and judgment. The Supreme Court held:

> Where parties consent that the report of a referee, containing the evidence taken by said referee and his findings of fact and conclusions of law, shall be submitted to the court, together with the objections and exceptions thereto, for determination on the merits by the court, they are precluded by such submission from assigning error by the court in setting aside the report and findings of the referee and substituting therefor the findings of the court.

71 Neb. at 125, 98 N.W. at 418 (syllabus of court). The Supreme Court further held, "In such case this court will only consider the correctness of the findings and judgment of the district court." *Id*. at 126, 98 N.W. at 418 (syllabus of court).

In our research, we have found no cases where the Nebraska Supreme Court has considered whether a trial court must explicitly determine that the findings in a referee's report are clearly against the weight of the evidence before making its own contrary findings. Mark cites to a Florida case, which is helpful to our consideration of this issue. In *Kalmutz v. Kalmutz*, 299 So. 2d 30 (Fla. App. 1974), a Florida District Court of Appeals reviewed a trial court's (chancellor's) actions

with respect to several findings in a referee's (special master's) report of findings of fact, conclusions of law, and recommendations to the court in a dissolution of marriage action. In that case, the chancellor appointed a special master to take evidence and report his findings of fact, conclusions of law, and recommendations to the court. The husband filed exceptions to the master's report, and after the chancellor entered a final judgment which made certain changes to the master's recommendations, the wife appealed.

On appeal, the *Kalmutz* court first reviewed an earlier case from the Florida Supreme Court with respect to a chancellor's actions in overruling a master:

> "While it cannot be questioned that in a case where the chancellor has appointed a master and empowered him to make findings he may override or modify them in any manner consistent with the justice of the case, he may not do this except for good cause. We interpret 'good cause' to mean a showing that the findings of fact by the master were clearly erroneous.
>
> "From our study of the subject it seems to us logical, if the master has heard all the testimony, that an exceptant to his findings undertakes the burden of showing that the master has clearly made a mistake—in other words, the same burden as an appellant who challenges in this court the conclusions of fact reached by the chancellor who has heard the witnesses. After all the master acts as an agent of the chancellor, and what he does in the capacity is in effect done by the court. These recommendations should be set aside only upon good cause, even though the findings were . . . advisory. . . .
>
> "In fine [sic], we have the view that where, as in this case, a competent master is selected by the chancellor and attentively conducts the hearings, thoroughly digests the testimony of the witnesses, and arrives at conclusions which are logical and well supported, his findings, although advisory, should not be set aside arbitrarily or

> capriciously (of which there is no claim in this case) nor should they be disregarded or overruled by the chancellor simply because of an opinion of the chancellor at variance with that of the master. As we have said, the master was acting as an accredited agent of the chancellor and was at the time performing a service which would have been performed by the chancellor himself but for the appointment. Having seen and heard the witnesses, he had a definite advantage over the chancellor, who reviewed the case from a typewritten record."

Kalmutz v. Kalmutz, 299 So. 2d 30, 33-34 (Fla. App. 1974), quoting *Harmon v. Harmon*, 40 So. 2d 209 (Fla. 1949) (citations omitted).

The appellate court in *Kalmutz* then reviewed the master's findings and recommendations, the transcribed testimony, the exceptions to the master's report, and the chancellor's order. After doing so, the appellate court concluded that the master's findings were not shown to be clearly erroneous. The appellate court in *Kalmutz* determined:

> While a chancellor's view of the evidence may be at variance with the master such a variance or difference of opinion is not sufficient to override or modify the master's report absent a showing "that the findings of fact made by the master were clearly erroneous". Accordingly, as hereinafter delineated, in those instances where there was competent substantial (although conflicting) evidence to support the findings of the master his findings must be sustained and the order of the chancellor vacated and set aside.

299 So. 2d at 34.

The appellate court then determined whether there was competent substantial evidence to support each of the four findings made by the master. The chancellor had modified three of the master's findings and made no reference to the fourth finding in its order. The appellate court found that with respect to two of the modified findings, the chancellor had

based its modification on a view of the evidence at variance with the master's. With respect to those two findings, the appellate court found evidence to support the master's findings. With respect to the third finding modified by the chancellor, the appellate court found the evidence did not support the master's determination, which was thus clearly erroneous, giving the chancellor the power to override the recommendation. Based on the record before it, the appellate court was not prepared to make a determination with respect to the master's fourth finding, which dealt with a contempt issue. Accordingly, the appellate court remanded that issue to the chancellor to "make specific findings." *Id.* at 35.

[9] In the present case, the district court made some references in the decree to the referee's findings and in several instances, the district court's findings follow those of the referee word for word. The court, however, made numerous findings that differed from those of the referee. In those instances, the court did not specifically determine that the referee's findings were clearly against the weight of the evidence. Rather, the district court essentially conducted a de novo review, substituting its view of the evidence in making its determination. In addition, the court made numerous explicit findings with respect to the weight and credibility of certain testimony from the parties, despite the fact that the court did not have the benefit of seeing and hearing the witnesses as did the referee. Generally, witness credibility and the weight to be given a witness' testimony are questions for the trier of fact. *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012). See, also, *Stutzman v. Bates*, 118 Neb. 520, 225 N.W. 678 (1929) (finding of referee on fairly conflicting evidence is binding on appellate court); *Creedon v. Patrick*, 3 Neb. (Unoff.) 459, 91 N.W. 872 (1902) (appellate court declined to reach independent conclusion where evidence before referee was conflicting, referee's report had been confirmed by trial court, and appellate court found sufficient evidence to sustain referee's findings).

[10] We conclude that the district court erred in failing to apply the correct standard of review with respect to the referee's report. We hold that a trial court may only set aside or modify the report of a referee issued pursuant to Neb. Rev. Stat. § 25-1129 et seq. (Reissue 2016) upon a determination that the referee's findings were clearly against the weight of the evidence.

We have reviewed the referee's findings, the parties' exceptions, and the court's decree to determine which of the parties' assigned errors relate to matters in which the district court made findings inconsistent with those of the referee. In those instances, we will determine whether the relevant findings of the referee were clearly against the weight of the evidence. The evidence in this case was conflicting. We consider the fact that the referee saw and heard the witnesses and observed their demeanor while testifying, and we will give great weight to the referee's determinations as to credibility. The district court clearly had its own strong feelings about the witnesses' credibility in this case, but we determine that the district court's differing view of the evidence is not sufficient to override the referee's view of the evidence absent a showing that the referee's findings were clearly against the weight of the evidence. In those instances where there was competent substantial, but conflicting, evidence to support the referee's findings, the differing findings of the district court must be vacated and set aside.

3. Classification and Division of Marital Estate

[11] Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate

between the parties in accordance with the principles contained in § 42-365. *Sellers v. Sellers*, 294 Neb. 346, 882 N.W.2d 705 (2016).

[12-15] Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. *Id.* Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance. *Id.* The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's ability to determine how the property should be divided in an action for dissolution of marriage. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004). The burden of proof rests with the party claiming that property is nonmarital. *Stanosheck v. Jeanette*, 294 Neb. 138, 881 N.W.2d 599 (2016).

(a) Sonia's Nonmarital Property

Mark asserts that the district court erred in setting aside certain property to Sonia as nonmarital. Sonia asserts that the district court erred in failing to characterize a life insurance policy purchased by her father as nonmarital and in failing to award her nonmarital equity in Capitol Park, Lamp & Lighting, and certain residential rental property.

Evidence was adduced that between 1993 and 2008, Sonia's father made gifts to her of over $1.7 million. Generally, Sonia attempted to trace some of these gifts to assets acquired during the marriage. Mark claimed that all of the money had been commingled with marital property and was untraceable. The referee found that the evidence made it nearly impossible to trace most of the monetary gifts from Sonia's father to current identifiable assets. Sonia filed an exception to the referee's failure to properly credit her for gifts from her family.

(i) West O Development/Dollar General Building

Sonia and her sister purchased the West O Development property in 2005, using a gift from their father of $825,000. Sonia later purchased her sister's interest with funds obtained from a loan. The West O Development entity includes a Dollar General building. Various repairs and improvements to the building were made over the years with additional loans. Although the referee recognized the $825,000 gift to purchase the West O Development/Dollar General building, it found that it did not retain its status as a gift because the equity in the building became encumbered by loans, the building was pledged as security for other loans, and moneys generated during the marriage were invested into the building in order to improve it. The referee awarded West O Development to Mark as a marital asset at a value of $1,263,950.

The district court, on the other hand, found that the gift of $825,000 was traceable and that the property which now represents the gift was identifiable. The court awarded Sonia this asset as nonmarital property valued at $1,263,950, subject to the existing debt of $610,000. The court found that there was no evidence of marital funds being used for the continued operation of West O Development or that marital resources were used to service the debt. The court also noted that rents developed from the property were sufficient to service the debt. The district court did not discuss the referee's findings or determine that the referee's findings were clearly against the weight of the evidence.

Although Mark has waived his right to assert error with respect to the award of this property to Sonia, he has preserved his argument that the property should be considered marital. The evidence was clearly conflicting on whether marital resources were invested in this entity. As noted by the referee, the testimony of the parties showed that they both borrowed $500,000 and added another $25,000 of their savings in order to buy out Sonia's sister's interest. The referee further noted

Mark's testimony that a significant amount of additional work and money was put into the Dollar General building. The referee also referred to evidence that the building had been pledged as security for several loans. There is evidence in the record to support the referee's finding that the gift of money from Sonia's father to purchase the building did not retain its status as a gift and that the entire value of West O Development should be considered a marital asset. The finding of the referee in this regard is not clearly against the weight of the evidence. The district court erred in determining that this asset should be treated as a nonmarital asset.

(ii) Mortgage Payoff on Marital Residence

Evidence was adduced about another gift made to Sonia from her father in 2008. The referee found this gift of $432,948 was a gift to the marriage and was not intended solely for the use of Sonia. The referee found that even if it was a gift to Sonia, the money was applied to marital debt and spent on marital business activities. Nevertheless, the referee found that the equities involved required some recognition of this gift, and he reduced the fair market value of the marital home awarded to Sonia by one-half of the funds used to pay off the mortgage balance (half of $220,300, or $110,150). The district court, on the other hand, gave Sonia credit for the full $220,300 mortgage payoff on the marital residence. The district court did not discuss the referee's findings or determine that the referee's findings were clearly against the weight of the evidence.

There was evidence in the record to support the referee's finding either that this gift was not intended solely for Sonia ($212,647 of the $455,401 was placed in a certificate of deposit in Mark's name only with the balance of $220,300 being used to pay off the family home mortgage) or that it lost its status as a gift as it was applied to marital debt and spent on marital business activities. The referee's finding was not clearly

against the weight of the evidence. The district court erred in its determination that Sonia is entitled to a credit of $220,300, instead of the credit of $110,150 given by the referee, against the value of the marital home as a gift.

(iii) Life Insurance Policy

The referee awarded Sonia a life insurance policy as a marital asset valued at $104,600, having determined that any moneys advanced for life insurance payments could not be traced with any certainty. The district court also awarded Sonia this policy at a value of $104,600 and included it as a marital asset in its division ledger. The court did not specifically discuss the policy in its findings regarding the traceability of nonmarital funds. Sonia argues that this asset should have been characterized as nonmarital because her father purchased it for her when she was 17 years old.

Sonia and her father testified that he purchased a life insurance policy for Sonia when she was 17 and that he paid the annual premiums directly to the life insurance company for many years. At some point, however, he stopped making the premium payments directly and began giving Sonia money to make the payments herself. According to Sonia, this money was placed in a joint account with Mark and premiums were paid from this account. However, the record shows that other money was deposited into this account by the parties during the marriage and that other checks were written from this account for the parties' house and living expenses. In other words, there has been a commingling of the money advanced by Sonia's father such that the life insurance policy did not retain its status as a nonmarital asset.

We conclude that the referee's finding that the money advanced for the life insurance premium payments from Sonia's father could not be traced with sufficient certainty was not clearly against the weight of the evidence, and the district court did not err in awarding Sonia the life insurance policy as a marital asset.

(iv) Nonmarital Equity in Certain Property

Sonia asserts that the district court failed to award her nonmarital equity in Capitol Park, Lamp & Lighting, Sark Motors, and certain residential rental property. These assets were awarded to Mark as marital property by both the referee and the district court. Sonia argues that these are "mixed" marital assets and that at least some of their value should be considered nonmarital for which she should be given a credit. Brief for appellee on cross-appeal at 73. Both the referee and the district court found that the evidence was insufficient to trace any gifted money to Sonia to these assets. We agree. The referee's findings in this regard were not clearly against the weight of the evidence, and the district court did not err in affirming this determination.

(b) Award of Commercial Properties to Sonia

As we determined above, Mark has waived his argument that the district court erred in awarding Sonia three commercial properties: West O Development, Sun Valley, and Mini Storage.

(c) Valuation of Commercial Property

Mark asserts that the district court erred in its valuation of Sark Tile, Lamp & Lighting, and Grab It Hardware.

(i) Sark Tile

Sark Tile is a corporation owned by the parties. Both the referee and the district court made extensive findings about the valuation of this property and gave differing reasons for reaching their respective valuations. The referee awarded Sark Tile to Mark at a value of $491,353. Sonia filed an exception to the referee's valuation of Sark Tile. The district court awarded Sark Tile to Mark at a value of $570,000. Although the district court referenced the referee's conclusion that the value of Sark Tile was "not less than $540,327," the court did not reference

the referee's final determination of value at $491,353. Nor did the court find that the referee's finding of the value of this asset was clearly against the weight of the evidence.

There was significant evidence adduced by both parties regarding the value of this company, particularly with regard to the extensive inventory. There were numerous expert valuations submitted into evidence containing analyses of inventory records, corporate tax returns, and balance sheets. The referee concluded, after a review of this evidence, that "it remains nearly impossible for the Referee to know what this business is worth because of the irreconcilable evidence and testimony offered by the experts on behalf of Mark and Sonia." Because of the continuing concerns the referee had about the value of the Sark Tile inventory, he requested and received permission to retain an expert to conduct a fair market valuation of the inventory. After this valuation of the inventory was done, adjustments to the business valuation were made by the experts although the valuations continued to vary significantly. After reviewing the "irreconcilable evidence," the referee determined that the value of the tile (i.e., inventory) was not less than $540,327, which he derived by averaging the 2013 tax return value of the inventory and his expert's appraisal and then subtracting 20 percent from that amount based upon another expert's opinion that 80 percent of the inventory is salable, together with another 10 percent reduction to account for the normal markup over cost. Incorporating this inventory value of $540,327 into an expert's adjusted 2013 balance sheet, the referee determined the value of Sark Tile as an ongoing entity to be $491,353.

The district court noted that the valuations of this business ranged from $15,000 to $1,482,664. The court rejected the inventory figures used by all the experts and arrived at its own conclusion of the value of the inventory based upon its extrapolation of the original cost of products stored in the shipping containers and the cost of sales information contained in the corporate tax returns. The court found that the value of Sark

Tile was $570,000. The district court made no reference to the referee's findings in connection with this asset nor did it find that they were clearly against the weight of the evidence.

We conclude that there was sufficient credible evidence to support the referee's findings and that these findings of value of the inventory and business were not clearly against the weight of the evidence. The district court erred in substituting its determination of value for Sark Tile.

(ii) Lamp & Lighting

Lamp & Lighting is another corporation owned by the parties. Again, both the referee and the district court made numerous findings with respect to this asset. The referee awarded this business to Mark at a value of $107,000. The referee also assigned a loan for Lamp & Lighting of $150,000 to Mark. Sonia filed an exception to the referee's valuation of Lamp & Lighting. The district court, using a somewhat different analysis than the referee, determined the value of Lamp & Lighting to be $257,000. The district court further noted the existence of a $150,000 debt, bringing the net value of Lamp & Lighting to $107,000. The district court did not make a determination that the findings of the referee were clearly against the weight of the evidence.

As was the case with the Sark Tile valuation, both parties provided expert valuation evidence with respect to Lamp & Lighting which differed significantly. Because of the referee's concern about the accuracy of the inventory values of Lamp & Lighting, it requested and received permission to appoint an expert to provide a fair market value of the inventory. The referee rejected this expert's inventory value as essentially being too low but determined that the inventory number on the tax returns was "over-stated." Because of the "irreconcilable [and] conflicting" evidence, the referee valued the inventory at not less than $190,000, which was arrived at by averaging the expert's inventory appraisal with the year-end inventory reported on Lamp & Lighting's 2013 tax return

and deducting 10 percent based upon nonsalable items or the markup that a potential buyer may exclude from an offer to purchase the business. After incorporating the $190,000 value for the inventory into Mark's expert's analysis, the referee determined the value of Lamp & Lighting to be $107,000.

The district court noted that the expert's valuations of Lamp & Lighting varied between $25,001 and $650,000. Similar to its method of valuation of Sark Tile, the court looked at gross sales and costs of goods sold on tax returns to arrive at its value of $257,000. The district court did not determine that the referee's finding of value was clearly against the weight of the evidence.

We conclude that there was sufficient credible evidence to support the referee's value of Lamp & Lighting and that it was not clearly against the weight of the evidence. The district court erred in substituting its own determination of value of this asset.

(iii) Grab It Hardware

Grab It Hardware was another business owned by the parties; it was closed in 2014. The referee made no findings with respect to this business, and it is not included in the appendix to the report which shows the division of assets and debts. The district court found that at the time of its closing in 2014 (after the valuation date of December 31, 2013), the assets of this business sold for $5,000. The court placed a value of $5,000 for this business and assigned it as a marital asset to Mark. The district court did not determine that the exclusion of this asset from the referee's division of assets was clearly against the weight of the evidence. However, because the referee did not make any findings regarding this business, we find no error by the district court in including the value of $5,000 for this business as a marital asset.

(d) Division of Personal Property

Mark asserts that the district court erred in dividing the parties' personal property.

The parties presented a significant amount of information concerning personal property. The referee made extensive findings and a detailed division of the parties' personal property. The referee awarded Sonia personal property valued at $13,340. The referee awarded Mark certain personal property valued at $7,470 and certain undervalued personal property in Sonia's possession valued at $9,650, as well as other personal property ("[p]ing pong table"; "[f]oosball table"; pool table, cues, and rack; compressor; and "Yamaha ATV"), at a total value of $4,375. The referee also awarded Mark "sentimental and pre-marital items" valued at $0. The total value of the personal property awarded to Mark by the referee was $21,495. Sonia filed an exception to the referee's valuation of the personal property and to the referee's overall allocation of the marital estate. The district court adopted the referee's allocation of personal property, "with a few minor modifications." The district court valued the personal property awarded to Sonia at $27,365 and to Mark at $23,870. It is next to impossible to determine the reason for the different valuations. The district court did not determine that the referee's findings were clearly against the weight of the evidence. We conclude that the district court erred in substituting its own valuation and division of personal property for that of the referee.

(e) Sark Tile's Shipping Containers

Mark asserts that the district court erred in treating Sark Tile's shipping containers as personal property. There was evidence adduced about the containers in which the tile sold by Sark Tile was delivered. The referee did not separately value the containers. Sonia filed an exception to the failure to include the containers in the division of property. The district court awarded to Mark, as personal property, 74 containers used by Sark Tile that existed as of the end of 2013 and all containers acquired since that date. In its division worksheet, the district court valued the 74 containers at $61,152. Mark argues on appeal that it was error to treat the containers as personal assets

because they were a corporate asset of Sark Tile. The district court did not determine that the referee's failure to separately value the containers owned by Sark Tile was clearly against the weight of the evidence.

In reviewing the district court's valuation of Sark Tile, it is evident that the court focused exclusively on the value of inventory as opposed to the overall value of the business; whereas the referee incorporated the inventory value into the overall value of the business. We conclude that there was sufficient evidence to support the referee's valuation of the Sark Tile business without separately valuing the containers owned by the business and that this valuation was not clearly against the weight of the evidence. The district court erred in including a separate value for the Sark Tile containers in its division of marital assets.

(f) Marital Debt

Mark asserts that the district court erred in determining marital debt. The referee assigned to Mark all of the marital debt, with the exception of the accrued real estate taxes on the family home after December 31, 2013, which it treated as a postseparation debt assigned to Sonia. The referee valued the total liabilities assigned to Mark at $2,856,658.30. The district court, as mentioned previously, assigned $610,000 of debt on the West O Development property to Sonia. In addition, it assigned a debt of $12,347 to Sonia associated with an unimproved parcel of real estate awarded to her. The district court's recapitulation shows total debt assigned to Mark as $2,236,544.18. The difference from the referee's value of debt assigned to Mark very closely relates to these two debts.

Mark challenges the failure to include certain debts in the marital estate. He first challenges the failure to include "$150,000.00 in loans made to Mark from Craig Smith." Brief for appellant at 67. However, the referee did not include these loans in the marital estate, noting that they were "Post-separation." The district court made the same

determination. Although we earlier determined that Mark did not waive his challenge to the classification of these debts, because Mark withdrew any exceptions he had to the referee's findings regarding these loans and the district court did not modify the referee's report in this regard, he is not allowed to challenge this now on appeal.

Mark also argues that the district court failed to include two other specific loans from "Security First" to Sark Tile totaling $250,000. Because the referee and the district court listed the debts in different ways, it is difficult to determine whether the district court's assignment of debts to Mark differed from the referee's determination of debts. However, as noted above, the difference in the assignment of debts is essentially explained by the assignment to Sonia of the indebtedness related to West O Development and the debt regarding the unimproved lot. Because Mark withdrew his exception to the referee's division of debts, we conclude that he is precluded from assigning error to the district court's determination of marital debt. However, as determined above, Mark was not precluded from assigning error to the district court's treatment of West O Development as nonmarital property, with the corresponding assignment of $610,000 of associated debt to Sonia, which we addressed above.

(g) Conclusion

The district court awarded Sonia marital property totaling $1,843,409 and marital debt totaling $12,347. The court also set aside $1,263,950 to Sonia as her nonmarital interest in West O Development, with the corresponding debt of $610,000, and further set aside $220,300 as her nonmarital portion of the family home. The court awarded Mark marital property totaling $4,906,406 and marital debt totaling $2,086,544.18. As set forth above, we have found certain errors in the district court's classification, valuation, and division of the marital estate, and we vacate and set aside those portions of the decree and modify the distribution of the marital estate in the decree accordingly

to incorporate the findings of the referee as to those issues. The following is a summary of our conclusions:

- The district court erred in its determination that the West O Development/Dollar General building should be treated as a nonmarital asset. Accordingly, Sonia's award of marital property increases by $1,263,950, and the amount of marital debt awarded to her increases by $610,000.
- The district court erred in its determination that Sonia is entitled to a credit of $220,300 against the value of the marital home as a gift as opposed to the $110,150 credit given by the referee. Accordingly, the marital property awarded to Sonia increases by $110,150.
- The district court erred in substituting its determination of Sark Tile's value for that of the referee. Accordingly, the value of the marital property awarded to Mark decreases by $78,647 (difference between court's value of $570,000 and referee's value of $491,353).
- The district court erred in substituting its own determination of Lamp & Lighting's value for that of the referee. Accordingly, the value of the marital property awarded to Mark decreases by $150,000 (difference between court's value of $257,000 and referee's value of $107,000).
- The district court erred in substituting its own valuation and division of personal property for that of the referee. Accordingly, the value of the marital property awarded to Mark decreases by $2,375 (difference between court's value of $23,870 and referee's value of $21,495) and the value of the marital property awarded to Sonia decreases by $14,025 (difference between court's value of $27,365 and referee's value of $13,340).
- The district court erred in including a separate value for the Sark Tile shipping containers in its division of marital assets. Accordingly, Mark's award of marital property decreases by $61,152.
- Finally, as discussed further below, we determine that the district court erred in modifying the amount of credit to be

given to Mark for his child support payments. Accordingly, he is to receive a credit on his child support payment of $30,184 as determined by the referee (instead of the credit of $13,512 given by the court).

The following table represents our modifications to the district court's distribution:

MARITAL PROPERTY DISTRIBUTION

	Sonia	Mark
District court's net marital distribution	$1,831,062.00	$2,819,861.82
West O Development	1,263,950.00	
First Security Bank loan on West O Development	(610,000.00)	
Increase due to error in amount of gift credit on marital home	110,150.00	
Decrease in value of Sark Tile		(78,647.00)
Decrease in value of Lamp & Lighting		(150,000.00)
Decrease in value of personal property	(14,025.00)	(2,375.00)
Decrease due to error in valuing shipping containers		(61,152.00)
Modified Net Marital Distribution	$2,581,137.00	$2,527,687.82

Equalization Payment Due

Difference in net marital distribution credit to Mark (one-half of $53,449.18)	$26,724.59
Ski trip credit to Mark	2,000.00
Child support payment credit to Mark	30,184.00
Balance to be paid from Sonia to Mark	$58,908.59

We therefore modify the decree to require Sonia to pay Mark as equalization the sum of $58,908.59, payable within 90 days of the entry of the mandate in the district court.

4. Errors Relating to Parties' Children

(a) Custody

Mark asserts that the district court erred in setting forth conflicting custodial arrangements for the parties' youngest child, Susana.

The referee found that joint legal custody of all three children was in their best interests, with Mark having primary physical custody of Daniel and Sonia having primary physical custody of Cristina and Susana. Based upon the recommendations of a counselor, no set parenting time was established for Daniel and Cristina. The referee set parenting time for Mark with Susana on alternating weekends from Thursday after school to Monday at 8 a.m., together with overnights on Wednesdays on alternating weeks. Sonia filed exceptions with regard to the referee's parenting plan.

The district court determined that "some modifications to the Referee's proposed Parenting Plan designed to reduce potential sources of conflict is in the best interest of the children." The district court then set forth conflicting custody arrangements. In the body of the decree, the court stated that Sonia was awarded legal and physical custody of Cristina and Susana and that Mark was awarded legal and physical custody of Daniel. However, in the parenting plan attached to the decree, the court stated that the parties would share joint legal custody of all the children, with Mark having primary physical custody of Daniel and Sonia having primary physical custody of Cristina. The court stated that the parties would share joint physical custody of Susana. The parenting schedule set by the court did not provide for parenting time for Daniel and Cristina but gave the parties parenting time with Susana on alternating weeks.

The district court made these "modifications" to the referee's parenting plan with regard to custody and parenting time without determining that the referee's findings were clearly

against the weight of the evidence. We conclude that the evidence supported the referee's determination of custody and parenting time and that the district court erred in modifying these findings. We therefore modify the decree to clarify that the parties shall share joint legal custody of all three children, with Sonia to have physical custody of Cristina and Susana and Mark to have physical custody of Daniel. The parenting plan is modified to incorporate the plan attached to the referee's report.

(b) Christmas Holiday Parenting Time

On cross-appeal, Sonia asserts that the district court erred in allocating parenting time over the Christmas holiday.

The referee's parenting plan divided the Christmas break into two periods. The first half of Christmas break is to commence at 6 p.m. on the day the child (only pertaining to Susana at this time) is excused for the Christmas holiday break and concludes at noon the day that constitutes the midpoint of the Christmas holiday break. The second half of Christmas break is to commence at noon the day constituting the midpoint from when the child is released from school for the Christmas holiday break and concludes at 7 p.m. on the day before school is to resume. The parties were awarded these times in alternating years.

The district court in its parenting plan modified the visitation for Susana to alternating weeks with each parent, from Friday to Friday. With respect to Christmas, the court's parenting plan provided that every year the parent who does not have parenting time on Christmas Day as a result of the weekly rotation shall have parenting time on December 24 beginning at noon and ending at 11:30 p.m.

Sonia's complaint with respect to the Christmas holiday parenting time is that the district court's schedule precludes her from taking Susana to Spain to visit extended family. Sonia requested that she have the entire Christmas break

every other year so she could take the children to visit family and that on the years Mark has the children for the entire holiday, she can spend the entire break in Spain with her family. This is the same argument Sonia made to the referee which was rejected. We find no error by either the referee or the district court in failing to alternate the entire Christmas break between the parties. As we determined above, the parenting plan devised by the referee was not clearly against the weight of the evidence and should be incorporated into the court's decree.

(c) Parties' Income

Mark asserts that the district court erred in determining the parties' incomes for purposes of child support.

[16-20] The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009). In general, child support payments should be set according to the Nebraska Child Support Guidelines. *Johnson v. Johnson*, 290 Neb. 838, 862 N.W.2d 740 (2015). 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. *Id.* Generally, 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. *Id.* In calculating child support, the court must consider the total monthly income, defined as income of both parties derived from all sources. Neb. Ct. R. § 4-204 (rev. 2015); *Burcham v. Burcham, ante* p. 323, 886 N.W.2d 536 (2016). Section 4-204 states: "If applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources."

(i) Mark's Income

At the time of trial, Mark was 46. He has a bachelor's degree in economics and a "M.B.A." degree.

Sark Tile pays Mark an annual salary of $20,000, although he "forewent [his] salary" and only received $15,000 in 2012. As recognized by the referee, determining Mark's income from the tax returns was "all but impossible" because there were significant personal and family expenses that were being paid through one or more of the parties' businesses or commercial properties. Both parties utilized expert witnesses to provide an analysis of Mark's annual income. Looking at tax returns and other information, Mark's expert determined that Mark's "Total Personal Cash Flow (Four Year Weighted Average)" was $58,753. Both parties' experts observed that in 2013, Mark's income based on the tax returns was significantly lower than it had been the 3 previous years. Sonia's expert provided analysis of Mark's annual income by looking at personal monthly credit card purchases and payments and determined that the credit card expenses, which were paid every month, routinely ran $15,000 per month over the 2 previous years.

The referee detailed his analysis in calculating Mark's earning capacity as well as actual earnings, utilizing Mark's expert's cashflow analysis together with Mark's monthly salary. The referee utilized total monthly income for Mark of $15,148.17 in its child support worksheet. Sonia filed exceptions to the determination of Mark's income.

In contrast to the referee, the district court considered entirely different information in determining Mark's monthly income, including credit card payments for Mark's personal expenses paid by one of the family businesses and depreciation taken on real estate. The district court determined that Mark's gross monthly income is at least $33,481. However, it utilized total monthly income for Mark of $20,000 on the child support worksheet attached to the decree. The district court did not determine that the referee's findings regarding Mark's income were clearly against the weight of the evidence.

We conclude that there was sufficient evidence to support the referee's determination of Mark's income and that it was not clearly against the weight of the evidence. The district court erred in modifying Mark's income and in its corresponding calculation of child support. We modify the decree to incorporate the referee's determination of Mark's income of $15,148.17.

(ii) Sonia's Income

At the time of trial, Sonia was 44. She was born in Mexico and first came to the United States from Spain at age 16 as an exchange student. After finishing her last year of high school and first year of college in Spain, she returned to the United States at age 18 or 19 and has continued to reside here since. Sonia had not worked outside the home since January 2000 when she was pregnant with the parties' son. Sonia does have a college degree, and she had limited experience in the jewelry business after the parties were married, earning approximately $25,000 per year.

The referee found that Sonia has some earning capacity not to exceed an annual gross income of $25,000 per year. On the child support worksheet, the referee utilized total monthly income for Sonia of $2,083.33. No exception to this finding was filed by Sonia, and Mark withdrew his exception. The district court made a finding consistent with the referee's—that Sonia's earning capacity does not exceed $25,000 per year. On the child support worksheet, the district court used total monthly income for Sonia of $2,100 (rounding up the referee's figure). Because Mark withdrew his exception to the referee's findings, he is precluded from asserting error in the district court's determination of Sonia's income.

(d) Worksheet 3

Mark asserts that the district court erred in failing to prepare worksheet 3 of the Nebraska Child Support Guidelines in calculating child support. The referee used worksheets 1 and

2 of the child support guidelines in calculating child support, consistent with the split custody award. No exception was filed by Sonia, and Mark withdrew his exceptions. The district court also used worksheets 1 and 2 in calculating child support on a split custody basis. Mark is precluded from asserting error in the district court's utilization of worksheets 1 and 2. Based upon our foregoing conclusions, we modify the decree to incorporate the referee's child support worksheets in place of the district court's worksheets.

(e) Credit for Overpayment of Temporary Support

Mark asserts that the district court erred in improperly crediting Mark for overpayment of temporary child support. The record shows that Mark was paying temporary child support predicated on Sonia's having custody of all three children. Daniel began living with Mark in May 2013, and Mark's request to modify temporary support was deferred until the time of trial. Based upon the findings of the referee concerning Mark's income and the referee's split custody calculation, the referee found that Mark should have a credit of $1,372 per month for each month that he overpaid child support. Through September 2015, the referee recommended that Mark receive a credit of $30,184 against the money judgment owed rather than being subtracted from his child support obligation going forward. Sonia filed an exception to this finding.

The district court gave Mark credit for only 12 months of overpayments, and based upon its determination of child support owed by Mark under the split custody calculation, it determined the credit should be $13,512. The district court made no finding that the referee's determination of the amount of credit was clearly against the weight of the evidence.

We conclude that the evidence was sufficient to support the referee's determination of child support credit and that it was not clearly against the weight of the evidence. The district court erred in modifying the amount of credit to be given to

Mark. We therefore modify the decree to provide that Mark receive a credit of $30,184.

(f) Private School Tuition

Mark asserts that the district court erred in requiring him to pay private school tuition. The referee recommended that Mark pay all tuition for the children in conformity with the parties' temporary stipulation through completion of the 2014-15 school year. The referee specifically declined to order Mark to continue to pay school tuition going forward. While the referee found (citing an unpublished case of this court) that a court could include education expenses in a support order if the court found such expenses were "'reasonable and necessary,'" including such expenses would constitute a deviation. The referee, in declining to order Mark to mandatorily pay these expenses, noted that it utilized the "optional extrapolation methodology" set forth in Neb. Ct. R. § 4-203(C) (rev. 2011) of the child support guidelines to the fullest extent possible in determining appropriate child support and included the regular and ongoing payment of personal credit card expenses through the businesses as income attributable to Mark. Sonia filed an exception to this decision.

The district court found that Mark should be required to pay the "school tuition and matriculation fees" for the children to attend any primary or secondary private school in Lincoln, Nebraska, for the next 5 years. Thereafter, the court ordered that each party shall be responsible for 50 percent of these costs for all children. The district court made no determination that the findings of the referee on this issue were clearly against the weight of the evidence.

We conclude that there was sufficient evidence to support the referee's findings regarding payment of school tuition, particularly given the amount of child support and alimony to be paid by Mark to Sonia, along with the substantial property awarded to Sonia. The referee's finding was not clearly against the weight of the evidence. The district court erred in

requiring Mark to pay for private school tuition and fees for the next 5 years and for the parties to thereafter split the cost. We modify the decree to incorporate the referee's findings regarding payment of school tuition.

(g) Conclusion

As set forth above, we have found certain errors in the district court's findings relating to the parties' children, and we vacate and set aside those portions of the decree and modify the decree accordingly to incorporate the findings of the referee as to those issues.

5. Alimony

Mark asserts that the district court erred in awarding alimony.

[21,22] In considering alimony, a court should weigh four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the party seeking support to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). In addition to the specific criteria listed in § 42-365, a court should consider the income and earning capacity of each party and the general equities before deciding whether to award alimony. *Brozek v. Brozek, supra*.

[23-26] The statutory criteria for dividing property and awarding alimony overlap, but the two serve different purposes and courts should consider them separately. *Id.* The purpose of a property division is to distribute the marital assets equitably between the parties. *Id.* 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 § 42-365 make it appropriate. *Brozek v. Brozek, supra*. In weighing a request for alimony, the court may take into account all of the property owned by the parties when entering the decree, whether accumulated by their joint efforts or acquired by inheritance. *Id*.

The referee discussed the pertinent statutory factors set forth in § 42-365 in its consideration of alimony. The referee also considered the significant child support obligation that Mark is required to pay, the ages of the children, Sonia's limited employability, and the significant money judgment that will need to be paid over the next 10 years. The referee also recognized that Mark had already paid significant alimony since May 1, 2013. The referee found that commencing October 1, 2015, Mark should pay to Sonia the sum of $4,500 per month through April 30, 2019, for a total of 43 months. Thereafter, Mark should pay $4,000 per month for an additional 48 months, commencing May 1, 2019, and concluding after payment of the April 2023 payment. Sonia filed an exception to this decision.

The district court, while noting consideration of the same factors as the referee, determined that commencing December 1, 2015, Mark should pay Sonia $4,500 per month each month through November 30, 2025. The district court did not determine that the referee's findings were clearly against the weight of the evidence.

We recognize that as a result of our findings regarding the property division, Mark is no longer required to pay a money judgment to Sonia; rather, Sonia is now required to pay a money judgment to Mark, albeit of a far lesser amount. Nevertheless, the remaining factors cited by the referee in support of its alimony award lead us to conclude that the referee's award was not clearly against the weight of the evidence. The district court erred in substituting its own determination of alimony for that of the referee. Accordingly, we vacate and set aside that portion of the decree and modify the decree accordingly to incorporate the findings of the referee as to alimony.

6. Award of Fees

[27,28] Mark asserts that the district court erred in awarding attorney fees. In a marital dissolution action, an award of

attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013). A dissolution court deciding whether to award attorney fees should consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

The referee recommended that Mark pay Sonia's attorney fees in the amount of $20,000 and costs of $20,000. Sonia filed an exception to this decision. The district court also ordered Mark to pay Sonia's attorney fees in the sum of $20,000 and costs of $20,000. Because Mark withdrew his exceptions to the referee's report, he is precluded from challenging the award of attorney fees on appeal.

V. CONCLUSION

As set forth above, Mark has waived his right to appeal certain issues by accepting certain benefits of the judgment. He is precluded from challenging certain other portions of the decree because he withdrew his exceptions to the referee's report.

We hold that a trial court may only set aside or modify the report of a referee upon a determination that the referee's findings were clearly against the weight of the evidence. The district court made certain errors in setting aside or modifying findings of the referee which were supported by the evidence and not clearly against the weight of the evidence. As set forth above, we have vacated and set aside those findings and have modified the decree to incorporate the referee's findings as to those issues. We affirm the decree as modified.

Affirmed as modified.

In re Interest of Austin G., a child under 18 years of age. State of Nebraska, appellee, v. Kayla S. appellant.

898 N.W.2d 385

Filed June 13, 2017. No. A-16-947.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Proof.** In order to terminate parental rights, a court must find clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 2016) exists and that termination is in the child's best interests.
3. **Parental Rights: Abandonment: Words and Phrases.** For purposes of Neb. Rev. Stat. § 43-292(1) (Reissue 2016), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.
4. **Guardians and Conservators: Parental Rights.** Guardianships give parents an opportunity to temporarily relieve themselves of the burdens involved in raising a child, thereby enabling parents to take those steps necessary to better their situation so they can resume custody of their child in the future.
5. ____: ____. Although a guardian becomes the caretaker of the child during the appointment, the parent must still retain an interest in the child and maintain some sort of relationship with the child.
6. **Parental Rights: Abandonment: Intent.** The failure of the parent to have any contact with the child for far longer than the 6 months required by Neb. Rev. Stat. § 43-292(1) (Reissue 2016) demonstrates the intent to

withhold the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.

7. **Parental Rights: Proof.** Only one statutory ground for termination need be proved in order for parental rights to be terminated.
8. ____: ____. In addition to proving a statutory ground, the State must show that termination is in the best interests of the child.
9. **Constitutional Law: Parental Rights: Proof.** A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.
10. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.
11. **Parental Rights: Statutes: Words and Phrases.** The term "unfitness" is not expressly used in Neb. Rev. Stat. § 43-292 (Reissue 2016), but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests.
12. **Constitutional Law: Parental Rights: Words and Phrases.** In discussing the constitutionally protected relationship between a parent and a child, parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
13. **Parental Rights.** The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.
14. ____. The best interests of a child require termination of parental rights when a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time.
15. ____. Children cannot, and should not, be made to await uncertain parental maturity.

Appeal from the County Court for Wayne County: Ross A. Stoffer, Judge. Affirmed.

Kyle C. Dahl for appellant.

Eric W. Knutson, Deputy Wayne County Attorney, for appellee.

Mark D. Albin, guardian ad litem.

Pirtle, Bishop, and Arterburn, Judges.

Pirtle, Judge.

INTRODUCTION

Kayla S. appeals from an order of the Wayne County Court, sitting as a juvenile court, which terminated her parental rights to her minor child, Austin G. Based on the reasons that follow, we affirm.

BACKGROUND

Kayla is the biological mother of Austin, born in April 2012. On August 6, 2012, the State filed a petition alleging that Austin came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The petition alleged that Austin lacked proper parental care by reason of the fault or habits of Kayla in that she had left him home alone and unattended for an extended period of time. A motion for temporary custody was also filed on August 6, and the court entered an order placing Austin in the temporary care, custody, and control of the Nebraska Department of Health and Human Services (Department).

On August 13, 2012, an adjudication hearing was held, wherein Kayla entered a plea of admission to the allegation in the petition, and the court adjudicated Austin pursuant to § 43-247(3)(a). A disposition hearing was held on November 5, 2012, and the stated permanency goal was guardianship with Terry G., Austin's paternal grandmother. Austin was placed with Terry on October 11, 2012.

In December 2012, Kayla and the Department each filed a consent and waiver to the appointment of Terry and her husband as guardians for Austin. On December 17, the court entered an order discharging the Department from its legal custody of Austin and appointing Terry and her husband as Austin's legal guardians.

Kayla filed a motion for a visitation plan on May 3, 2013, asking the court for an order granting her specific time with Austin. On August 5, the court entered an order providing a visitation plan for the parties. It granted Kayla supervised visits, 2 hours in duration, every Monday and Friday. Prior to the order regarding visitation, there was no set visitation. Kayla had to call Terry to set up a time that worked for them both.

On October 25, 2013, Kayla filed a motion to terminate the guardianship, which motion was objected to by the guardians. In April 2014, a stipulation was agreed to by the parties allowing the guardianship to continue. The court approved the stipulation in May. In October, Kayla filed a motion to dismiss the motion to terminate the guardianship and the court entered an order which dismissed the motion to terminate the guardianship.

On May 7, 2015, the guardian ad litem for Austin filed a motion to terminate Kayla's parental rights, alleging that statutory grounds existed to terminate under Neb. Rev. Stat. § 43-292(1) through (3) and (6) (Reissue 2016) and that termination was in Austin's best interests. Trial on the motion to terminate was held on 3 days between October 2015 and June 2016.

The caseworker appointed to Austin's case after he was removed from Kayla's care testified that she initially wanted to do an in-home plan for Austin so he could be placed back in Kayla's care. However, Kayla missed a team meeting at which time the plan was discussed, and the caseworker testified that she had a difficult time locating Kayla after Austin was removed. When she did make contact, Kayla had no home for Austin to go to, and she had no means to provide for him. The caseworker's involvement with Austin's case ended after the guardianship was established in December 2012.

Kayla testified that she was charged with child abuse as a result of leaving Austin home alone, as alleged in the petition to adjudicate, and was sentenced to probation in October 2012.

Her probation was revoked after she was charged with driving under suspension. She was sentenced to 23 days in jail.

Kayla testified that she was using methamphetamine between August and November 2012. She testified that during that time, she missed meetings with the caseworker, but made a few of the visits with Austin that were set up. She also testified that she had to move out of the home where she was living when Austin was removed and that she was homeless for a period of time.

Kayla completed an alcohol and drug evaluation in December 2012, which recommended "intensive outpatient treatment," which she participated in and completed in the fall of 2013. She testified that she has not used alcohol and drugs since November 2012.

Kayla lived at a homeless shelter from November 2012 through February or March 2013. She then moved in with her parents in Pilger, Nebraska. Kayla's father is a convicted sex offender as a result of sexually assaulting Kayla's sister. Kayla lived with her parents until May, when she moved to Stanton, Nebraska. On December 9, Kayla married Jacob M., and they moved to Norfolk, Nebraska, in February 2014. In August, Kayla and Jacob moved to Independence, Missouri, and lived with Jacob's mother. In March or April 2015, they moved back to Nebraska and lived in a hotel in Tecumseh, Nebraska, where Jacob was doing maintenance work. Kayla and Jacob moved back in with Kayla's parents in Pilger in August. This is where they were living on the first and second days of trial, October 26, 2015, and March 28, 2016, respectively. Kayla testified that she and Jacob planned to continue living with her parents. However, on the last day of trial, June 21, Kayla and Jacob were living in Wayne, Nebraska. They have two children together—the first was born in May 2014, and the second in April 2015. On the last day of trial, Kayla stated she was pregnant.

Kayla has been employed at various times since the guardianship was established. She was employed full time by a

manufacturing company from October 2012 to January 2013. She then worked part time for a restaurant for a few months in 2013. After that, she worked at a convenience store for 6 months to a year. She did not work when she lived in Missouri. Kayla started working for a consulting service in November 2015, working 25 to 30 hours per week. She testified that Jacob was not working at that time because he was in jail for 4 months. On the last day of trial, Kayla did not have a job. She testified that she quit her job with the consulting service in May 2016, because Jacob obtained employment in Wayne and they moved there.

Kayla testified that she has been paying child support "here and there." She testified that the only payments that have been made have been taken out of her paychecks during times she was working; she has not made any payments on her own. She also testified that she has not provided anything else for Austin, such as clothes, diapers, or toys, since September 2014.

Kayla testified that her last visit with Austin was in August 2014, before she and Jacob moved to Missouri. She admitted to having Terry's telephone number, and Terry testified that her number has not changed. Kayla testified that she did not always have a telephone, but had use of Jacob's mother's telephone during the time she lived in Missouri. When Kayla moved back to Nebraska, she had access to a telephone through the hotel where she and Jacob were living. She also had access to a telephone at her parents' home. Terry testified that Kayla has provided her with various telephone numbers over the years and that Kayla usually had a telephone.

At the time Kayla moved to Missouri in August 2014, there was a pending criminal charge of driving under suspension against Kayla in Madison County, Nebraska. An arrest warrant was subsequently issued, which remained outstanding until she moved back to Nebraska in 2015. She testified that the arrest warrant and the charge were resolved around August or September 2015.

Kayla testified that she has made positive changes to her life since Austin was removed in August 2012. She testified that she has not used drugs or alcohol since 2012. She has not had any criminal charges against her since 2014. She has completed intensive outpatient therapy and a "Moral Recognition Therapy" class.

Terry testified that she kept track of Kayla's visits on calendars. These calendars were entered into evidence, as well as a summary of the visitation tracked in the calendars that was prepared by Terry. Terry testified that Kayla had no visits with Austin between January and April 2013 and that Kayla did not contact Terry during that time. Between September 2012 and February 6, 2015, 251 visits were scheduled. Kayla attended 108 of the visits and missed 143 visits.

Terry stated that Kayla's last visit was August 5, 2014. She testified that from August 5 until October 1, she tried to call or text Kayla on a regular basis to offer her visitation, but got no response. She testified that there has been no contact between Kayla and Austin since August 2014. Kayla had not sent him any letters, cards, or gifts.

Terry testified that Kayla asked for a visit with Austin at a court appearance in December 2015, which was after the termination trial had begun. Terry told her it would not be in Austin's best interests because this would be the first contact with him since August 2014.

Kayla testified that she did not have many visits with Austin between June and August 2014 because Terry's house was destroyed by a tornado in June and Terry was busy with the cleanup and could not meet for visits. Kayla also testified that she did not have transportation at that time. She testified that in August 2014, Terry stopped the visits. Kayla stated that she kept trying to make contact and that it was not her intent to stop seeing Austin. She also testified that after moving to Missouri in August 2014, she texted Terry one time and did not get a response. She stated that Terry never tried to contact her. She also admitted that when she

lived in Missouri, she never gave Terry her address or current telephone number.

She testified that she tried contacting Terry on one occasion when she moved back to Nebraska from Missouri, but she got no response. Kayla also testified that she tried to take Austin presents on his birthday in April 2016, but Terry would not accept them.

Terry testified that after the tornado hit in June 2014, she still offered Kayla visits on Mondays and Fridays at an alternate location. She testified that Kayla did not try to contact her between September and December 2014 after Kayla moved to Missouri. She testified that she did not receive any voice messages or texts from Kayla on her telephone. She also testified that she did not receive any calls or texts from Kayla in 2015. Terry testified that she has had the same telephone number for at least the past 10 years.

Following trial, the court entered an order terminating Kayla's parental rights to Austin and finding that there was clear and convincing evidence to support termination under § 43-292(1) through (3), but not (6). It further found that termination of Kayla's rights was in Austin's best interests.

ASSIGNMENTS OF ERROR

Kayla assigns that the juvenile court erred in (1) finding there was clear and convincing evidence that statutory grounds existed to terminate her rights and (2) finding there was clear and convincing evidence to establish that terminating her parental rights was in Austin's best interests.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of

the facts over the other. *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015).

ANALYSIS

Statutory Grounds for Termination.

[2] In order to terminate parental rights, a court must find clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Alec S.*, 294 Neb. 784, 884 N.W.2d 701 (2016). In the present case, the juvenile court found that the State established by clear and convincing evidence that grounds for termination existed under § 43-292(1) through (3).

[3] Section 43-292(1) requires proof that "[t]he parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition." For purposes of § 43-292(1), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child. *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014).

The motion to terminate Kayla's parental rights to Austin was filed on May 7, 2015. At the time the motion was filed, Kayla had not had a visit with Austin since August 5, 2014, which was 9 months before the motion was filed. She had no contact with Austin during that time. She did not send him any letters, cards, or gifts. Since at least September 2014, she had not provided him with any necessities, such as clothes or diapers, nor had she provided any nonnecessities, such as toys. She moved out of the state from August 2014 to March or April 2015, indicating an intent to withhold her "presence, care, love, protection, maintenance, and the opportunity for the display of parental affection" for Austin. See *id.* at 612, 849 N.W.2d at 513. Even after moving back to Nebraska, she failed to have contact with Austin. She testified that she had

Terry's telephone number, and Terry testified that her number has not changed for at least 10 years. She also testified that she either had a telephone or had access to a telephone, yet she never contacted Terry. Kayla testified that she tried to contact Terry once after Kayla moved to Missouri and once after she returned to Nebraska, but Terry testified that she had not received any calls or texts from Kayla. Terry also testified that Kayla did not respond when she tried to contact her about having visits with Austin. Kayla provided no reasonable explanation for her failure to have contact with Austin since August 5, 2014. As of the first day of trial, October 26, 2015, Kayla had not had contact with Austin for over 14 months.

[4-6] The fact that Austin was in a guardianship does not excuse Kayla's lack of contact. Guardianships give parents an opportunity to temporarily relieve themselves of the burdens involved in raising a child, thereby enabling parents to take those steps necessary to better their situation so they can resume custody of their child in the future. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). Although a guardian becomes the caretaker of the child during the appointment, the parent must still retain an interest in the child and maintain some sort of relationship with the child. See *id.* The failure of the parent to have any contact with the child for far longer than the 6 months required by § 43-292(1), as in the present case, demonstrates the intent to withhold the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child. We conclude that the juvenile court did not err in finding that § 43-292(1) was proved by clear and convincing evidence.

[7] Only one statutory ground for termination need be proved in order for parental rights to be terminated. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). Because we conclude that there is clear and convincing evidence to show that Kayla abandoned Austin pursuant to

§ 43-292(1), we need not discuss the other statutory grounds which the court found to exist.

Best Interests and Parental Fitness.

[8-13] Kayla next asserts the juvenile court erred in finding that termination of her parental rights was in Austin's best interests. In addition to proving a statutory ground, the State must show that termination is in the best interests of the child. *In re Interest of Kendra M. et al., supra*. A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit. *Id.* There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit. *Id.* The term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests. *In re Interest of Kendra M. et al., supra*. In discussing the constitutionally protected relationship between a parent and a child, we have stated: "'"Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being."'" *Id.* at 1033-34, 814 N.W.2d at 761, quoting *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992). The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other. *In re Interest of Kendra M. et al., supra.*

As the juvenile court pointed out, the evidence presented in this case is different from the evidence in most termination cases, because Austin is in a guardianship situation and the Department is not involved:

> The nature of this case, being in the form of a termination of parental rights filed while the child is in a guardianship, prevents the presentation of the type of best interest evidence typically found in a juvenile court termination of parental rights case. With the child in a guardianship, no [Department] or family support workers are involved. Since the child is doing well in the current placement, there is no need for therapists. However, the person most able to testify about Austin's condition, circumstances and best interests, both before and after the filing of the termination petition, Austin's guardian/grandmother [Terry], did testify and confirmed Austin's relationship with her and her husband and that he is doing well in the current placement.

Kayla argued in her brief and at oral argument that *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013), is similar to the case at hand and should be relied on in determining whether termination is in Austin's best interests. In *Kenneth C.*, the district court terminated the father's parental rights to his son, finding that the father had abandoned the child under § 43-292(1) and that termination was in the child's best interests. The father had not had any direct contact with his son in approximately 4 years. On appeal, the Nebraska Supreme Court reversed the termination of the father's parental rights, concluding that it had not been shown that termination was in the child's best interests. The court stated that statutory grounds are based on a parent's past conduct, but the best interests element focuses on the future well-being of the child. The court found that there was ample evidence in the record that the father had not fulfilled his parental obligations to the child in the past, but there was almost no evidence as to whether the current circumstances were such that termination of the father's parental rights would be in the child's best interests.

We conclude that *Kenneth C. v. Lacie H., supra*, can be distinguished from the case at hand. *Kenneth C.* is procedurally

different from the present case in that *Kenneth C.* was a paternity action brought by the father seeking a determination of paternity and visitation with the child, and the mother counterclaimed with a motion to terminate the father's parental rights. The present case is a termination action brought by Austin's guardian ad litem and involves a guardianship situation.

Further, in *Kenneth C.*, the court noted that the child's need for permanency was not of the same magnitude as a child who has been in foster care for an extended period of time because the child would have permanency with his mother, regardless of whether the father's rights were terminated. In the present case, although Austin has not been in foster care, he has been in a temporary guardianship for an extended period of time.

Finally, we determine that there is sufficient evidence to make a determination of whether the current circumstances are such that termination of Kayla's parental rights would be in Austin's best interests.

Kayla's actions from the time Austin was removed from her care in August 2012 to the time of trial have demonstrated her unwillingness to be Austin's parent. The caseworker testified that Kayla was difficult to locate right after Austin was taken away and that Kayla missed a team meeting to discuss a plan for Austin's care. After the guardianship was established, Kayla's visits with Austin were inconsistent. Between September 2012 and February 6, 2015, Kayla had missed over one-half of her scheduled visits. As previously discussed, Kayla had not had contact with Austin since August 2014.

Austin was removed from Kayla's care when he was less than 4 months old. He turned 4 years old during the course of the termination trial. Austin has had no relationship with Kayla and certainly nothing that resembles a parent-child relationship. There was no evidence of any type of bond between Austin and Kayla, and nothing to show that Austin knows that Kayla is his mother. Terry testified that she did not remember Austin ever calling Kayla "'Mom'" when he had visits, and

she stated that Austin called Kayla the babysitter's name a couple times. Further, as the juvenile court stated:

> One thing that is clear from the evidence is that Austin will suffer no consequences from the termination of the parental relationship with [Kayla] that is inherent in a termination of parental rights since [Terry] testified that there is no such relationship and that Austin has no knowledge of his mother. There was no evidence presented of a beneficial bond between Austin and his mother. This evidence was not contradicted by [Kayla] other than testimony about inconsistent visitations that took place prior to August, 2014; those visitations taking place at or prior to the time Austin was approximately 30 months old. In contrast, to not act at the present time would place Austin in a situation where he might lose the only "parents" he has known since he was approximately eight months old.

The guardianship has been in place since December 2012. At the time of trial, Kayla indicated that she was not asking for custody of Austin and that she was not opposed to continuations of the guardianship. Kayla had filed a motion to terminate the guardianship in 2013, but the motion was subsequently dismissed by Kayla. The record demonstrates that Kayla has been and continues to be content with Terry's providing Austin the emotional and physical care he needs and has no intention of trying to regain custody.

Although Kayla has made progress in regard to her lifestyle since August 2012, she continues to struggle with stability in housing and employment. She has moved multiple times to various towns and out of state. She had most recently moved between the second and third days of trial, March 28 and June 20, 2016, respectively. She and Jacob moved from Kayla's parents' house in Pilger to Wayne. Kayla has struggled to have her own housing, living with her parents on two occasions (including her father who is a convicted sex offender) and her mother-in-law. She has also had inconsistency in employment,

resulting in her failure to consistently pay her court-ordered child support. On the third and last day of trial, Kayla was not working because she had quit her job because they moved to Wayne.

[14,15] Based upon our de novo review of the record, we find clear and convincing evidence that Kayla's personal deficiencies have prevented her from performing her reasonable parental obligations to Austin in the past, and would likely prevent her from doing so in the future. Accordingly, the presumption of fitness has been rebutted. We also find that it was shown by clear and convincing evidence that termination of Kayla's parental rights would be in Austin's best interests. The best interests of a child require termination of parental rights when a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time. *Wayne G. v. Jacqueline W.*, 21 Neb. App. 551, 842 N.W.2d 125 (2013). Children cannot, and should not, be made to await uncertain parental maturity. *Id.*

CONCLUSION

We conclude that the county court for Wayne County, sitting as a juvenile court, did not err in terminating Kayla's parental rights to Austin. Accordingly, the court's order is affirmed.

Affirmed.

John Craw, appellant, v. City of Lincoln, Nebraska, and John and Jane Doe(s) 1 through 10, appellees.

899 N.W.2d 915

Filed June 20, 2017. No. A-15-1070.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
3. **Actions: Pleadings: Notice.** Civil actions are controlled by a liberal pleading regime; a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
4. **Actions: Pleadings.** The rationale for a liberal notice pleading standard in civil actions is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage.
5. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act specifically excludes claims arising out of any interference with contract rights.
6. **Property.** A job is not the type of property for which inverse condemnation claims can be brought.

7. **Due Process: Public Officers and Employees: Property: Contracts: Notice.** A public employee's due process rights arise from a contractually created property right to continued employment. A public employee with a property interest in his employment has the right to due process of law, which requires that the employee be provided with oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to explain his or her side of the story.
8. **Political Subdivisions Tort Claims Act: Wages.** A timely filing of a tort claim under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012), is not sufficient to satisfy the filing requirements of Neb. Rev. Stat. § 15-840 (Reissue 2012) for purposes of the application of the Nebraska Wage Payment and Collection Act, because the two underlying claims are separate and distinct.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Jeffery R. Kirkpatrick, Lincoln City Attorney, and Don W. Taute for appellees.

Pirtle, Bishop, and Arterburn, Judges.

Bishop, Judge.

John Craw appeals from a district court order dismissing with prejudice his amended complaint against the City of Lincoln, Nebraska, and John and Jane Doe(s) 1 through 10, who were "employees and/or agents of the City." (The City of Lincoln and John and Jane Doe(s) 1 through 10 will collectively be referred to as "the City.") We affirm in part the district court's dismissal, and in part reverse and remand for further proceedings.

BACKGROUND

On October 30, 2013, Craw filed a complaint in the county court for Lancaster County against the City alleging four

causes of action related to his employment and termination as the "PGA Professional for Holmes Golf Course" in Lincoln. His first cause of action alleged as follows: that he submitted a claim to the City pursuant to the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012), and his claim was denied; that "[d]uring the course of his work and employment with the City," Craw was "misclassified as an independent contractor and was wrongfully terminated from his position as the PGA Professional for the Holmes Golf Course, the last engagement for which was to expire and/or be ready for renewal on April 30, 2012," and his last day was October 30, 2011; that due to the City's negligence, Craw was damaged; and that he incurred damages including (1) past and future physical pain, mental suffering, and emotional distress, (2) past and future inconvenience, (3) damage to property, and (4) loss of use of property. His second cause of action alleged that the City damaged his property or property rights and deprived him of use of his property, entitling him to compensation under Neb. Const. art. I, § 21. His third cause of action alleged that he was entitled to recovery for his property damage pursuant to Neb. Rev. Stat. § 76-705 (Reissue 2009), because his property was damaged for public use without a condemnation proceeding. His fourth cause of action alleged "violations of the rights guaranteed to him by the Nebraska and United States[] Constitutions, by the statutes of the State of Nebraska and of the United States of America, all as regards civil rights and/or discrimination."

On May 28, 2014, the City filed a motion to dismiss Craw's complaint pursuant to both Neb. Ct. R. Pldg. § 6-1112(b)(1) (lack of subject matter jurisdiction) and § 6-1112(b)(6) (failure to state claim upon which relief can be granted).

In a form journal entry and order filed on June 27, 2014, the county court granted the City's motion to dismiss. Craw was granted 2 weeks to file an amended complaint or a motion to transfer to the district court.

On July 11, 2014, Craw, pursuant to Neb. Rev. Stat. § 25-2706 (Reissue 2016), filed a request to transfer the proceedings to the district court for Lancaster County, because the "relief requested, at least in part, is beyond the jurisdiction of [the county court] and exclusively within the jurisdiction of the District Court." The request for transfer motion was sustained on July 15. The proceedings were certified and transferred to the district court by the deputy clerk of the "Lancaster County Court" on August 29.

On September 23, 2014, the City filed a motion to dismiss Craw's complaint in the district court pursuant to § 6-1112(b)(1) and (6).

In an order filed on April 10, 2015, the district court granted the City's motion to dismiss Craw's complaint. The district court found that it lacked subject matter jurisdiction over Craw's third cause of action (which the court determined was a "statutory inverse condemnation claim") because § 76-705 requires that such actions be taken in the county court. The district court then found that Craw failed to state a claim upon which relief could be granted with regard to his first, second, and fourth causes of action, as discussed next.

The district court labeled Craw's first cause of action a "tort claim"; however, the district court "seriously question[ed]" whether Craw had "actually pled a tort claim as opposed to a claim based on contract." It said:

> The only well-pled factual allegation in the Complaint is that [Craw's] engagement as the Holmes Golf Course PGA Professional was terminated prior to the time it was set to expire and/or be renewed. [Craw's] use of the term "engagement" . . . suggests a contract-based claim. However, [Craw] also seeks damages for physical pain, mental suffering, and emotional distress, which suggest a tort claim. As it stands, the scant factual allegations of the Complaint are insufficient to allow the court to determine the true nature of [Craw's] first cause of action.

The district court found that the "difficulty in determining the type of claim that is actually pled" warranted dismissal without prejudice of Craw's first cause of action.

The district court described Craw's second cause of action as a "constitutional inverse condemnation claim," and it found that "[a]s alleged, [Craw's] engagement as the Holmes Park Golf Course PGA Professional is not the type of vested property right for which [a constitutional] inverse condemnation claim would lie" and such claim should be dismissed.

As for Craw's fourth cause of action, the district court said that it was "some sort of constitutional violation" claim and that "[b]ecause [Craw] has not set forth any facts as to what constitutional rights have been violated and in what manner by [the City]," his conclusory allegations were insufficient to state a plausible claim to relief "[e]ven with the more relaxed rules of notice pleading that Nebraska now utilizes . . . ."

The district court granted the City's motion to dismiss. Craw was given 14 days to file an amended complaint, and the court ordered that "[i]f no amended complaint is filed, then this case will be dismissed with prejudice without further hearing of the court."

On April 24, 2015, Craw filed an amended complaint against the City alleging the original four "cause[s] of action," but with some additional detail, and a fifth cause of action. The causes of action set forth in the amended complaint were as follows: (1) tort claim pursuant to the PSTCA, (2) constitutional inverse condemnation, (3) statutory inverse condemnation, (4) violation of the Due Process and Equal Protection Clauses of the state and federal Constitutions, and (5) violation of the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue 2010 & Cum. Supp. 2016).

On May 4, 2015, the City filed a motion to dismiss Craw's amended complaint pursuant to § 6-1112(b)(1), regarding Craw's third cause of action, and § 6-1112(b)(6), regarding Craw's first, second, and fourth causes of action. The

City's motion to dismiss did not mention Craw's fifth cause of action.

In an order filed on October 20, 2015, the district court granted the City's motion to dismiss. The district court found that it lacked subject matter jurisdiction over Craw's third cause of action (statutory inverse condemnation claim pursuant to § 76-705) for the same reasons as stated in the court's April order, that being that such actions must be taken in county court.

Likewise, the court found that Craw's second and fourth causes of action failed to allege sufficient facts to state a plausible claim for relief, just as it had found in its April 2015 order. With respect to the second cause of action (constitutional inverse condemnation), the district court pointed to the reasons set forth in its April order, wherein the court found that "[a]s alleged, [Craw's] engagement as the Holmes Park Golf Course PGA Professional is not the type of vested property right for which [a constitutional] inverse condemnation claim would lie" and such claim should be dismissed. With respect to the fourth cause of action (violation of his rights under the state and federal Constitutions, specifically his rights to due process and equal protection), the district court found that Craw failed to allege any facts demonstrating that he had a protected property interest in his continued employment.

The district court went into a more detailed discussion regarding Craw's first and fifth causes of action. With regard to the first cause of action (tort claim pursuant to the PSTCA), the district court found the amended complaint lacked sufficient allegations to show that the claim was one in tort rather than contract. It said the primary well-pled factual allegation—that Craw's "'engagement'" as the Holmes Golf Course PGA Professional was terminated prior to the time it was to expire and/or be renewed—suggests a contract-based claim. The court found that Craw failed to allege sufficient facts to show that the City owed him a duty based in either contract

or tort and that therefore, Craw's first cause of action failed to state a claim for which relief may be granted.

With regard to Craw's fifth cause of action (Nebraska Wage Payment and Collection Act claim), the district court found that Craw had not alleged that he complied with the statutory prerequisites found in Neb. Rev. Stat. § 15-840 (Reissue 2012), which require a claimant to first present a written claim to the City before filing a claim under the Nebraska Wage Payment and Collection Act. The district court noted that if a claim presented to the City pursuant to § 15-840 is disallowed, then the claimant may appeal that determination to the district court. The court said: "[Craw] has not alleged compliance with the procedure set forth in . . . § 15-840. Rather, [Craw] has only alleged that he, through his attorney, submitted his claim to the City for damages under the PSTCA." The court concluded that Craw's fifth cause of action failed to state a claim upon which relief could be granted.

The district court granted the City's motion to dismiss and dismissed with prejudice Craw's amended complaint. Craw now appeals.

ASSIGNMENTS OF ERROR

Craw assigns, summarized and restated, that the district court erred in determining that (1) it did not have subject matter jurisdiction over the statutory inverse condemnation claim, (2) he failed to state a claim upon which relief could be granted as to the other causes of action, (3) the amended complaint should be dismissed with prejudice, and (4) "allowing further amendment" of the complaint would be futile.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Jacob v. Nebraska Dept. of Corr. Servs.*, 294 Neb. 735, 884 N.W.2d 687 (2016).

ANALYSIS

[2] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Tryon v. City of North Platte*, 295 Neb. 706, 890 N.W.2d 784 (2017). In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id*.

[3,4] Nebraska is a notice pleading jurisdiction. *Id.* Civil actions are controlled by a liberal pleading regime. *Id*. A party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. *Id*. The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted. *Id*. Stated another way, fair notice that a claim exists, not the authorizing statute or legal theory, is all that is required to carry a valid claim at the pleading stage. *Id*. The rationale for this liberal notice pleading standard is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage. *Id*.

In his amended complaint, Craw alleged that "[b]y definition" he was an "employee of the City," but had been "misclassified as an independent contractor and was wrongfully terminated from his position as the PGA Professional for the Holmes Golf Course, the last engagement for which was to expire and/or be ready for renewal on April 30, 2012." He alleged that his "last day at the Holmes Golf course, as [a] professional, was October 30, 2011." He also mentioned some wrongdoing that occurred during his "employment." In his brief, he stated: "Reduced to essentials, Craw complains against the City for the manner in which his engagement as the PGA Professional at Holmes was established, managed and terminated, by the

City, especially in 2011, but prior to that time as well." Brief for appellant at 25. It is from these allegations that Craw's "successive causes of action, all of which are pleaded in the alternative," arise. *Id.* at 20.

First Cause of Action—
Tort or Contract?

In his amended complaint, Craw set forth several allegations under the heading "First Cause of Action." Among the allegations were that he had submitted to the City, through its city clerk, his claim for damages under the PSTCA, and the City denied his claim; he was "[b]y definition" an "employee of the City" (and he set forth more specific factual allegations as to why he was an "employee"); during the course of his work and employment with the City, he was "misclassified as an independent contractor and was wrongfully terminated from his position as the PGA Professional for the Holmes Golf Course, the last engagement for which was to expire and/or be ready for renewal on April 30, 2012," and his last day as a professional was October 30, 2011. He further alleged that "[w]hile the basic relationship may exist as an agreement or contract, certain of the parties' obligations toward the other sound in, and are based upon the principles of negligence, which is to say the law of torts is involved." After setting forth the general duties of an employer to an employee, he alleged that "[i]n particular, the City had a duty with regard to Craw, to see to it that he [was] properly categorized as [a] City employee[], and a further duty of fair treatment." He alleged that the City failed to meet its duties and that as a "direct and proximate result," Craw suffered and incurred various damages, including past and future physical pain, mental suffering, and emotional distress; inconvenience in the past and future; damage to property; and loss of use of property.

The district court found that Craw's amended complaint lacked sufficient allegations to show that the claim was one in tort rather than contract. It said:

> The primary well-pled factual allegation in the Amended Complaint is that [Craw's] "engagement" as the Holmes Golf Course PGA Professional was terminated prior to the time it was set to expire and/or be renewed. [Craw's] use of the term "engagement" . . . suggests a contract-based claim. While [Craw] alleges that the City owed him a duty to properly categorize him as an employee, the nature of this duty must be considered in light of the fact that [Craw's] position with the City was the subject of an "engagement" that could expire or be renewed. Without any factual allegations regarding the nature of [Craw's] "engagement" with the City, the court cannot determine whether any alleged duty on the part of the City to properly categorize [Craw] as an employee was encompassed within the terms of [Craw's] "engagement."

The court found that Craw failed to allege sufficient facts to show that the City owed him a duty based in either contract or tort and that therefore, Craw's first cause of action failed to state a claim for which relief may be granted.

In his brief, Craw argues that "[t]he Amended Complaint gives [the City] 'fair notice of what the . . . claim is and the grounds upon which it rests.'" Brief for appellant at 26. The City argues: "It is clear that [Craw's] 'allegations' cannot be characterized as anything other than assertions, conclusions, and threadbare recitals. They are form, but no substance." Brief for appellees at 13. The City further argues that "[e]ven accepting any well pled allegations as true, it is quite evident that [Craw] is not setting forth a cause of action based in tort, but rather a cause of action based in contract." *Id.* at 14.

In his brief, Craw stated that his first cause of action was a tort claim. He alleged that he filed a claim with the City via the PSTCA and that the City denied his claim. After setting forth the general duties of an employer to an employee, he alleged that "[i]n particular, the City had a duty with regard to Craw, to see to it that he [was] properly categorized as [a] City employee[], and a further duty of fair treatment." He alleged

that the City failed to meet its duties, and that as a "direct and proximate result," he was damaged. He asked for damages including physical and mental suffering, which are tort-related damages outside of contracted wage amounts.

[5] However, § 13-903(4) defines a "[t]ort claim" under the PSTCA as "any claim against a political subdivision for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee." Clearly, there has been no personal injury or death in the present matter. Therefore, Craw's alleged "loss" of employment would have to qualify as a "loss of property" under the PSTCA. This court declines to construe the statute in such a manner, particularly where the allegations in this case rest on an "engagement" between the parties sounding in contract, as the district court likewise concluded. See *Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5*, 231 Neb. 744, 438 N.W.2d 124 (1989) (claim based on breach of contract is not tort claim under PSTCA). Even Craw admitted that "the basic relationship may exist as an agreement or contract." His allegations that others may have negligently influenced that agreement does not convert his contract claim into a tort claim, other than perhaps to claim a tortious interference with his contract rights. However, to the extent Craw claims his rights under the terms of "engagement" were affected by negligent or wrongful acts of any employees, the PSTCA specifically excludes claims arising out of any "interference with contract rights." See § 13-910(7).

Accordingly, we agree with the district court that Craw's first cause of action failed to state a claim upon which relief could be granted.

Second and Third Causes of Action—
Inverse Condemnation.

[6] In his second and third causes of action, Craw makes inverse condemnation claims. More specifically, in his second

cause of action, Craw alleged that the City "damaged the property or property rights owned by [him]" and "deprived [him] the use of his property," thus entitling him to compensation under Neb. Const. art. I, § 21. Neb. Const. art. I, § 21, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." In his third cause of action, Craw alleged that pursuant to § 76-705, he is entitled to "recovery of his property damage . . . as the City . . . damaged the property of Craw, for public use, without instituting condemnation proceedings." Section 76-705 provides:

> If any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined.

Based on the allegations set forth in his amended complaint, the only "property" Craw could be referring to is his job at Holmes Golf Course. However, that is not the type of "property" for which inverse condemnation claims can be brought.

As stated by the Nebraska Supreme Court, "[I]nverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings." *Henderson v. City of Columbus*, 285 Neb. 482, 488, 827 N.W.2d 486, 491-92 (2013). While most inverse condemnation claims involve the taking of land, we have found cases addressing the "taking" of a job, but those claims were not successful.

In *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098 (7th Cir. 1995), one of the issues addressed was whether a principal's property (statutory tenure) was taken without just compensation in violation of the Fifth Amendment to the U.S. Constitution, which provides in relevant part: "[N]or shall

private property be taken for public use, without just compensation." The Seventh Circuit said:

> Job tenure is for some purposes "property" within the meaning of the Constitution, and the principals' tenure has been "taken." But there is a missing link in the principals' alternative argument that this taking violates the takings clause. Job tenure is property within the meaning of the due process clauses . . . which protect people against deprivations of life, liberty, or property without due process of law. . . .
>
> . . . But "property" as used in [the takings] clause is defined much more narrowly than in the due process clauses. It encompasses real property and personal property, including intellectual property. . . . But in this circuit anyway, though the Supreme Court left the issue open in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224, 106 S.Ct. 1018, 1025, 89 L.Ed.2d 166 (1986) [regarding retroactive application of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments], it does not extend to contracts . . . or to statutory entitlements.

Pittman v. Chicago Bd. of Educ., 64 F.3d at 1104.

In *Leach v. Texas Tech University*, 335 S.W.3d 386 (Tex. App. 2011), a former football coach brought an action against the university and university officials for breach of contract, violation of the whistleblower statute, and violation of the takings clause. The district court dismissed all claims except the breach of contract claim. On appeal, the Texas Court of Appeals held in relevant part that the coach failed to state a takings claim. The claims in question "involve[d] the purported taking without compensation of [the coach's] property and his termination without due process." *Id.* at 398. The takings clause of Texas Const. art. I, § 17, states in relevant part that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ." (This

portion of the Texas Constitution is similar to the takings clause in the Nebraska Constitution and the statutory language in § 76-705.) The Texas Court of Appeals stated that the elements of a takings claim are not satisfied when the State withholds property in a contractual dispute.

> This is apparently so because the party demanding compensation after performing his contractual duty to provide goods or services actually provided those goods or services voluntarily as opposed to being forced to do so via the State's power of eminent domain. . . . So, when the State withholds property under color of a contractual right, such as when it believes the contract was not properly performed, it is not acting as a sovereign invoking powers of eminent domain, but rather as a private party to a contract invoking rights expressed or implicit in the contract. . . . Thus, the takings clause appearing under Texas Constitution art. I, § 17 does not apply to contractual disputes.

Leach v. Texas Tech University, 335 S.W.3d at 398. The Texas Court of Appeals stated that the compensation sought by and allegedly due the coach is that which the university contracted to pay him in return for his performance of services as the coach, and the university purported to withhold compensation because the coach failed to abide by the terms of their agreement. The court held that "what we have here is nothing other than a contractual dispute . . . which falls outside the takings clause." *Id*.

In *Tracy v. City of Deshler*, 253 Neb. 170, 171, 568 N.W.2d 903, 905 (1997), the owner of a garbage collection business brought an action under Neb. Const. art. I, § 21, seeking compensation for the alleged unconstitutional "'taking'" of his business by the City of Deshler. In January 1992, the owner was granted a permit by the city to haul garbage "'for the year ending July 1, 1992,'" pursuant to the city's municipal codes. *Tracy v. City of Deshler*, 253 Neb. at 171, 568 N.W.2d at 905. One such code provided that if the city entered into

a contract for the citywide collection of garbage, all permits previously issued to private garbage collectors, including the permit issued to the owner, would expire immediately. The city subsequently entered into a contract for citywide garbage collection with one of the owner's competitors. As a result, the owner lost all of his garbage collection customers in the city. The owner filed an action against the city, seeking compensation for the loss of his garbage collection business, arguing that the loss of his business was a "taking" of property entitling him to compensation. *Id.* The Nebraska Supreme Court determined that the owner was engaged in a business that was subject to a conditional permit and that thus, he did not have a reasonable expectation of a continuing right to haul garbage in the city for the purposes of a takings claim. The court held that "payment of just compensation pursuant to Neb. Const. art. I, § 21, applies only to vested property rights, and a permit with the type of restrictive conditions imposed by [city ordinance] did not constitute a vested property right in any constitutional sense." *Tracy v. City of Deshler*, 253 Neb. at 176, 568 N.W.2d at 908.

Finally, in *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 743-44, 408 N.W.2d 261, 269 (1987), although in the context of due process rather than a takings claim, the Nebraska Supreme Court held that "[t]o have a property interest in employment, a person must have a legitimate claim of entitlement to it" and that "an employee at will . . . ha[s] no reasonable expectation of continued employment or legitimate claim of entitlement to it."

Craw claims to have been an "employee" of the City. If that is true, his employment appears to have been as a contract employee based on the fact that the "last engagement . . . was to expire and/or be ready for renewal on April 30, 2012." However, we note that at one point in his amended complaint, Craw alleged that he was a "statutory employee." Under either scenario, any claim Craw has regarding his employment or termination thereof falls outside of the takings clause. See,

Pittman v. Chicago Bd. of Educ., 64 F.3d 1098 (7th Cir. 1995); *Leach v. Texas Tech University*, 335 S.W.3d 386 (Tex. App. 2011). Because inverse condemnation does not apply to Craw's case, the district court properly dismissed with prejudice his second and third causes of action and we need not address any jurisdictional issues with regard to his inverse condemnation claims. See *Adair Asset Mgmt. v. Terry's Legacy*, 293 Neb. 32, 875 N.W.2d 421 (2016) (appellate court not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

Fourth Cause of Action—Due Process and Equal Protection.

In his fourth cause of action in his amended complaint, Craw alleged violations of his constitutional rights to due process and equal protection. Craw incorporated all preceding paragraphs of his amended complaint into his fourth cause of action; among those paragraphs was an allegation that "his employment was public employment." He then claimed:

> [T]he foregoing constitute violations of the rights guaranteed to him by the Nebraska and United States[] Constitutions, by the statutes of the State of Nebraska and of the United States of America, all as regards civil rights and/or discrimination. In particular, Craw claims, (a) that his misclassification as an independent contractor, rather than a statutory employee, violated the due process clauses of both the Nebraska and United States Constitutions, as matters both of substance and procedure; (b) that the manner in which his employment and/or position was terminated or eliminated further violated the due process clauses of both the Nebraska and United States Constitutions, at least as a matter of procedure; and, (c) that both the misclassification and termination or job elimination violated the equal protection clauses of both the Nebraska and United States Constitutions, in that his treatment was, without cause, different and less

favorable than other City employees or their comparable persons, who were similarly situated.

See, U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); Neb. Const. art. I, § 3 ("[n]o person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws").

In its order, the district court found that Craw's fourth cause of action failed to allege sufficient facts to state a plausible claim for relief. Additionally, the court found that Craw failed to allege any facts demonstrating that he had a protected property interest in his continued employment. In support of its finding, the district court cited to *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007) (constitutional due process protections apply when public employer deprives employee of property interest in continued employment).

[7] A public employee's due process rights arise from a contractually created property right to continued employment. *Scott v. County of Richardson*, 280 Neb. 694, 789 N.W.2d 44 (2010). A public employee with a property interest in his employment has the right to due process of law, which requires that the employee be provided with oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to explain his or her side of the story. *Id*.

The City claims that Craw "has provided no factual allegations with respect to the nature of his 'engagement' and without such factual allegations he has not sufficiently stated a plausible claim for relief that he was a public employee and therefore entitled to the protections of the Due Process clause" prior to his termination. Brief for appellees at 18.

Craw's failure to set forth the specific nature of the "engagement" does not necessarily defeat Craw's claim, at least for the purpose of surviving a motion to dismiss. See *Tryon v. City of North Platte*, 295 Neb. 706, 713, 890 N.W.2d 784, 789 (2017) ("[w]hile setting out the appropriate statute and the

allegations regarding each element required therein would have been helpful to appellees and the court, appellants' failure to do so does not defeat the presence of valid claims"). In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id*. The nature of Craw's engagement would certainly be discoverable at a later date. After the nature of his engagement and his employment classification is determined, then the issue of whether he was a public employee with a property interest in his job can be addressed.

We note that the district court did not specifically address Craw's equal protection claim in its order. The City's brief on appeal also ignores the issue. In Craw's brief, he argues that "[t]he Amended Complaint gives [the City] 'fair notice of what the . . . claim is and the grounds upon which it rests.'" Brief for appellant at 26. Although his amended complaint did not allege specific facts as to how "his treatment was, without cause, different and less favorable than other City employees or their comparable persons, who were similarly situated," there is a reasonable expectation that discovery will reveal evidence of the claim. See *Tryon, supra*.

While Craw's ability to successfully litigate a suit for due process and equal protection violations is yet to be determined, we find that he has provided fair notice of his claims, which is all that is required at the pleading stage. See *id.* Accordingly, the district court erred in finding that Craw's fourth cause of action failed to state a claim upon which relief could be granted.

Fifth Cause of Action—Nebraska Wage Payment and Collection Act.

In his fifth cause of action in his amended complaint, Craw alleged violations of the Nebraska Wage Payment

and Collection Act, § 48-1228 et seq. The Nebraska Wage Payment and Collection Act provides in relevant part that "[a]n employee having a claim for wages which are not paid within thirty days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court." § 48-1231(1). Both "[e]mployee" and "[w]ages" are statutorily defined. § 48-1229. In particular, Craw claims that "his misclassification by the City resulted in a substantial underpayment by the City of compensation to him and to others working at the golf course, both as to primary compensation and as to other benefits of City employment, all in such amount as is proven at trial."

The City's motion to dismiss did not mention Craw's fifth cause of action. However, the district court found that Craw's fifth cause of action failed to state a claim upon which relief could be granted because Craw failed to allege facts showing that he complied with the statutory prerequisites to bring such a claim. Specifically, the district court found that Craw had not alleged compliance with the procedure set forth in § 15-840 for filing a contract claim against a city of the primary class, like the City herein.

Section 15-840 provides:

> All liquidated and unliquidated claims and accounts payable against the city shall: (1) Be presented in writing; (2) state the name of the claimant and the amount of the claim; and (3) fully and accurately identify the items or services for which payment is claimed or the time, place, nature, and circumstances giving rise to the claim. The finance director shall be responsible for the preauditing and approval of all claims and accounts payable, and no warrant in payment of any claim or account payable shall be drawn or paid without such approval. *In order to maintain an action for a claim, other than a tort claim as defined in section 13-903, it shall be necessary, as a condition precedent, that the claimant file such claim within one year of the accrual thereof, in the office of the city*

> *clerk, or other official whose duty it is to maintain the official records of a primary-class city*.

(Emphasis supplied.) And Neb. Rev. Stat. § 15-841 (Reissue 2012) allows for an appeal to the district court after disallowance of a claim under § 15-840. Furthermore, in an action against a city of the primary class, an application of the Nebraska Wage Payment and Collection Act would not alter the need to satisfy the prerequisites of the claims statutes contained in §§ 15-840 and 15-841. See, *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005); *Thompson v. City of Omaha*, 235 Neb. 346, 455 N.W.2d 538 (1990).

The district court determined that Craw's fifth cause of action under the Nebraska Wage and Payment Collection Act failed to state a plausible claim for relief, because Craw had not alleged compliance with the prerequisites for bringing such a claim, and the district court dismissed the claim with prejudice. We find the dismissal with prejudice was error, because Craw should have been provided an opportunity to amend his pleading to cure this defect, to the extent he can do so.

[8] We note that Craw contends that he did file a timely claim with the City and that the amended complaint "alleges Craw's claim was timely filed under the tort claim statutes, Neb. Rev. Stat. §§ 13-901 *et seq.*" Reply brief for appellant at 6. But contrary to Craw's assertion, a timely filing of a tort claim with the City under the PSTCA, § 13-901 et seq., is not sufficient to satisfy the filing requirements of § 15-840 for purposes of the application of the Nebraska Wage Payment and Collection Act, because the two underlying claims are separate and distinct. For purposes of the PSTCA, a "[t]ort claim shall mean any claim against a political subdivision for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the political subdivision . . . . " § 13-903. The Nebraska Wage Payment and Collection Act allows an employee to file a claim for

unpaid wages. See, also, *Andrews v. City of Lincoln*, 224 Neb. 748, 751, 401 N.W.2d 467, 469 (1987) (§ 15-840 "prescribes a procedural prerequisite concerning contract claims, liquidated or unliquidated, against a city of the primary class"). Accordingly, a claim for one is not a claim for the other. To the extent that Craw may have filed a notice of his claim for unpaid wages with the City, apart from his tort claim, he should at least have an opportunity to amend his complaint to show such compliance.

To the extent Craw is able to plead procedural compliance with § 15-840, as discussed above, we address the City's additional argument that Craw "provided no facts to establish that he was an employee within the meaning of the Wage Payment and Collection Act." Brief for appellees at 19. For purposes of the Nebraska Wage Payment and Collection Act, an

> [e]mployee means any individual permitted to work by an employer pursuant to an employment relationship or who has contracted to sell the goods or services of an employer and to be compensated by commission. Services performed by an individual for an employer shall be deemed to be employment, unless it is shown that (a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact, (b) such service is either outside the usual course of business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business.

§ 48-1229. In his amended complaint, Craw alleged that he was "[b]y definition" an "employee of the City," and he set forth more specific factual allegations as to why he was an "employee." Among those allegations, he claimed that the City, at all times, "maintained and exercised extensive control" over

Craw; the City "intended Craw's employment to be long-term at the time he was first hired"; and a "significant majority" of Craw's responsibilities were mid-managerial and "he was allowed to exercise little, if any, independent judgment." He further alleges that his "misclassification" by the City resulted in a substantial underpayment of compensation to him. While the nature of Craw's relationship with the City and his ability to successfully litigate a suit for unpaid wages under the Nebraska Wage Payment and Collection Act are yet to be determined, the allegations as to his "employee" status are sufficient for purposes of pleading. But as previously discussed, this is only relevant so long as there has been proper procedural compliance.

CONCLUSION

For the reasons stated above, we find that the district court properly dismissed with prejudice Craw's first cause of action for an alleged tort claim under the PSTCA and Craw's second and third causes of action for inverse condemnation; we affirm those portions of the district court's order. However, we find that the district court erred in dismissing Craw's fourth cause of action (due process and equal protection) because Craw provided fair notice of that claim, which is all that is required at the pleading stage. We reverse the dismissal with prejudice of Craw's fifth cause of action (Nebraska Wage Payment and Collection Act) only insofar as Craw was not provided an opportunity to amend his pleading to address the procedural prerequisites noted by the district court's order; we otherwise affirm the district court's determination as to those procedural prerequisites. Accordingly, we reverse the district court's dismissal of Craw's fourth and fifth causes of action and remand the matter for further proceedings.

Affirmed in part, and in part reversed and remanded for further proceedings.

Imad K. Mohammed, appellee, v. Claudia D. Rojas, appellee, and State of Nebraska, intervenor-appellant.

898 N.W.2d 396

Filed June 20, 2017. No. A-16-295.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Appeal and Error.** An appellate court will not consider an issue on appeal that the trial court has not decided.
4. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
5. **Modification of Decree: Child Support.** A material change in circumstances must exist at the time of the modification trial because the court's decision to modify child support must be based upon the evidence presented in support of the complaint to modify and because the change in circumstances cannot be temporary.
6. **Modification of Decree: Child Support: Proof.** The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification.
7. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the 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.

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

Joe Kelly, Lancaster County Attorney, and Jessica A. Murphy for intervenor-appellant.

Mark T. Bestul, of Legal Aid of Nebraska, for appellee Imad K. Mohammed.

Pirtle, Bishop, and Arterburn, Judges.

Pirtle, Judge.

INTRODUCTION

The State of Nebraska, on behalf of the State of California, appeals from an order of the district court for Lancaster County, Nebraska, which found that no material change in circumstances had occurred to warrant a modification of Imad K. Mohammed's child support obligation for his and Claudia D. Rojas' two minor children. Based on the reasons that follow, we affirm.

BACKGROUND

Mohammed and Rojas were married in February 2001, and two children were born of the marriage—one in October 2002 and one in April 2004. In August 2011, a decree was entered in Maricopa County, Arizona, dissolving their marriage, granting Rojas sole custody of the children, and entering a child support order. The Arizona court approved a downward deviation in child support from the guidelines' amount of $92.13 to $0, based upon an agreement of Mohammed and Rojas. The parties agreed to deviate "because of [Mohammed's] economic circumstances and state of health, and because the guideline amount is relatively small." At the time of the decree, Mohammed had income of $1,274 per month and Rojas had income of $1,560 per month.

In December 2012, Rojas and the children moved to California, and sometime thereafter, they began receiving public assistance. In July 2014, the State of California notified Nebraska that the children were receiving "Temporary Assistance for Needy Families" (TANF) and requested that Nebraska register the Arizona decree and file a complaint to modify child support.

After the decree was registered in Nebraska, the State filed a complaint to modify child support. The complaint alleged that "there has been a material change in circumstances that has lasted three months and can reasonably be expected to last for an additional six months." The matter was heard by the district court referee for Lancaster County. During the trial, the State offered the "general testimony" of Rojas, which was an affidavit form filled out by Rojas. Rojas indicated that her gross monthly income was $607 in family assistance and $648 in food stamps. She failed to fill out the section of the form which asked for the first and last month and year that she received TANF. She indicated only that the total amount of TANF she received was $607 as of March 2015. Rojas reported no income other than the public assistance received from the State of California.

When asked by the referee what material change in circumstances had occurred, the State specified, "[T]he material change in circumstances is that [Rojas] and [the children] moved from Arizona to California and began seeking public assistance."

Mohammed testified that he lives in Nebraska with his current wife and her five children, three of whom are his biological children. He also testified that he was working 26 to 27 hours per week, making $9 an hour.

The referee found that there had been a material change in circumstances since the entry of the original order in that the State of California was providing public assistance to the children and was seeking an order of support for reimbursement of a portion of that public assistance. The referee

recommended that child support be set using Mohammed's actual income at the time of the hearing, resulting in an order of $89 per month.

Mohammed filed an exception to the referee's recommendations, and a hearing was held before the district court. The district court found that the State had failed to produce evidence to show that Rojas was not receiving public assistance at the time of the original decree and failed to produce evidence that public assistance was not in the contemplation of the parties at the time of the decree. Accordingly, the district court determined that a material change in circumstances did not exist to warrant a modification of child support and it dismissed the State's complaint to modify.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred in (1) failing to find a material change in circumstances had occurred when the State of California began providing Rojas public assistance for the benefit of the minor children and (2) failing to order child support as recommended by the referee.

STANDARD OF REVIEW

[1,2] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Pearson v. Pearson*, 285 Neb. 686, 828 N.W.2d 760 (2013). An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Kibler v. Kibler*, 287 Neb. 1027, 845 N.W.2d 585 (2014).

ANALYSIS

[3] Although the State's first assignment of error is specific to the public assistance being a material change in circumstances, the State argues that there was a material change in

that Rojas' income had decreased and the State of California was providing public assistance for the minor children. The State did not argue to the referee or to the district court that her decrease in income was a change in circumstances, and therefore, it cannot argue it now. See *Pearce v. Mutual of Omaha Ins. Co.*, 293 Neb. 277, 876 N.W.2d 899 (2016) (appellate court will not consider issue on appeal that trial court has not decided). The only material change argued was that Rojas began seeking public assistance in California.

[4] A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *Sellers v. Sellers*, 23 Neb. App. 219, 869 N.W.2d 703 (2015). The referee found, and the dissent agrees, that a material change in circumstances occurred when the State of California became an interested party and sought an order of support for reimbursement of a portion of the public assistance it provided Rojas. The district court concluded that a material change in circumstances did not exist because the State failed to produce evidence to show that Rojas was not receiving public assistance at the time of the original decree and failed to produce evidence that public assistance was not in the contemplation of the parties at the time of the decree. The record does not indicate if Rojas was receiving public assistance in Arizona at the time the decree was entered. The Arizona court determined Rojas' monthly income at that time was $1,560, but we do not know if that money was from employment or state aid. The Arizona proceedings are not in the record before us.

[5] Assuming without deciding that Rojas' receiving public assistance was a material change in circumstances, as the referee found and the dissent concludes, the State failed to meet its burden because it did not prove that the change existed at the time of the modification trial. In *Collins v. Collins*, 19 Neb. App. 529, 808 N.W.2d 905 (2012), we held

that the change in circumstances must exist at the time of the modification trial. We based our holding on two reasons. First, the court's decision to modify child support must be based upon the evidence presented in support of the complaint to modify. Second, the change in circumstances cannot be temporary. At the hearing before the referee, held in May and June 2015, the evidence showed that the total amount of TANF Rojas had received was $607 as of March 2015. Rojas' general testimony, which was filed on or about March 31, 2015, showed that her monthly income at that time included $607 in family assistance and $648 in food stamps. There is no information in the record as to when the assistance began or how long the assistance reasonably would be expected to last. Most important, there was no evidence that she was still receiving public assistance at the time of the modification trial.

The dissent notes that the district court did not address the rebuttable presumption set forth in Neb. Ct. R. § 4-217, which supports a conclusion that a material change in circumstances occurred. Section 4-217 provides that any 10-percent variation in the present child support obligation due to financial circumstances, which have lasted 3 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances. In concluding that a 10-percent variation exists, the dissent states: "[T]here is no dispute that Mohammed was paying no child support at all due to his agreement with Rojas in the Arizona consent decree." However, an analysis of the 10-percent variation provision under § 4-217 is not required where, as here, the evidence produced at trial fails to demonstrate that the purportedly changed financial circumstances existed at the time of trial and can be expected to continue for an additional 6 months.

The dissent also acknowledges that a district court "may accept or reject all or any part of the [child support referee's] report and enter judgment based on the court's own

determination," pursuant to Neb. Rev. Stat. § 43-1613 (Reissue 2016). However, the dissent fails to acknowledge that Rules of Dist. Ct. of Third Jud. Dist. 3-11(G) (rev. 2014) provides: "[T]he hearing before the court on the exception shall be de novo on the record before the referee. The court may ratify or modify the recommendations of the referee and enter judgment based thereon." Therefore, the district court had broad latitude in reviewing the referee's recommendation.

[6,7] The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification. *Collins v. Collins, supra*. The State failed to meet its burden. It did not present evidence to prove that a material change of circumstances existed at the time of trial or to show that the change was not temporary. Therefore, albeit for a different reason than that which the district court found, the district court did not err in failing to find that a material change in circumstances had occurred to warrant a modification of Mohammed's child support obligation. See *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004) (where record demonstrates decision of trial court is correct, although such correctness is based on ground or reason different from that assigned by trial court, appellate court will affirm). The State's assignments of error are without merit.

CONCLUSION

We conclude that the district court did not err in determining that a material change in circumstances did not exist to warrant a modification of Mohammed's child support obligation. Accordingly, the district court's order dismissing the State's complaint to modify is affirmed.

Affirmed.

Bishop, Judge, dissenting.

Modification of a registered child support order under the Uniform Interstate Family Support Act (UIFSA), Neb. Rev.

Stat. § 42-701 et seq. (Reissue 2016), "is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner," § 42-746(b). I am unable to join the majority opinion because I agree with the child support referee's determination that a material change in circumstances occurred when the State of California (California) became an interested party and sought assistance from the State of Nebraska (the State) to modify child support under UIFSA. The child support referee concluded:

> The difference in circumstances today from the Order in 2011 [Arizona decree] is that the State . . . has intervened in this action to seek an order of support. That intervention occurred after . . . California requested the assistance of [the State] in securing a support order. The UIFSA transmittal from California, which forms the basis for the State's complaint, indicates that the children of this case are receiving TANF funds (f/k/a ADC). Whether these funds were received at the time of the initial hearing is unknown from the hearing and from the record of the case. In any event, California is providing public assistance to the children and now seeks an order of support for reimbursement of a portion of the public assistance. That is a material change in circumstances in and of itself.

The record and the law support the referee's conclusion, as will be discussed below. And although the district court agreed that "[a]n application for public assistance may indeed constitute a material change in circumstances," the district court further concluded that the State "failed to produce evidence that [Rojas] was not receiving public assistance at the time of the original order." Further, the district court stated that "there was no evidence offered by the State that public assistance was not in the contemplation of the parties at the time of the previous order." However, whether either party

was on public assistance at the time of the Arizona consent decree, or whether they contemplated going on assistance at a later time, is irrelevant to the fact that Rojas is now living in California and receiving public assistance in that state. As noted by the State in its argument to the referee, California was never a party to the original Arizona agreement between Rojas and Mohammed, and Rojas' receipt of public assistance in California constitutes a material change, because California is now a party with an interest in child support being paid.

Since modifications of a registered child support order under UIFSA are subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state, we should consider the law applicable in Nebraska when a party applies for services under title IV-D of the federal Social Security Act. Upon an application by a party for such services, child support orders in such cases "shall be reviewed by the Department of Health and Human Services to determine whether to refer such orders to the county attorney or authorized attorney for filing of an application for modification." Neb. Rev. Stat. § 43-512.12(1) (Reissue 2016). The application "shall" be referred when the verifiable financial information indicates the present child support obligation varies from the Nebraska Child Support Guidelines "by more than the percentage, amount, or other criteria established by Supreme Court rule, and the variation is due to financial circumstances which have lasted at least three months and can reasonably be expected to last for an additional six months." § 43-512.12(1)(a). The percentage set forth in the guidelines is 10 percent. See Neb. Ct. R. § 4-217. Additionally, any 10-percent variation in the present child support obligation due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, "establishes a rebuttable presumption of a material change of circumstances." *Id*. Notably, nothing in the statute or the Supreme Court rule

requires proof of whether the parties may have been on title IV-D assistance somewhere else or what the parties may have previously contemplated with regard to public assistance. Rather, the rebuttable presumption of a material change in circumstances arises upon the variation in child support and the reasonable expectation as to the duration of the changed financial circumstances.

It is true that "upon receipt of the findings, recommendations, and exceptions," a district court "may accept or reject all or any part of the [child support referee's] report and enter judgment based on the court's own determination." Neb. Rev. Stat. § 43-1613 (Reissue 2016). However, the reasons supplied by the district court in its conclusion that there was no material change in circumstances in this case does not address UIFSA or the rebuttable presumption set forth in § 4-217 of the child support guidelines. Accordingly, the district court abused its discretion when concluding that the "State has failed to meet its burden of proof that there has been a material and substantial change of circumstances subsequent to entry of the original decree which was not contemplated when the prior order was entered." As noted, modification of child support does not always require proof of what the parties contemplated at the time of entry of an original decree; rather, a 10-percent variation in the present child support obligation due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, by itself, establishes a rebuttable presumption of a material change of circumstances.

Applied here, there is no dispute that Mohammed was paying no child support at all due to his agreement with Rojas in the Arizona consent decree. Mohammed did produce evidence of a limited income and a large family here in Nebraska that he needs to support. Therefore, the referee appropriately applied the rule for minimum child support set forth in the Nebraska Child Support Guidelines, which rule states:

> It is recommended that even in very low income cases, a minimum support of $50, or 10 percent of the obligor's net income, whichever is greater, per month be set. This will help to maintain information on such obligor, such as his or her address, employment, etc., and, hopefully, encourage such person to understand the necessity, duty, and importance of supporting his or her children.

Neb. Ct. R. § 4-209. The purpose of § 4-209 is to provide some support even in cases of very low income in order to reinforce the duties and obligations of being a parent. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014). Further, when another state is seeking this state's assistance to establish or modify child support under UIFSA, the procedures are designed to help facilitate interstate cooperation and consistency.

The general purpose of UIFSA is to unify state laws relating to the establishment, enforcement, and modification of child support orders. *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000). The goal of UIFSA is to streamline and expedite interstate enforcement of support decrees and to eliminate the problems arising from multiple or conflicting support orders from various states by providing for one tribunal to have continuing and exclusive jurisdiction to establish or modify a child support order. *Id*. UIFSA provides a system where only one child support order may be in effect at any one time. *Id*. UIFSA allows, under certain circumstances, a Nebraska court to enforce or modify a support order issued in another state. *Id*.

As it is allowed to do under UIFSA, California, as the initiating tribunal in this case, filed a "Child Support Enforcement Transmittal #1 - Initial Request" document (California petition) seeking to register the Arizona dissolution decree, modify it, and establish income withholding. The California petition has boxes checked for the following attachments: "Uniform Support Petition," "General Testimony/Affidavit," and "Support Order(s)." It lists Rojas as the petitioner and Mohammed as the respondent. The California petition was

sent from the "Merced County Department of Child Support Services" to the "Clerk of the Court - Lancaster County." The California petition contains an "Initiating Tribunal Number," contains an "Initiating IV-D Case Number," and is marked as a "TANF" type of "IV-D Case." It shows Mohammed and Rojas' children as dependent children who had been living in California for 13 to 14 months. The California petition was sworn to and signed before a notary public on July 17, 2014; accordingly, this process was commenced 11 months prior to the final hearing (June 17, 2015) before the child support referee. Nothing in the record indicates that California ever sought to terminate the proceedings it commenced as the initiating tribunal in July 2014.

UIFSA permits a child support enforcement agency to file a petition or comparable pleading directly in a tribunal of another state which has or can obtain personal jurisdiction over the respondent. See § 42-714(b). Upon receipt of such petition or comparable pleading from an initiating tribunal (California), the responding tribunal (the State), "shall cause the petition or pleading to be filed and notify the petitioner where and when it was filed." § 42-718(a). The California petition was filed on September 12, 2014, in the district court for Lancaster County. The State, as "Intervenor," filed a "Complaint to Modify" on January 2, 2015, alleging that a registered "Foreign Support Order" was confirmed by the district court for Lancaster County on November 25, 2014. The State also alleged that the registered order provided for no child support for the minor children and that there had been a material change in circumstances that "has lasted three months and can reasonably be expected to last for an additional six months."

In the initial hearing before the referee on May 6, 2015, the referee immediately noted that "this is actually an interstate matter" and that California "has asked us to modify the order that we have registered in Nebraska." The State offered Rojas' general testimony/affidavit under UIFSA, along with other documents to which there were no objections. Section 42-729

provides for special rules of evidence and procedure under UIFSA, and subsection (b) specifically provides that

> [a]n affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing outside this state.

Thus, the general testimony/affidavit signed by Rojas on March 27 was properly received in lieu of her attendance and testimony at the hearing.

The State called Mohammed to testify; however, after some difficulty in communication during the initial questions and answers, the referee continued the hearing to June 17, 2015, so that an interpreter could be present. At the June 17 hearing, Mohammed testified that he and Rojas "both went to the court and we agreed that I don't pay child support at that time." And although Mohammed testified that he was on public assistance in Nebraska (housing, food stamps, and Medicaid), he did not say anything about receiving public assistance in Arizona.

The State argued that California was never a party to the original agreement between Mohammed and Rojas and that Rojas' receipt of public assistance in California constitutes a material change, because California is now a party with an interest in child support being paid. Further, "[N]ow there is a third party, the State [on behalf of] California, seeking child support to reimburse TANF funds, public assistance being received for the children." The State noted that the Arizona decree did not mention public assistance being received by the children, and the State also pointed out that the State of Arizona was not a party to the marriage dissolution action.

The referee stated during the hearing that the first concern was determining "whether or not the fact that the State is now a party is a material change in circumstances." Mohammed's counsel argued there were no cases where an "obligee began

receiving benefits" constituted a change in circumstances. Additionally, Mohammed's counsel argued that even if it is a material change in circumstances, there was no evidence that the change was permanent, since "it's called Temporary Assistance to Needy Families. There's no evidence of the duration that's been presented to you today." The State countered that argument by noting that

> the title of the public assistance should not mean that it is not going to reach the requirement of lasting for six months. This case was sent to us months ago. The mother is still on public assistance. There is nothing to indicate that that public assistance is going to stop in the next month or two.

As previously noted, California initiated this proceeding in July 2014. By the time it went to final hearing in June 2015, 11 months had passed. Approximately 3 months had passed since Rojas signed her general testimony/affidavit indicating her unemployment. Whether she continued to remain unemployed over the next 6 months is not relevant, because more than 6 months had passed since California initiated the action in July 2014. Additionally, the possible change in Rojas' future earnings in this case is not particularly relevant, since any income she might receive would not change Mohammed's obligation to pay minimal child support. The child support determined by the referee was not dependent on Rojas' earnings; rather, it was calculated based solely on Mohammed's net income. The referee's report cites to § 4-209, the minimum support rule discussed previously. Ten percent of Mohammed's net income results in a minimum child support obligation of $89 per month, which is precisely what the referee recommended. The referee also recommended that the child support should not be made retroactive to the date of filing "due to [Mohammed's] minimal earnings and the absence of a request for retroactive modification from the initiating State of California."

I conclude that the child support referee correctly determined that there had been a material change in circumstances warranting a modification in child support from zero support to minimal support. The determination of minimal child support was consistent with the record, the law, and the Nebraska Child Support Guidelines. The district court had the authority to reject the referee's report; however, based on the record and the law applicable to this case, it was an abuse of discretion to deny the State's request, on behalf of California, to modify child support in the amount recommended by the referee. Therefore, I would have reversed the district court's order with directions to enter an order denying Mohammed's exceptions and putting into effect the referee's findings and recommendations.

Mohammed Nadeem, appellant, v.
State of Nebraska, appellee.
899 N.W.2d 635

Filed June 27, 2017. No. A-16-113.

1. **Motions to Dismiss.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element of the claim.
4. **Actions: Pleadings: Notice.** Civil actions are controlled by a liberal pleading regime; a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
5. **Convictions: Sentences: Proof.** Neb. Rev. Stat. § 29-4603(3) (Reissue 2016) requires a claimant to prove actual innocence, or that the claimant did not commit the crime for which he or she was charged, in order to recover under the Nebraska Claims for Wrongful Conviction and Imprisonment Act.

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

Jeffry D. Patterson for appellant.

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

Pirtle, Bishop, and Arterburn, Judges.

Arterburn, Judge.

INTRODUCTION

Mohammed Nadeem appeals from an order of the district court which dismissed his complaint requesting compensation under the Nebraska Claims for Wrongful Conviction and Imprisonment Act (the Act). See Neb. Rev. Stat. §§ 29-4601 to 29-4608 (Reissue 2016). The issue raised in this case is whether Nadeem's complaint contained sufficient allegations to survive the State's motion to dismiss. Because we find that Nadeem's complaint alleges sufficient facts to state a claim for relief under the Act that is plausible on its face, we conclude that the district court erred when it dismissed the complaint.

BACKGROUND

In June 2010, a jury found Nadeem guilty of attempted first degree sexual assault, a Class III felony pursuant to Neb. Rev. Stat. §§ 28-201 and 28-319 (Reissue 2008), and attempted third degree sexual assault of a child, a Class I misdemeanor pursuant to § 28-201 and Neb. Rev. Stat. § 28-320.01 (Reissue 2008). Subsequently, the district court sentenced Nadeem to a total of 3 to 6 years' imprisonment for his convictions.

Nadeem's convictions and sentences stem from his interactions with a 14-year-old girl who he approached at a public library when he was 22 years old. The evidence adduced at Nadeem's trial can be summarized as follows:

> On August 6, 2009, H.K. was with a friend at a Lincoln public library. H.K. was 14 years old at the time. While H.K. was sitting at a table in a reading room of the

library using her laptop computer, she noticed Nadeem, whom she did not know, standing within a couple feet of her looking at a newspaper and glancing over at her. Shortly thereafter, Nadeem began talking to H.K. and asked several questions, including how old she was, to which she replied 15. Nadeem asked H.K. for her telephone number. When she said it was her mother's number that she could not give him, he asked if he could give her his number, and she testified that she said, "I guess." Nadeem then left the area, and shortly thereafter, he returned and gave H.K. a piece of paper with a name, "John Nadeem," and a telephone number; asked her to call him; and told her he hoped to hear from her and to have a nice day. When H.K.'s mother later picked up H.K. and her friend from the library, H.K. told her mother about her encounter with Nadeem. H.K. and her mother reported the incident to the library and then called the police. The next day, the police asked H.K. to make a controlled call to Nadeem from the police station, which she agreed to do.

H.K. spoke with Nadeem and asked him why he wanted her to call. Nadeem indicated that he wanted to talk to her more and to see her. The conversation continued, and they began discussing what they would do together, which led to Nadeem's indicating that he wanted to touch H.K. When asked how, Nadeem said that he had a "grand collection of ideas" in regard to what type of touching. H.K. then volunteered to Nadeem that she was a virgin, and at that point, Nadeem asked H.K. if she wanted to lose her virginity and when she wanted to lose it. H.K. told him that she did not know how to do that, and he told her it could be done by "sexual stimulation" such as "licking," "kissing," and "fingering." When H.K. stated that she did not know what "fingering" meant, Nadeem said he could not explain it but he could show her. H.K. asked Nadeem three times if they

> were going to have "sexual intercourse," but he appeared not to understand that term. When H.K. asked him if he was going to "put his penis in her vagina," he said he could. At H.K.'s suggestion, Nadeem and H.K. agreed to meet at the library about 30 minutes later, and H.K. told him to bring a condom and a can of a particular soda pop. Nadeem was arrested when he arrived at the library, shortly after the call, although he had neither of the requested items.

State v. Nadeem, No. A-10-981, 2013 WL 674158 at *1 (Neb. App. Feb. 26, 2013) (selected for posting to court website).

Nadeem appealed his convictions and sentences. Ultimately, this court reversed Nadeem's convictions and sentences after finding that the district court erred in failing to instruct the jury on the entrapment defense for the charge of attempted first degree sexual assault and that Nadeem received ineffective assistance of trial counsel. See *State v. Nadeem, supra*. In reversing Nadeem's convictions, we found: "[T]he sum of the evidence is sufficient to sustain the convictions when viewed most favorably to the State, and therefore, Nadeem may be retried if the State so elects." *Id*. at *15. However, we also found that by the time our opinion was issued, Nadeem was "on the cusp of having served his entire sentence, if he ha[d] not already done so." *Id*. As such, we instructed the district court as follows:

> [J]ustice demands that [Nadeem] be immediately released from incarceration upon a reasonable bond if he has not already been released when our mandate issues. . . . [T]he requirement that he register under the Nebraska Sex Offender Registration Act is also reversed because the convictions which form the basis for that requirement are reversed.

Id. at *16.

Based on this court's decision to reverse Nadeem's convictions, on September 9, 2015, Nadeem filed a complaint in the district court alleging that he was entitled to compensation

pursuant to the Act. Specifically, Nadeem alleged that he had been "arrested, prosecuted, convicted, and imprisoned for crimes for which he was legally and actually innocent." Nadeem requested damages in the amount of $500,000. The State filed a motion to dismiss Nadeem's complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). In the motion, the State asserted that Nadeem failed to state a claim upon which relief could be granted.

Following a hearing on the State's motion, the district court entered an order dismissing Nadeem's complaint with prejudice. The court found that Nadeem failed to state a cause of action under the Act because he failed to sufficiently allege he was "'actually innocent.'" The court also found that Nadeem could not "cure [this] defect with an amended complaint" because this court had previously stated in *State v. Nadeem, supra*, that the evidence presented at trial was sufficient to support Nadeem's convictions.

Nadeem appeals from the district court's order.

ASSIGNMENTS OF ERROR

On appeal, Nadeem argues, restated and consolidated, that the district court erred in granting the State's motion to dismiss and thereby dismissing his complaint for failure to state a claim.

STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo. *Bruno v. Metropolitan Utilities Dist.*, 287 Neb. 551, 844 N.W.2d 50 (2014). When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion. *Id.*

ANALYSIS

[3] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted

as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element of the claim. *Id.*

[4] Nebraska is a notice pleading jurisdiction. *Tryon v. City of North Platte*, 295 Neb. 706, 890 N.W.2d 784 (2017). Civil actions are controlled by a liberal pleading regime. *Id*. A party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. *Id.* The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted. *Id.*

In his complaint, Nadeem asserts that he is entitled to compensation pursuant to the Act. Section 29-4603 provides:

> In order to recover under the . . . Act, the claimant shall prove each of the following by clear and convincing evidence:
>
> (1) That he or she was convicted of one or more felony crimes and subsequently sentenced to a term of imprisonment for such felony crime or crimes and has served all or any part of the sentence;
>
> (2) With respect to the crime or crimes under subdivision (1) of this section, that the Board of Pardons has pardoned the claimant, that a court has vacated the conviction of the claimant, or that the conviction was reversed and remanded for a new trial and no subsequent conviction was obtained;
>
> (3) That he or she was innocent of the crime or crimes under subdivision (1) of this section; and
>
> (4) That he or she did not commit or suborn perjury, fabricate evidence, or otherwise make a false statement to cause or bring about such conviction or the conviction of another, with respect to the crime or crimes under

> subdivision (1) of this section, except that a guilty plea, a confession, or an admission, coerced by law enforcement and later found to be false, does not constitute bringing about his or her own conviction of such crime or crimes.

The parties appear to agree that Nadeem's complaint sufficiently alleges that he was previously convicted of a felony and was imprisoned for approximately 3 years as a result of this conviction, pursuant to § 29-4603(1); that his felony conviction was reversed and he was not retried pursuant to § 29-4603(2); and that he did not commit or suborn perjury, fabricate evidence, or otherwise make a false statement to cause or bring about such conviction or the conviction of another pursuant to § 29-4603(4). Accordingly, the only issue we must decide is whether Nadeem sufficiently alleges that he was innocent of attempted first degree sexual assault pursuant to § 29-4603(3). We note that, although Nadeem was previously convicted of both attempted first degree sexual assault and attempted third degree sexual assault of a child, our analysis focuses solely on his conviction for attempted first degree sexual assault because the relief provided under § 29-4603 relates only to prior "felony crimes." Attempted third degree sexual assault of a child was, at the time Nadeem was charged, a Class I misdemeanor, and as a result, it does not qualify as "felony crimes."

[5] The Nebraska Supreme Court has previously found that § 29-4603(3) requires a claimant to prove "actual innocence," or that the claimant "did not commit the crime for which he or she [was] charged," in order to recover under the Act. *Hess v. State*, 287 Neb. 559, 563, 843 N.W.2d 648, 653 (2014). The court defined "actual innocence" to refer to "'[t]he absence of facts that are prerequisites for the sentence given to a defendant.'" *Id*. (quoting Black's Law Dictionary 859 (9th ed. 2009)). Essentially, § 29-4603(3) requires a claimant to prove that he did not commit the crime for which he was charged. *Hess v. State, supra*.

Nadeem was charged with and convicted of attempted first degree sexual assault. In order to prove a person guilty of attempted first degree sexual assault, the evidence must show that the person intentionally engaged in conduct which constituted a substantial step toward subjecting another to sexual penetration when the person was at least 19 years old and the victim was at least 12 years old, but was less than 16 years old. See §§ 28-201 and 28-319. Conduct shall not be considered a substantial step unless it is strongly corroborative of the person's criminal intent. § 28-201(3).

In his complaint, Nadeem alleges that he lacked the criminal intent to subject H.K. to sexual penetration and that he did not engage in a substantial step toward subjecting H.K. to sexual penetration. Specifically, in paragraphs 9 and 11 of Nadeem's complaint, he alleges that his initial conversation with H.K. at the public library was entirely "innocent" and did not include a "'sexual component.'" In paragraph 15 of the complaint, Nadeem alleges that during his telephone conversation with H.K., which police facilitated and initiated, it was H.K. who brought up sex, while Nadeem was confused, hesitant, and uncertain about this topic of conversation. Nadeem also alleges that it was H.K. who suggested meeting Nadeem on that day. Nadeem alleges that although he did go to the library after his telephone call with H.K. and after she asked him to meet her there, he arrived without a condom, which was also requested by H.K.

We acknowledge that in this court's previous opinion, *State v. Nadeem*, No. A-10-981, 2013 WL 674158 (Neb. App. Feb. 26, 2013) (selected for posting to court website), we specifically found that the evidence presented at Nadeem's criminal trial was sufficient to sustain his convictions for attempted first degree sexual assault and for attempted third degree sexual assault. However, in the current appeal, we are analyzing only whether the allegations in Nadeem's complaint are sufficient to state a cause of action under the Act. As such, we are confined to review only the specific allegations in Nadeem's

complaint. We cannot look to evidence outside of the pleadings which may or may not be presented at a subsequent phase of these proceedings. We also cannot assess the nature and quality of the evidence presented in past proceedings to predict the outcome of this action.

During his oral argument, Nadeem's counsel acknowledged the high evidentiary bar that must be reached in this case, particularly given the facts that are likely to be adduced. However, we find it noteworthy that Nadeem has never before testified. In his complaint, Nadeem alleged that he did not have the requisite intent to commit the alleged crime and did not take a substantial step toward committing that crime. As such, he alleges that no crime was actually committed. The decision as to the merits of his claims belongs to the finder of fact.

When we view the allegations contained in Nadeem's complaint in their entirety, we conclude that Nadeem included sufficient factual allegations in his complaint to meet the liberal pleading regime of our notice pleading rules. Accordingly, we reverse the district court's decision to dismiss Nadeem's complaint.

CONCLUSION

Nadeem's complaint alleges sufficient facts to state a claim for relief that is plausible on its face under the Act. Accordingly, the district court erred in dismissing his complaint for failure to state a claim. Therefore, the court's order dismissing the complaint is reversed, and the cause is remanded for further proceedings.

Reversed and remanded for further proceedings.

Bishop, Judge, dissenting.

Given the undisputed facts of this case, Nadeem cannot state a plausible claim under the Nebraska Claims for Wrongful Conviction and Imprisonment Act (the Act). The

Act was not created to compensate individuals who, on appeal, obtain a reversal and an opportunity for a new trial as a result of an error occurring at the initial trial. The Act was created to compensate actually innocent people who were convicted and imprisoned for a felony crime they absolutely did not commit. Such situations might include a case of mistaken identity or perhaps cases involving a false confession given under duress and coercion. Subsequent witness, DNA, or other evidence may prove that such persons did not actually commit the crime for which they were convicted. That is not the situation here.

The Act was created so that "persons who can demonstrate that they were wrongfully convicted shall have a claim against the state as provided in the act." Neb. Rev. Stat. § 29-4602 (Reissue 2016). The Legislature found that "innocent persons who have been wrongfully convicted of crimes and subsequently imprisoned have been uniquely victimized [and] should have an available avenue of redress," especially "[i]n light of the particular and substantial horror of being imprisoned for a crime one did not commit . . . ." *Id*. Notably, the statutory language specifically limits recourse under the Act to those persons who did not commit the crime for which he or she was imprisoned. Being actually innocent of committing a crime is quite different from having a jury conviction reversed and the cause remanded for a new trial because of an error occurring during the initial trial.

As explained by our Supreme Court, in order to recover under the Act, "actual innocence" must be proved, which is defined as "'[t]he absence of facts that are prerequisites for the sentence given to a defendant.'" *Hess v. State*, 287 Neb. 559, 563, 843 N.W.2d 648, 653 (2014) (quoting Black's Law Dictionary 859 (9th ed. 2009)). "In lay terms, actual innocence means that a defendant did not commit the crime for which he or she is charged." *Id*. In other words, there can be no facts to support one or more elements of a particular crime. However, if the facts do exist, even if disputed, to support

each element of the crime, then there can be no actual innocence. Such facts exist in this case.

The crime at issue here is attempted first degree sexual assault. As applied to these facts, a conviction for that crime would require evidence that Nadeem attempted to subject H.K. to sexual penetration. See Neb. Rev. Stat. § 28-319 (Reissue 2008). To prove Nadeem attempted to commit this crime, there must be evidence that he engaged in a substantial step toward committing the crime; and, conduct shall not be considered a substantial step unless it is strongly corroborative of Nadeem's criminal intent. See Neb. Rev. Stat. § 28-201 (Reissue 2008).

In the present case, Nadeem does not dispute that he approached H.K. at the library and that H.K. told him she was 15 years old (even though she was 14). This did not deter the 22-year-old Nadeem from giving H.K. his telephone number after asking her whether she had a boyfriend (and "other such small talk," according to his complaint). When H.K. called Nadeem the following day, Nadeem told her he wanted to talk to her and see her, and then they engaged in a sexually explicit discussion of what they would do together, including "licking," "kissing," and "fingering," the latter of which Nadeem said he could not explain to H.K. but he could show her. At H.K.'s suggestion, Nadeem met her at the library about 30 minutes later.

Nadeem does not dispute these facts. Rather, Nadeem's complaint asserts that "[e]ven if pure speculation could give rise to the belief that . . . Nadeem may have had the requisite intent to attempt to sexually assault [H.K.], it was due in total to the inducement of law enforcement. In other words, he was entrapped." However, to the extent Nadeem could have been successful on a defense of entrapment, he would have established only legal innocence, not actual innocence. Such a defense does not erase the existence of the prerequisite facts from which a jury could (and did) conclude that the necessary elements of attempted first degree sexual assault were

met beyond a reasonable doubt. The jury could have reached that same conclusion whether an instruction on entrapment had been given or whether the evidence regarding Nadeem's past behaviors in the library had been excluded. This is because the essential or prerequisite facts to convict Nadeem of attempted first degree sexual assault existed. Nadeem can dispute what the facts mean in terms of his intent, and he can argue entrapment, but these are matters for a jury to decide. Nadeem's arguments do not erase the existence of the underlying facts. Therefore, even under the principles of liberal notice pleading, Nadeem cannot claim the "absence of facts" necessary to establish his actual innocence under the Act. I would affirm the district court's order dismissing Nadeem's complaint.

Northeast Nebraska Public Power District, appellee and cross-appellant, v. Nebraska Public Power District, appellant and cross-appellee.

900 N.W.2d 196

Filed June 27, 2017. No. A-16-309.

1. **Contracts: Appeal and Error.** The construction of a contract is a question of law, and is reviewed de novo.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
4. **Declaratory Judgments.** A declaratory judgment action is ripe for judicial determination if the issue presented is fit for judicial determination and would result in significant harm if review were delayed.
5. **Courts: Judgments: Damages.** A court may proceed to the merits of a case where the issues presented are largely legal in nature, the issue may be resolved without further factual development, or judicial resolution will largely settle the parties' dispute; and significant harm applies to both actual damages, pecuniary or otherwise, and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution.
6. **Pretrial Procedure: Appeal and Error.** On a discovery issue, the district court's ruling is reviewed for an abuse of discretion.
7. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.

8. **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.
9. **Contracts.** If the terms of a contract are clear, a court may not resort to rules of construction and must accord clear terms their plain and ordinary meaning as an ordinary or reasonable person would understand them.
10. ____. The fact that the parties suggest opposing meanings of a disputed instrument does not compel the conclusion that the instrument is ambiguous.
11. **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.

Appeal from the District Court for Wayne County: James G. Kube, Judge. Affirmed.

Kile W. Johnson and Corey J. Wasserburger, of Johnson, Flodman, Guenzel & Widger, and John C. McClure, of Nebraska Public Power District, for appellant.

Steven D. Davidson and David C. Levy, of Baird Holm, L.L.P., for appellee.

Inbody, Riedmann, and Arterburn, Judges.

Arterburn, Judge.

INTRODUCTION

Nebraska Public Power District (NPPD) appeals and Northeast Nebraska Public Power District (Northeast) cross-appeals from an order entered by the district court for Wayne County granting summary judgment in favor of Northeast and denying NPPD's motion for summary judgment. On appeal, NPPD argues the district court erred in overruling NPPD's motion to dismiss for lack of subject matter jurisdiction, overruling NPPD's motion to compel, interpreting the relevant contract provisions, failing to find that equitable estoppel did not give rise to a cause of action, and granting summary judgment in favor of Northeast. On cross-appeal, Northeast

preserved its right to relief on its alternative claim alleging promissory estoppel as a matter of law. For the reasons set forth below, we affirm.

BACKGROUND

Northeast is a political subdivision of the State of Nebraska and a public power district engaged in the distribution of electricity to approximately 8,500 metered accounts in parts of Pierce, Thurston, Wayne, Dixon, and Dakota Counties. Northeast operates approximately 3,000 miles of electric lines and over 100 miles of high-voltage transmission lines in its service area. Northeast is governed by an elected board of directors.

NPPD is a political subdivision of the State of Nebraska and a public power district engaged in the generation and transmission of electricity at wholesale to numerous towns, public power districts, and cooperatives across Nebraska. NPPD is Nebraska's largest wholesale electric utility.

Prior to January 1, 2015, Northeast was a member of the Nebraska Electric Generation and Transmission Cooperative, Inc. (NEG&T). NEG&T is a nonprofit cooperative of more than 25 Nebraska public power districts and nonprofit electric membership corporations, all of whom are wholesale customers of NPPD. NEG&T was formed, in part, to provide a single point of negotiation with NPPD on behalf of its members in order to obtain energy through a single contract between NEG&T and NPPD. As a member of NEG&T, Northeast satisfied all of its demand and energy requirements under a wholesale power agreement with NEG&T, which, in turn, purchased electricity at wholesale from NPPD. Under Northeast's contract with NEG&T, Northeast did not have the right to limit or reduce the amounts of demand and energy it was obligated to purchase under the contract. Northeast had to withdraw from NEG&T if Northeast desired to limit and reduce its purchases of demand and energy requirements in order to purchase demand and energy requirements from

another wholesale provider. Upon withdrawing from NEG&T, Northeast was obligated under the wholesale power contract (WPC) to contract with NPPD for the remainder of the term of the WPC. Once contracted with NPPD under the WPC, Northeast could avail itself of the limit and reduction provisions contained in the WPC.

Northeast engaged an outside consultant to assist with issues regarding its potential transition from NPPD to a new wholesale electricity provider in 2013. There were 77 wholesale customers bound by the same WPC, either through individual contracts with NPPD or through the NEG&T cooperative contract. The WPC was originally implemented with most of those customers on January 1, 2002, for a term of 20 years. The NEG&T member agreement contract stated:

> Beginning January l, 2008, and thereafter, pursuant to the terms of the Member Agreement, a Member may elect to limit or reduce its purchase of demand and energy from NEG&T; provided, a Member electing to limit or reduce its purchase of demand and energy from NEG&T may only do so upon notice of termination of its Member Agreement. Upon the effective termination date of the Member Agreement, the Member shall enter into an Individual Wholesale Power Contract with NPPD, a copy of which is attached hereto as Exhibit E, for the remainder of the 20-year term of this Contract, which Individual Wholesale Power Contract shall set forth the terms and conditions governing such limitation or reduction and which Individual Wholesale Power Contract shall be the same contract as is offered to other NPPD wholesale customers under similar conditions of service.

The WPC, in turn, provided that until January 1, 2008, the customer must purchase from NPPD the entire amount of demand and energy needed to service its customers. After January 1, 2008, the WPC gave the customer the ability to limit and reduce its purchase of demand and energy from NPPD upon advanced written notice under a specified formula.

Northeast withdrew from NEG&T at the end of 2014 and entered into the WPC with NPPD effective January 1, 2015. Northeast provided notice to NPPD of its intent to limit and reduce its purchases of demand and energy requirements under the WPC when it executed the WPC in January 2015. The WPC limit and reduction provision, which is the provision upon which Northeast requested declaratory relief in this action, stated:

> Effective on and after the calendar year commencing January l, 20ll, Customer shall have the right, for any reason and with proper written notice, to reduce the amount of Demand and Energy it purchases from NPPD in any calendar year to levels below the Base Demand and Energy Obligation; provided, such notice(s) of reduction shall be given no earlier than January 1, 2008. Customer can reduce its monthly Demand and Energy obligations from NPPD in any such calendar year by an amount no greater than the product of (a) ten percent (10%) of the Customer's Base Monthly Demand and Energy Obligation, multiplied by (b) the number of years between the effective date of the reduction and either (i) January 1, 2010, or (ii) one year prior to the ending date of a previous reduction, whichever is later; provided, however, in no event shall Customer be allowed to reduce to a level below ten percent (10%) of the Customer's Base Monthly Demand and Energy Obligation prior to completion of the term of this Contract. Notification(s) to reduce purchases of Demand and Energy by thirty percent (30%) or less must be given by Customer to NPPD not less than three (3) calendar years prior to the effective date of such reduction. Notification(s) to reduce purchases of Demand and Energy by more than thirty percent (30%) must be given by Customer to NPPD not less than five (5) calendar years prior to the effective date of such reduction.

In early 2013, Northeast retained its outside consultant to explore alternatives with respect to wholesale power suppliers. He began communicating with NPPD in order to determine the maximum reduction available in the shortest amount of time. In May 2013, NPPD's vice president of customer services communicated to Northeast's outside consultant that he understood the reduction paragraph to allow Northeast, with proper notice, to reduce its demand and energy purchases from NPPD at the rate of 30 percent per year for 3 consecutive years (30/30/30 method).

In June 2013, Northeast's board of directors issued a request for proposals, soliciting proposals from potential suppliers of wholesale power. Northeast sent NPPD a copy of the request for proposals as a prospective bidder. In August 2013, Northeast's general manager was authorized by the board of directors to issue notice to NEG&T of its intent to withdraw from the membership agreement. He issued this notice to NEG&T on October 28.

On November 1, 2013, NPPD communicated to Northeast's outside consultant that after further review, NPPD no longer understood the reduction paragraph to permit the 30/30/30 method of reduction. In late 2013, Northeast executed a purchase agreement with Big Rivers Electric Corporation (BREC) to purchase power at the maximum schedule of reduction from NPPD.

On June 23, 2014, Northeast filed an action for declaratory judgment in the district court. Northeast also filed an action for equitable estoppel to prevent NPPD from prohibiting Northeast from reducing in any manner other than the 30/30/30 method. On July 24, NPPD filed a motion to dismiss on the basis of lack of subject matter jurisdiction. The district court overruled NPPD's motion to dismiss on December 2.

On December 30, 2014, during the pendency of litigation, Northeast and NPPD executed the WPC, which had an effective date of January 1, 2015. Northeast sent formal notice that it intended to limit and reduce its purchase under the

contract and that its preferred means of reduction was the 30/30/30 method.

During discovery, the district court entered a protective order that was stipulated to by both parties. The protective order provided that any material exchanged in the course of discovery and marked "'Confidential'" would be limited in use to the purposes of litigation. Northeast provided NPPD with a redacted copy of its contract with BREC, and removed 13 sections of the agreement. On June 9, 2015, NPPD filed a motion to compel the disclosure of the unredacted document. On August 14, the district court overruled the motion to compel.

Each party filed a motion for summary judgment in June 2015. On January 19, 2016, the district court entered an order granting Northeast's motion for summary judgment, in part, and overruling NPPD's motion for summary judgment. The district court found that the reduction provision in the contract was unambiguous. The court concluded that the 30/30/30 method was the appropriate reduction method. The court declined to reach the promissory estoppel issue, finding it moot because Northeast obtained all the relief it requested on the contract claim. NPPD filed a notice of appeal on March 23.

ASSIGNMENTS OF ERROR

NPPD argues the district court erred in (1) overruling NPPD's motion to dismiss for lack of subject matter jurisdiction, (2) overruling NPPD's motion to compel, (3) interpreting the relevant contract provisions, (4) failing to find that equitable estoppel did not give rise to a cause of action, and (5) granting summary judgment in favor of Northeast. On cross-appeal, Northeast preserved its right to relief on its alternative claim alleging promissory estoppel as a matter of law.

STANDARD OF REVIEW

[1-3] The construction of a contract is a question of law, and is reviewed de novo. *Labenz v. Labenz*, 291 Neb. 455,

866 N.W.2d 88 (2015). An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Pittman v. Western Engineering Co.*, 283 Neb. 913, 813 N.W.2d 487 (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Motion to Dismiss

NPPD argues that the district court erred in overruling its motion to dismiss for lack of subject matter jurisdiction. NPPD asserts that the district court should have dismissed the case because Northeast "sought an advisory opinion to determine whether its future actions would constitute a breach under a contract that had yet to be executed at the time the declaratory judgment action was filed." Brief for appellant at 15. NPPD argues the case was not, and is not, ripe for judicial review. We find these assertions lack merit.

The Nebraska Supreme Court in *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008), adopted a two-step analysis from the U.S. Court of Appeals for the Eighth Circuit to determine whether a declaratory judgment action was ripe. In *Nebraska Public Power Dist. v. MidAmerican Energy*, 234 F.3d 1032 (8th Cir. 2000), NPPD sought declaratory relief regarding the meaning of a contract provision addressing decommissioning payments for a MidAmerican Energy Company (MidAmerican) nuclear power facility. Certain payments were allegedly due only after MidAmerican made a contractual election to extend the time to decommission the facility, the deadline for which had not yet occurred. NPPD asked the court to interpret contractual duties that

would arise only if the election were made. As a result, MidAmerican contended that NPPD's declaratory judgment claim was not ripe, and could not be ripe for adjudication until after the contractual election occurred. *Id.*

[4,5] The Eighth Circuit held that a declaratory judgment action is ripe for judicial determination if the issue presented is fit for judicial determination and would result in significant harm if review were delayed. The first prong of the test, fitness for judicial determination, goes to a court's ability to visit an issue. *Id.* A court may proceed to the merits of a case where the issues presented are largely legal in nature, the issue may be resolved without further factual development, or judicial resolution will largely settle the parties' dispute; and significant harm applies to both actual damages, pecuniary or otherwise, and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution. *Id.* A party need not wait for actual harm to occur; however, both the immediacy and the size of the threatened harm must be significant. *Id.* A party seeking judicial relief must necessarily satisfy both prongs to at least a minimal degree. *Id.*

The court in *MidAmerican Energy* found the case ripe despite the fact that the triggering event for MidAmerican's payment or nonpayment remained in the future. The court noted that the case presented primarily a legal question of contract interpretation about which the facts were already established, the resolution of which would largely resolve the dispute. *Id.* Moreover, delay would cause harmful uncertainty that would require NPPD to gamble millions of dollars on an uncertain legal foundation. *Id.* The insecurity caused by the parties' contending interpretations of the contract worked a definite, tangible, and significant future harm, and even worked as a present harm on their ability to plan and conduct business operations. *Id.* Finally, the court found it significant that the case would not change if the court waited for the future contractual deadline to pass. The parties were 3 years from the decommissioning decision. If the court were to

withhold adjudication, the parties would have returned shortly, making precisely the same arguments, with nary a scintilla of additional relevant evidence. *Id.*

The present case presents an issue of contract interpretation where all relevant facts and contingencies have already occurred and the resolution of which will end the dispute. The current record confirms that Northeast has terminated the WPC with NEG&T, has entered into the required direct WPC with NPPD, and has provided the required advance contractual notice of its intention to limit and reduce its purchases. Northeast's first reduction will occur on January l, 2018. All triggering events that define the legal issues and give context to the interpretation of the contract have already taken place. The contract is in force, requisite notices to limit and reduce have been given, and there is a clear and defined dispute about the parties' rights in light of that notice. There is no remaining factual uncertainty and no future event yet to take place other than implementation of decisions already made. As a result, the legal issues of contract interpretation raised in this case are fit for determination now.

There is both a present significant potential harm, a nearly $1 million difference between the proposed reduction methods, and future uncertainty from an operational standpoint for Northeast. Absent resolution, Northeast will not know from whom, or in what amount, it will be purchasing demand and energy for its customers over a multiyear period. Logistical and business planning regarding Northeast's operations would be significantly impacted. If this case were dismissed, the parties would return with the same contract provision dispute and nearly the same evidence. This case is ripe for review, and the district court did not err in denying NPPD's motion to dismiss.

Motion to Compel

NPPD argues the district court erred in denying its motion to compel an unredacted version of the wholesale power

contract between Northeast and BREC. NPPD asserts that without an opportunity to verify or contradict Northeast's claims with respect to the cost difference between the BREC and NPPD contracts, the district court deprived NPPD of important evidence which could have been dispositive in this case. We find these assertions lack merit.

[6] On a discovery issue, the district court's ruling is reviewed for an abuse of discretion. See *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015). It is difficult to show that a party has been prejudiced by a discovery order, or that the question is not moot; and the harmless error doctrine, together with the broad discretion the discovery rules vest in the trial court, will bar reversal save under very unusual circumstances. *Id.*

The district court determined that whatever reduction method utilized involves a calculation of a percentage of energy purchase reduction under the contract between NPPD and Northeast. The court noted that there was some relevance in reviewing the contract between Northeast and BREC for establishing the materiality of contractual aspects which would help determine the ultimate costs to Northeast. However, the court determined that the potential harm of disclosing BREC's contract to NPPD, one of its business competitors, outweighed the purpose for which NPPD sought the unredacted contract. The court determined that the redacted contract disclosed sufficient information in order for NPPD to defend its position in this case. After a review of the record, we find the district court did not abuse its discretion in denying NPPD's motion to compel.

Contract Interpretation

NPPD argues the district court erred in its contract interpretation finding that the 30/30/30 method was consistent with the plain language of the WPC. NPPD asserts that the unambiguous language of the WPC only allows successive reductions after the first year at a maximum of 10 percent per

year (30/10/10 method). Upon our review, we find this assertion lacks merit.

[7-11] The meaning of a contract and whether a contract is ambiguous are questions of law. *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 868 N.W.2d 67 (2015). 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. *Kasel v. Union Pacific R.R. Co.*, 291 Neb. 226, 865 N.W.2d 734 (2015). If the terms of a contract are clear, a court may not resort to rules of construction and must accord clear terms their plain and ordinary meaning as an ordinary or reasonable person would understand them. See *id.* The fact that the parties suggest opposing meanings of a disputed instrument does not compel the conclusion that the instrument is ambiguous. *Id.* When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Facilities Cost Mgmt. Group, supra*.

There is no question that the contract language in dispute is unnecessarily complicated. However, we find that there is only one reasonable interpretation of the contract. We, therefore, find that the contract is not ambiguous. According clear terms their plain and ordinary meaning, we find that the reduction provision at issue allows for the 30/30/30 method, commencing on January 1, 2018.

First, the parties agree that the maximum potential reduction under the WPC is 90 percent of the base obligation. The parties also agree that 3 years' advance notice must be given to implement a reduction of 30 percent or less and that 5 years' advance notice must be given to implement a reduction of more than 30 percent. Finally, the parties agree that Northeast can reduce its demand by 30 percent in its first year of reduction. The parties disagree on whether subsection (i) or subsection (ii) applies to the reductions proposed for 2019 and 2020. NPPD argues that subsection (i) is inapplicable after the initial reduction, so subsection (ii) must apply.

NPPD argues that the phrase "(ii) one year prior to the ending date of a previous reduction, whichever is later," should be fairly read to mean "'ending date of a previous reduction *level*' within the context of the reduction paragraph as a whole," brief for appellant at 28. Therefore, after Northeast's initial reduction of 30 percent of its demand, the subsequent reductions would be limited to 10 percent multiplied by the ending date of the previous reduction, which was 1 year for each subsequent reduction that Northeast had given advance notice. This is how NPPD arrived at its 30/10/10 method. In contrast, Northeast argues, and the district court found, that there was not an "ending date of a previous reduction," therefore the limiting provision of subsection (ii) is inapplicable and subsection (i) applies.

Affording the plain and ordinary meaning as an ordinary or reasonable person would understand it, the phrase "(ii) one year prior to the ending date of a previous reduction, whichever is later," we find that there is no "ending date of a previous reduction." Northeast provided notice of continuous, cumulative, and maximum reductions of 30 percent annually to the maximum reduction level of 90 percent of its monthly base demand and obligation under the WPC. The district court found: "The ending of previous reduction cannot mean that the reduction continues to exist. To 'end' means to terminate; a cessation; a point beyond which something does not continue, or which ceases to exist." We agree with the district court's conclusion given the context of this contract that the ordinary meaning of the term "ending date" is the date on which a previous reduction ends. Here, the proposed reductions will not end. They will each remain in place through the duration of the contract's term, which expires on January 1, 2022. The original 30-percent reduction that begins in 2018 will remain in place during 2019. Each additional reduction will be capped at 30 percent, and the total will be capped at 90 percent per the reduction provision. Since there was no "ending date of a previous reduction," subsection (ii) does not

come into effect, and thus subsection (i) was applicable for every notice. However, the notice requirement of the contract capped each year's subsequent reduction to a 30-percent total, and at 90 percent from January 1, 2020, until the expiration of the WPC. Upon our review, we find that the district court did not err in its interpretation of the contract provisions and, therefore, did not err in granting summary judgment in favor of Northeast.

Remaining Assigned Errors

On cross-appeal, Northeast preserved its right to relief on its alternative claim alleging promissory estoppel as a matter of law. NPPD argues that the district court should have found that equitable estoppel did not give rise to a cause of action, but can serve only as a defense.

The district court found that the equitable estoppel issue was moot, since it granted summary judgment on the contract claim to Northeast. We agree. Our findings above render this issue contained in the remaining assigned errors moot.

CONCLUSION

Upon our review, we find the district court did not err in overruling NPPD's motion to dismiss for lack of subject matter jurisdiction. The district court did not err in overruling NPPD's motion to compel. Additionally, the district court did not err in its interpretation of the relevant contract provisions. The district court did not err in granting summary judgment in favor of Northeast. Finally, our opinion regarding the contract's meaning renders moot the remaining causes of action.

Affirmed.

State of Nebraska, appellee, v. Frantz G. Kolbjornsen, appellant.

900 N.W.2d 206

Filed July 3, 2017. Nos. A-16-766, A-16-768, A-16-769.

1. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2016) for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. In an appeal involving such a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.
2. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
3. **Effectiveness of Counsel: Appeal and Error.** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.
4. **Postconviction: Judgments: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2016), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.
5. **Postconviction: Effectiveness of Counsel: Appeal and Error.** In a postconviction proceeding, the district court should first address the claim that counsel was ineffective for failing to file a direct appeal, including holding an evidentiary hearing, if required. Upon reaching its decision, the district court should enter a final order on that claim only. If the claim for a new direct appeal is denied, a defendant should be permitted to appeal that denial. Only after the resolution of

that appeal, or, alternatively, the expiration of the defendant's time to appeal, should the district court proceed to consider the remaining claims.

6. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
7. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant.
8. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.
9. **Fees: Appeal and Error.** Neb. Rev. Stat. § 25-1912 (Reissue 2016), applicable to civil and criminal appeals, generally provides that an appeal may be taken by filing a notice of appeal and depositing the required docket fee with the clerk of the district court.
10. **Jurisdiction: Affidavits: Fees: Appeal and Error.** A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal, and an in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and a proper affidavit of poverty.
11. **Affidavits: Appeal and Error.** The impoverished appellant, not her or his attorney, must execute the affidavit which substitutes for the payment of fees and costs and the posting of security.
12. **Effectiveness of Counsel: Proof.** 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.
13. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire effectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.

Appeal from the District Court for Hall County: Teresa K. Luther, Judge. Affirmed in part, and in part vacated and remanded for further proceedings.

Mitchell C. Stehlik, of Lauritsen, Brownell, Brostrom & Stehlik, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, Kimberly A. Klein, and, on brief, George R. Love, for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Pirtle, Judge.

INTRODUCTION

Frantz G. Kolbjornsen filed three identical motions for postconviction relief following his pleas of no contest to the underlying criminal charges in cases Nos. CR 14-596, CR 14-598, and CR 14-600. His motions were denied following an evidentiary hearing. Kolbjornsen appeals the orders of the district court for Hall County, and the cases have been consolidated for briefing and disposition. We affirm in part, and in part vacate and remand the causes for further proceedings.

BACKGROUND

On November 25, 2014, Kolbjornsen was charged by information in three separate criminal cases in Hall County, Nebraska: (1) No. CR 14-596—second degree forgery, a Class III felony; (2) No. CR 14-598—possession of a destructive device, a Class IV felony; and (3) No. CR 14-600—assault in the first degree, a Class II felony, and use of a deadly weapon to commit a felony, a Class II felony.

Kolbjornsen was also charged in Hall County case No. CR 14-602 with theft by unlawful taking. Pursuant to a plea agreement, the State amended the charges in cases Nos. CR 14-596, CR 14-598, and CR 14-600, and agreed to dismiss the following charges: (1) three forgery charges, each a Class I misdemeanor; (2) use of a deadly weapon to commit a felony, a Class II felony; and (3) theft, a Class IV felony.

Kolbjornsen entered pleas of no contest to amended charges of (1) attempted forgery, in the second degree, a Class IV felony; (2) possession of a destructive device, a Class IV felony; and (3) attempted first degree assault, a Class III felony.

At the time he was sentenced, Kolbjornsen was serving a term of imprisonment for a criminal conviction in Hamilton

County, Nebraska. As part of the plea agreement, the State also agreed to recommend concurrent sentences for the amended charges in Hall County cases Nos. CR 14-596, CR 14-598, and CR 14-600 and for the sentences subject to the agreement to run concurrent to the sentence imposed in Hamilton County. Kolbjornsen was convicted of each of the amended criminal charges in the district court for Hall County.

Kolbjornsen was sentenced on March 11, 2015. The State recommended concurrent sentencing, but asked that Kolbjornsen not receive credit for time served for the Hamilton County sentence, as it was not related to the crimes committed in Hall County. The State recommended that sentencing be concurrent with the Hamilton County sentence beginning from the date of sentencing in Hall County.

In case No. CR 14-596, the court sentenced Kolbjornsen to 20 months' to 5 years' imprisonment, with the sentence to be served concurrently with cases Nos. CR 14-598 and CR 14-600. In case No. CR 14-598, Kolbjornsen was sentenced to 20 months' to 5 years' imprisonment, with the sentence to be served concurrently with the sentences imposed in cases Nos. CR 14-596 and CR 14-600. In case No. CR 14-600, Kolbjornsen was sentenced to 5 to 7 years' imprisonment, with the sentence to be served concurrently with cases Nos. CR 14-596 and CR 14-598. The court ordered that these concurrent sentences would run consecutively to the sentence imposed by the district court for Hamilton County, and the court gave no credit for time previously served. The court indicated that the imposition of these sentences would add 2½ years to his parole eligibility and 3½ years to the "jam time," or the time of his mandatory discharge.

Kolbjornsen filed amended motions for postconviction relief in each case, including several allegations of trial court error and allegations of ineffective assistance of counsel. The same motion was filed in each case. A single evidentiary hearing was held March 3, 2016, to address the postconviction motions.

On July 28, 2016, the district court filed orders addressing several of Kolbjornsen's specific allegations and denying Kolbjornsen's motions for postconviction relief "in [their] entirety." The same order was filed in each case. Kolbjornsen timely appealed and requested that the cases be consolidated for the purposes of appeal.

ASSIGNMENTS OF ERROR

Kolbjornsen asserts, generally, that the district court erred in denying his motions for postconviction relief. He argues that he was denied effective assistance of trial counsel for several reasons, including the allegation that trial counsel failed to file a direct appeal in each case. He also argues multiple allegations of trial court error.

STANDARD OF REVIEW

[1] In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2016) for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. *State v. Armstrong*, 290 Neb. 991, 863 N.W.2d 449 (2015). In an appeal involving such a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous. *Id.*

[2,3] In appeals from postconviction proceedings, we independently resolve questions of law. *State v. Determan*, 292 Neb. 557, 873 N.W.2d 390 (2016). Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision. *Id.*

ANALYSIS

[4] The Nebraska Postconviction Act, § 29-3001 et seq., provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or

her constitutional rights such that the judgment was void or voidable. *State v. Hessler*, 295 Neb. 70, 886 N.W.2d 280 (2016).

In this consolidated appeal, Kolbjornsen makes several claims related to the effectiveness of his trial counsel and alleges there were multiple irregularities or errors in the proceedings before the trial court.

[5] In *State v. Determan, supra*, the Nebraska Supreme Court modified the procedure to be followed by those district courts that are presented with postconviction motions alleging both a direct appeal claim and other claims of ineffective assistance of counsel. The Nebraska Supreme Court stated:

> In the future, the district court should first address the claim that counsel was ineffective for failing to file a direct appeal, including holding an evidentiary hearing, if required. Upon reaching its decision, the district court should enter a final order on that claim only. If the claim for a new direct appeal is denied, a defendant should be permitted to appeal that denial. Only after the resolution of that appeal, or, alternatively, the expiration of the defendant's time to appeal, should the district court proceed to consider the remaining claims.
>
> We note that this procedure is applicable only in those situations where a defendant raises both the ineffectiveness of counsel for not filing a direct appeal along with other allegations of ineffectiveness.

Id. at 563, 873 N.W.2d at 395.

In *State v. Determan, supra*, the Nebraska Supreme Court ultimately found that the proper disposition of the underlying appeal would be to vacate the district court's order denying postconviction claims and remand the cause for further proceedings.

Here, following an evidentiary hearing, the district court denied postconviction relief on the basis that trial counsel was ineffective for failing to file a direct appeal in each case. The district court also addressed Kolbjornsen's other allegations

of ineffective assistance and allegations of trial court error. Keeping in mind the procedure set forth in *State v. Determan, supra*, we will only consider Kolbjornsen's argument regarding trial counsel's alleged failure to file a direct appeal in each case. The remainder of the district court's orders are vacated and the causes are remanded for further proceedings.

[6,7] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Hessler*, 295 Neb. 70, 886 N.W.2d 280 (2016). 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. *State v. Hessler, supra*.

[8] After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

[9-11] Neb. Rev. Stat. § 25-1912 (Reissue 2016), applicable to civil and criminal appeals, generally provides that an appeal may be taken by filing a notice of appeal and depositing the required docket fee with the clerk of the district court. *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010). The Nebraska Supreme Court has noted that a poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal and that an in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and a proper affidavit of poverty. *Id.* The impoverished appellant, not her or his attorney, must execute the affidavit which substitutes for the payment of fees and costs and the posting of security. *Id.*

Kolbjornsen asserts that his trial counsel was ineffective for failing to file a direct appeal in each case and that the

district court erred in denying postconviction relief on this basis. He asserts that he asked his wife to notify his trial counsel that he wished to file direct appeals, and he argues that his counsel failed to do so or make other affirmative steps to ensure the appeals could proceed prior to the filing deadline. Kolbjornsen's wife testified that she contacted counsel on March 18 or 19, 2015, to give him notice that Kolbjornsen wished to appeal the orders filed on March 11.

At the evidentiary hearing, trial counsel testified that in situations such as this, he typically asks his clients to write him directly rather than communicating through a spouse so he has a clear directive from a client regarding their wishes. Nevertheless, he recognized the urgency involved and he proceeded to immediately prepare and send a letter to Kolbjornsen at the correctional institution. He did not recall the date that Kolbjornsen's wife contacted him by telephone, but testified that his standard course of practice would be to communicate with this client within a day or two.

Trial counsel testified that he acted promptly due to the short period of time remaining before the deadline to file appeals. He said the letter instructed Kolbjornsen that the poverty affidavits had to be signed, notarized, and back in counsel's possession by April 10, 2015, in order to perfect the appeals. Counsel testified that he sent the letter on March 31 and that he received Kolbjornsen's response on April 13, after the deadline for direct appeals had passed. Trial counsel said the letter containing a signed poverty affidavit was the only direct communication he received from Kolbjornsen requesting that he file appeals.

Kolbjornsen testified that he received the letter from trial counsel on April 4, 2015. He signed the form and had it notarized on April 8, and he mailed it back to trial counsel on the same day. He received a letter from trial counsel indicating that the deadline had passed for filing direct appeals and advising him to file motions for postconviction relief.

The court found that there was no evidence Kolbjornsen's counsel ignored his instructions, and it found that counsel acted promptly, providing adequate instructions regarding the filing deadline. The court noted that this situation is similar to that in *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004), in which it appeared the postal service may have been a factor in Kolbjornsen's inability to timely file the appeals. However, the court also noted that Kolbjornsen waited weeks before contacting counsel regarding his desire to file appeals and that his counsel acted promptly to provide him with the necessary documents. The court indicated that Kolbjornsen could have made alternative arrangements for delivery if he felt the mail service would be "questionable for meeting the deadline." Ultimately, the court found that there was no evidence showing that counsel was deficient in his performance.

When reviewing a claim of ineffective assistance of counsel, an appellate court reviews factual findings of the lower court for clear error. We find the trial judge, as the trier of fact, did not clearly err in determining that Kolbjornsen's delay in contacting counsel regarding his desire to appeal affected his counsel's ability to timely file appeals on his behalf.

[12,13] 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. See *State v. Alford, ante* p. 213, 884 N.W.2d 470 (2016). The entire effectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Id.*

The evidence shows that trial counsel acted promptly once Kolbjornsen's wife contacted him, and he sent the necessary paperwork and instructions in a timely manner. The evidence also shows that, after sentencing, Kolbjornsen delayed a week or more before asking his wife to contact his counsel, and delayed again in signing and returning the letter, even though he had been informed that failure to return the poverty

affidavits by April 10, 2015, would affect his ability to file direct appeals.

Based upon our review of the record, we conclude that trial counsel's performance was not deficient and that the district court did not err in denying postconviction relief on this theory of ineffective assistance of counsel. And because our decision on Kolbjornsen's claim of ineffective assistance of counsel for failing to timely file direct appeals is subject to further review, we conclude that based on *State v. Determan*, 292 Neb. 557, 873 N.W.2d 390 (2016), neither the district court nor this court can address the remaining postconviction claims until a mandate has issued as to the direct appeal issue. Accordingly, we must vacate the district court's orders as to the remaining postconviction claims and remand the causes with directions to defer consideration of those claims until after the mandates have issued as to the direct appeal claims.

CONCLUSION

We find the district court did not err in denying Kolbjornsen's motions for postconviction relief on the basis that his trial counsel was ineffective for failure to file direct appeals. We vacate the district court's orders as to the remaining postconviction claims and remand the causes with directions to defer consideration of those claims until after the mandates have issued as to the direct appeal claims.

Affirmed in part, and in part vacated and remanded for further proceedings.

State of Nebraska, appellee, v. Alicia R. Campbell, appellant.

900 N.W.2d 556

Filed July 11, 2017. No. A-16-836.

1. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
2. ____: ____. In reviewing a sufficiency of the evidence claim, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
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. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **Investigative Stops: Motor Vehicles: Probable Cause.** 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.** Under Fourth Amendment case law, it is reasonable for an officer to request that a driver sit in the patrol car during a traffic stop.
7. ____: ____: ____: ____. Once a motor vehicle has been lawfully detained for a traffic violation, the police officer may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.

8. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** It is reasonable and lawful for an officer, during a traffic stop, to request that a driver exit his or her vehicle.
9. **Controlled Substances.** A person possesses a controlled substance when he or she knows of the nature or character of the substance and of its presence and has dominion or control over it.
10. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Possession can be either actual or constructive, and constructive possession of an illegal substance may be proved by direct or circumstantial evidence.
11. **Controlled Substances.** To be guilty of possession of a controlled substance, the defendant must possess the controlled substance knowingly or intentionally.
12. **Controlled Substances: Proof.** Mere presence at a place where a controlled substance is found is not sufficient to show constructive possession. Instead, the evidence must show facts and circumstances which affirmatively link the accused to the marijuana and paraphernalia so as to suggest that he or she knew of it and exercised control over it.
13. **Investigative Stops: Motor Vehicles.** The fact that one is the driver of a vehicle, particularly over a long period of time, creates an inference of control over items in the vehicle.
14. **Courts: Jurisdiction.** While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power.
15. **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.
16. **Convictions: Sentences: Moot Question: Appeal and Error.** An appeal from a criminal conviction is not moot, even though a sentence for a criminal conviction has been fully served, when the defendant is subjected to collateral consequences resulting from the criminal conviction.

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

Joe Nigro, Lancaster County Public Defender, and Shawn Elliott for appellant.

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

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Pirtle, Judge.

INTRODUCTION

Alicia R. Campbell appeals her convictions and sentences in the district court for Lancaster County for failure to obey a lawful order of the Nebraska State Patrol, possession of marijuana, and possession of drug paraphernalia. She challenges the sufficiency of the evidence for each offense and argues that her sentence for failure to obey a lawful order of the State Patrol is excessive. Based on the reasons that follow, we affirm.

BACKGROUND

On August 27, 2015, Nebraska State Patrol Trooper Kyle Gress was assigned to the traffic division and was working a targeted patrol along Highway 2 near Lincoln, Nebraska. He was in a marked patrol car and was in uniform. His primary duty was enforcing traffic laws. Around 5 p.m., he noticed a vehicle that appeared to be speeding. The posted speed limit was 65 miles per hour, and Gress estimated the vehicle was traveling about 80 miles per hour. He used the radar device in his patrol car and confirmed that the vehicle was speeding at 79 miles per hour. He then initiated a traffic stop.

Gress testified that once the vehicle stopped, he approached it on the passenger side. He testified that he does this for safety reasons when making stops, because it keeps him away from the traffic side of the vehicle. As he approached the vehicle, he noticed that the windows had a dark tint and that the passenger-side window was partially open. Gress thought this was unusual because most people roll the window down all the way when he approaches a vehicle. There was an adult male in the front passenger seat, later identified as Devin James, and Campbell's 5-year-old daughter was in the back seat. Gress asked Campbell for her driver's license and registration.

Campbell gave Gress her driver's license and tried to locate her registration.

Almost immediately upon Gress' approaching the vehicle, James became involved and began talking over Campbell and Gress. James began video recording the stop on his cell phone by placing it at the window, which interfered with Gress' view of the driver. There was also a rescue unit in the area with its siren on, which made it difficult for Gress to communicate with Campbell. Gress testified that as a result of these circumstances, he was having difficulty hearing and seeing Campbell. He asked Campbell to exit her vehicle and walk back to his patrol car so he could conduct the traffic stop. Gress walked over to the driver's side of Campbell's vehicle to make sure she exited safely. However, Campbell remained in her vehicle.

Gress stayed on the driver's side of the vehicle and asked her again to exit her vehicle so he could conduct the traffic stop. Gress stated that he did not recall telling Campbell the reason for the traffic stop, even though she asked him why she had been stopped. Campbell did not get out of her vehicle. Gress told her multiple times that she needed to exit her vehicle, but she did not comply. She asked for Gress' supervisor to come to the location, and Gress stated that he had already tried to contact him. During this exchange, James repeatedly stated that Campbell was not going to get out of the vehicle. James continued talking over Gress and continued video recording the events, as well as narrating the video. James stated that he was transmitting the video through a "live-streaming app" on his cell phone. This caused Gress concern, and he told James to stop recording because it was an "officer safety issue." Gress testified that due to James' actions, he could not communicate with Campbell. He testified that he felt James was trying to control the situation by not permitting him to speak to Campbell.

Gress told Campbell that he was giving her a lawful order to get out of her vehicle and that if she did not comply, she would be arrested. Campbell did not comply with Gress' order.

Gress told her she was under arrest and needed to exit the vehicle. Campbell still refused to get out of her vehicle.

Gress next tried to reach into the vehicle through the driver's-side window, which was partially down, to unlock the door which Campbell had previously locked. A struggle ensued when he did so, and Gress ended up breaking the driver's-side window of the vehicle. He then tried reaching into the vehicle through the same window opening again. As a result of the struggle and broken glass, Gress had cuts on both of his arms. Gress subsequently disengaged from the struggle, backed away from the vehicle, and waited for other officers to arrive. Campbell exited the vehicle after two other troopers, including Gress' supervising officer, arrived on scene. Campbell and James were both arrested and taken into custody.

After Campbell and James were arrested, police conducted an inventory search. The search uncovered marijuana and several items of drug paraphernalia.

The State filed an information charging Campbell with seven counts: (1) assault of an officer in the third degree, (2) failure to obey a lawful order of the State Patrol, (3) speeding, (4) failure to use a child passenger restraint, (5) no valid registration, (6) possession of marijuana, and (7) possession of drug paraphernalia. Campbell pled not guilty to the charges.

A jury trial was held on counts 1, 2, and 5, and a bench trial was held on counts 3, 4, 6, and 7. At the jury trial on counts 1, 2, and 5, Gress testified, giving his account of the traffic stop as set forth above. During the testimony of Gress, the State offered and the court received into evidence the video of the traffic stop taken by the camera on Gress' cruiser.

Campbell testified in her own defense. She admitted that Gress told her to exit her vehicle and come back to his cruiser and that she did not comply. She testified that she did not get out of her vehicle because she was afraid. She stated that she was afraid because Gress did not tell her the reason for the stop when she asked him multiple times, he refused to look at her proof of insurance that she was trying to show him on her cell phone, and he disapproved of James' recording the stop. She

stated that based on those actions, she did not know what his intentions were. Campbell further testified that she is a rape victim and that based on her prior trauma, she was afraid of going back to Gress' cruiser with him. She also testified that she was concerned for her safety because Gress put his hand on his gun a few times during the traffic stop. Because of her fear, she told Gress to have his supervisor come to the scene and then she would exit her vehicle. She testified that she wanted the supervisor present to ensure her safety and to have a witness to the interactions between her and Gress.

Campbell also testified that during the encounter, she used her cell phone to call the 911 emergency dispatch service, at which point she perceived Gress to become upset. She admitted that the 911 dispatch officer told her that she should exit the vehicle, but that she was too afraid to do so given all that had occurred.

James also testified in Campbell's defense, and his video recording of the events was admitted into evidence.

At the close of the State's case in the jury trial, the district court sustained Campbell's motion for a directed verdict as to count 5, no valid registration. The jury acquitted Campbell of count 1, assault of an officer in the third degree, but found her guilty of count 2, failure to obey a lawful order of the State Patrol.

The bench trial on counts 3, 4, 6, and 7 was held after the other counts had been submitted to the jury. Sgt. Michael Grummert of the State Patrol testified for the State. As part of his job, he had received training on how to detect controlled substances, including marijuana, and had experience in doing so. He testified that he was familiar with what marijuana looks like and how it smells. He had also been trained in how marijuana is ingested.

Grummert conducted an inventory search of the vehicle after Campbell was arrested. He testified that during the search, he found a brown purse which contained a marijuana grinder, rolling papers, a marijuana pipe, and a small baggie of marijuana. Grummert testified that in his opinion, the

substance in the baggie was in fact marijuana. The purse was located on the back seat of the vehicle, behind the front passenger seat. Grummert testified that the purse appeared to be "a female's purse" and noted that Campbell was the only adult female in the vehicle at the time of the stop. Grummert also found rolling papers, a second marijuana grinder, and a purple cylinder containing marijuana in what he described as a "brown leather carpet bag." This bag was located on the middle of the passenger seat. Grummert testified that the rolling papers, grinders, and pipe are used for ingesting marijuana. Finally, Grummert located a black leather bag on the back seat behind the driver's seat which contained a black cylinder with marijuana residue and alcohol.

After the bench trial, the district court found Campbell guilty of count 3, speeding; count 6, possession of marijuana; and count 7, possession of drug paraphernalia. The court found Campbell not guilty of count 4, failure to use a child passenger restraint.

The district court subsequently sentenced Campbell to 7 days in jail on count 2, failure to obey a lawful order, and ordered her to pay fines for the other infractions.

ASSIGNMENTS OF ERROR

Campbell assigns that the trial court erred in (1) finding there was sufficient evidence to convict her of failure to obey a lawful order of the State Patrol, (2) finding there was sufficient evidence to convict her of possession of marijuana, (3) finding there was sufficient evidence to convict her of possession of drug paraphernalia, and (4) imposing an excessive sentence on her conviction for failure to obey a lawful order of the State Patrol.

STANDARD OF REVIEW

[1,2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility

of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Draper*, 295 Neb. 88, 886 N.W.2d 266 (2016). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

[3,4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Draper, supra.* An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

ANALYSIS

Sufficiency of Evidence—
Failure to Obey
Lawful Order.

Campbell first argues that the evidence was insufficient to convict her of failure to obey a lawful order of the State Patrol. Campbell was convicted of violating Neb. Rev. Stat. § 81-2008 (Reissue 2014), which states: "Any person who fails or refuses to obey any lawful traffic direction or any lawful order of the superintendent or any of the subordinate officers or employees of the Nebraska State Patrol . . . shall be deemed guilty of a Class III misdemeanor."

It is undisputed that Gress was an employee of the State Patrol and that Campbell failed to obey Gress' order. Campbell focuses her argument on the lawfulness of Gress' order. She contends that his order was not lawful because he never informed her of the reason for the traffic stop and because he asked her to exit her vehicle less than a minute after he approached the vehicle. She argues that when Gress' actions are examined as a whole, it is evident that she had good reason to believe that Gress was not acting lawfully, nor within the scope of his duties.

The evidence shows that Gress asked Campbell to step out of her vehicle shortly after making contact. However, the timing of Gress' initial order does not make the order unlawful. His initial request was made because James was interrupting Gress and was holding his cell phone up to the window, obstructing Gress' view into the vehicle. There was also a rescue unit going by with its siren on, making it hard to communicate with Campbell.

At the time of Gress' initial request to exit the vehicle, Campbell had no reason to question his authority. She was driving her vehicle 14 miles over the posted speed limit at the time she was stopped. Gress was in a marked patrol car and was in uniform. It was daylight at the time of the stop, and there was heavy traffic on Highway 2, where she was stopped.

When Gress moved to the driver's side of the vehicle, he continued to order Campbell to exit her vehicle so he could conduct the traffic stop. Campbell refused to comply, and the situation escalated from there.

[5] In regard to Campbell's contention that Gress' order was unlawful because he did not tell her the reason for the traffic stop, she cites to no authority for her position and we find none. Gress stopped Campbell for speeding, a traffic violation, and therefore he had probable cause to stop her. See *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005) (traffic violation, no matter how minor, creates probable cause to stop driver of vehicle). The fact that he did not tell her that she was stopped for speeding does not make his order to exit the vehicle unlawful.

We conclude that Campbell's argument that Gress' order was not lawful is without merit. Neb. Rev. Stat. § 81-2005(1) (Reissue 2014) gives all officers of the State Patrol, as peace officers, the power to enforce "the Nebraska Rules of the Road, and any other law regulating the registration or operation of vehicles or the use of the highways." As previously stated, Gress executed a traffic stop of Campbell's vehicle because

Campbell was speeding, a traffic violation. Campbell does not argue that the stop was unlawful. Gress was in uniform and was driving a marked patrol car at the time of the stop. Gress testified that he ordered Campbell out of her vehicle in order to complete the traffic stop because James was interfering with the stop. The video footage from Gress' cruiser, as well as the video taken by James, corroborates Gress' testimony. Gress asked or ordered Campbell to exit her vehicle multiple times, and he told her that if she did not comply, she would be violating a lawful order and would be arrested.

[6-8] Under Fourth Amendment case law, the Nebraska Supreme Court has held that it is reasonable for an officer to request that a driver sit in the patrol car during a traffic stop. See *State v. Verling, supra*. See, also, *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (once motor vehicle has been lawfully detained for traffic violation, police officer may order driver to get out of vehicle without violating Fourth Amendment's proscription of unreasonable searches and seizures). Therefore, it is reasonable and lawful for an officer to request that a driver exit his or her vehicle.

We conclude the evidence was sufficient to support a finding that Gress' order was lawful and that Campbell refused to obey that lawful order. Accordingly, the evidence was sufficient to support a conviction for failure to obey a lawful order of the State Patrol.

Sufficiency of Evidence—
Possession of Marijuana
and Possession of Drug
Paraphernalia.

Campbell next assigns that there was insufficient evidence to convict her of possession of marijuana and possession of drug paraphernalia. She makes the same argument in regard to both assignments of error, so we will address them together. Campbell argues that the evidence was insufficient, because James was in closer proximity to the purse

containing the baggie of marijuana and drug paraphernalia and had easier access to it. She also contends that her mere presence in the vehicle was not enough to find her guilty of the two offenses.

[9-11] A person possesses a controlled substance when he or she knows of the nature or character of the substance and of its presence and has dominion or control over it. *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017). Possession can be either actual or constructive, and constructive possession of an illegal substance may be proved by direct or circumstantial evidence. *Id.* "To be guilty, the defendant must possess the controlled substance 'knowingly or intentionally.'" *Id.* at 761, 890 N.W.2d at 210.

[12] Campbell did not have actual possession of the marijuana and paraphernalia, so the question before us is whether there is sufficient evidence from which a trier of fact could reasonably infer that she was in constructive possession, i.e., that she was aware of the presence of the marijuana and paraphernalia and had dominion or control over it. See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). Mere presence at a place where a controlled substance is found is not sufficient to show constructive possession. *Id.* Instead, the evidence must show facts and circumstances which affirmatively link Campbell to the marijuana and paraphernalia so as to suggest that she knew of it and exercised control over it.

[13] The purse was located on the back seat of the vehicle behind the passenger seat where James had been sitting. The purse contained the baggie of marijuana, as well as drug paraphernalia. The purse belonged to either Campbell or James, as they were the only two adults in the vehicle. When Grummert was asked if he was able to determine who the owner of the purse was, he testified that it appeared to be "a female's purse" and that Campbell was the only adult female inside the vehicle at the time of the stop. Further, the fact that one is the driver of a vehicle, particularly over a long period of time, creates an inference of control over items in the vehicle. *State v. Howard, supra.* Campbell was driving at the time of the

stop, and the evidence showed that she and James had been in Kansas City, Missouri, before driving through Lincoln. They were on their way to Denver, Colorado, with California being their final destination. Campbell was apparently the owner of the vehicle as well, because she testified about looking for her registration for the vehicle when first pulled over.

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, 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. Howard, supra.* We conclude that the evidence, viewed in the light most favorable to the prosecution, was sufficient to find Campbell guilty of both possession of marijuana and possession of drug paraphernalia. Her second and third assignments of error are without merit.

Excessive Sentence.

Campbell argues that her sentence for failure to obey a lawful order of the State Patrol is excessive. She claims that she is entitled to judicial relief in the form of a reduced jail sentence or probation. However, Campbell admits in her brief that she has already served the 7-day jail sentence.

[14,15] While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power. *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006). 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. *Id.* Because Campbell has already served the jail sentence she is challenging, her claim that her sentence is excessive does not rest upon existing facts and she lacks a legally cognizable interest in the outcome of the

issue. Therefore, her assignment of error challenging her jail sentence is moot.

[16] We recognize that the Nebraska Supreme Court has held that an appeal from a criminal conviction is not moot, even though a sentence for a criminal conviction has been fully served, when the defendant is subjected to "collateral consequences" resulting from the criminal conviction. *State v. Patterson*, 237 Neb. 198, 204, 465 N.W.2d 743, 748 (1991). We do not find that this exception to the mootness doctrine is applicable in the present case.

For the sake of completeness, even if Campbell's excessive sentence argument was not moot, the 7-day jail sentence is not excessive. The failure to obey a lawful order of the State Patrol is a violation of § 81-2008, a Class III misdemeanor, punishable by a maximum of 3 months' imprisonment, a $500 fine, or both. There is no minimum time for imprisonment. See Neb. Rev. Stat. § 28-106 (Cum. Supp. 2014). Campbell was sentenced to 7 days in jail. Campbell's sentence is within the statutory limits, and we find no abuse of discretion by the trial court in imposing a 7-day sentence.

CONCLUSION

We conclude that the evidence was sufficient to find Campbell guilty of failure to obey a lawful order of the State Patrol, possession of marijuana, and possession of drug paraphernalia. We determine that Campbell's excessive sentence argument is moot and that even if it was not moot, it is without merit. Accordingly, Campbell's convictions and sentences are affirmed.

Affirmed.

Shala R. Chevalier, appellant, v. Metropolitan Utilities District of Omaha, appellee.

900 N.W.2d 565

Filed July 18, 2017. No. A-16-103.

1. **Directed Verdict: Evidence.** A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
2. **Directed Verdict: Appeal and Error.** In reviewing a directed verdict, an appellate court gives the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **Rules of Evidence: Appeal and Error.** When 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. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
6. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
7. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidentiary conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.

8. **New Trial: Appeal and Error.** An appellate court reviews a trial court's ruling on a motion for a new trial for abuse of discretion.
9. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
10. **Employer and Employee: Federal Acts: Discrimination.** The Family and Medical Leave Act of 1993 provides eligible employees up to 12 workweeks of unpaid leave in any 12-month period and prohibits employers from discriminating against employees for exercising their rights under the act.
11. ____: ____: ____. Basing an adverse employment action on an employee's use of leave, or in other words, retaliation for the exercise of rights under the Family and Medical Leave Act of 1993, is actionable.
12. **Employer and Employee: Federal Acts: Discrimination: Proof.** To establish a prima facie case of retaliation under the Family and Medical Leave Act of 1993, an employee must show that he or she exercised rights afforded by the act, that an adverse employment action was suffered, and that there was a causal connection between the exercise of rights and the adverse employment action.
13. **Fair Employment Practices: Discrimination: Proof.** For purposes of construing the Nebraska Fair Employment Practice Act in disparate treatment cases, the three-part *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), test is used and is as follows: (1) the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination; (2) if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection; and (3) should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
14. ____: ____: ____. A prima facie case of gender discrimination requires the plaintiff to prove that he or she (1) is a member of a protected class, (2) was qualified to perform the job, (3) suffered an adverse employment action, and (4) was treated differently from similarly situated persons of the opposite sex.
15. ____: ____: ____. The plaintiff in an employment discrimination action bears the burden to first prove to the fact finder by a preponderance of the evidence a prima facie case of discrimination.
16. **Employer and Employee: Discrimination: Proof.** Once the plaintiff has established a prima facie case of discrimination, the burden of

production shifts to the employer to rebut the prima facie case by producing clear and reasonably specific admissible evidence that would support a finding that unlawful discrimination was not the cause of the employment action.

17. ____: ____: ____. In an employment discrimination action, when the employer articulates a legitimate, nondiscriminatory reason for the decision, raising a genuine issue of fact as to whether it discriminated against the employee, the employer's burden of production created by the employee's prima facie case is satisfied and drops from the case.
18. ____: ____: ____. In an employment discrimination action, after the employer has presented a sufficient, neutral explanation for its decision, the question is whether there is sufficient evidence from which a jury could conclude that the employer made its decision based on the employee's protected characteristic, despite the employer's proffered explanation.
19. **Rules of Evidence: Proof: Words and Phrases.** The best evidence rule is a rule of preference for the production of the original of a writing, recording, or photograph when the contents of the item are sought to be proved.
20. **Rules of Evidence: Proof: Fraud.** The purpose of the best evidence rule is the prevention of fraud, inaccuracy, mistake, or mistransmission of critical facts contained in a writing, recording, or photograph when its contents are an issue in a proceeding. By its terms, the best evidence rule applies to proof of the contents of a recording.

Appeal from the District Court for Douglas County: W. Mark Ashford, Judge. Affirmed.

Joy Shiffermiller and Abby Osborn, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Mark Mendenhall, of Metropolitan Utilities District of Omaha, for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Pirtle, Judge.

INTRODUCTION

Shala R. Chevalier brought an action against her employer, Metropolitan Utilities District of Omaha (MUD), in the district court for Douglas County, alleging gender and disability

discrimination in a promotion decision, retaliation for her complaint of discrimination, and retaliation for taking leave from work pursuant to the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq. (2012). A jury found in favor of MUD on all causes of action, and the trial court accepted the verdicts and entered judgment in favor of MUD. Chevalier appeals. Finding no merit to her assignments of error, we affirm.

BACKGROUND

Chevalier began working for MUD in July 1993. She alleges that she contracted Lyme disease in 2006, which resulted in her being disabled, and that MUD was aware of her disability. She alleges that throughout her employment she has been "harassed based on her disability."

In February 2010, Chevalier applied for a promotion to a supervisory position—supervisor of field engineering. Eight men and three women applied for the position, including Chevalier. Stephanie Henn, director of plant engineering, was the decisionmaker for the position. The position was given to David Stroebele, who Chevalier alleges was "less senior and less qualified" than she was and did not have all the required qualifications for the position. She claims she was denied the position based on her gender.

In July 2010, Chevalier filed a complaint of discrimination with the Nebraska Equal Opportunity Commission (NEOC) and the federal Equal Employment Opportunity Commission (EEOC). She claims that MUD began retaliating against her after she filed her complaint. On July 28, 2011, the NEOC issued a "right to sue" notice on Chevalier's discrimination charge.

Chevalier filed a complaint in the district court for Douglas County on September 22, 2011, and a motion to amend the complaint on December 16, 2013. The amended complaint asserted five causes of action. The first three causes of action alleged violations of the Nebraska Fair Employment Practice

Act, Neb. Rev. Stat. § 48-1101 et seq. (Reissue 2010) in that (1) MUD denied her a promotion based on her sex; (2) MUD denied her a promotion and subjected her to other discrimination and harassment based on her disability, specifically the effects she suffered from having contracted Lyme disease; and (3) MUD retaliated against her for complaining of discrimination and filing a complaint with the NEOC and EEOC. Chevalier's fourth cause of action alleged that MUD retaliated against her for using leave afforded to her under the FMLA. The fifth cause of action alleged that MUD's continued retaliation against her for her complaint of discrimination was actionable under Neb. Rev. Stat. § 20-148 (Reissue 2012). Chevalier later dismissed the fifth cause of action.

A jury trial was held on Chevalier's first four causes of action in her amended complaint. Chevalier presented evidence to show that she suffers from Lyme disease and has been treated by doctors for the disease since at least 2006. She was initially diagnosed and treated by a physician's assistant. In the spring of 2007, she started treating with a Lyme disease specialist, and she continued treating with him until 2009 or 2010. Chevalier testified that she told Charles Pattavina, her supervisor, about her Lyme disease because it was affecting her work. She stated that it was taking her longer to complete her work because she had problems with thought processing. Her other symptoms included joint pain, a decreased immune system, numbness and twitching in her face, and "shooting pains." She testified that she was still able to do her job with the symptoms she was having, but she had to take sick days off work "here and there" as a result of the Lyme disease. After she informed MUD of her disease, a safety meeting was held, at Chevalier's urging, to inform employees about Lyme disease. Chevalier testified that in 2009, Pattavina told her that she needed to stop taking so much sick leave. Henn, Pattavina's supervisor at the time, also discussed Chevalier's sick time with her and told her she needed to "get well."

Chevalier also testified that after she saw the specialist in the spring of 2007, she gave MUD's nurse a letter from him stating why she had been off work. After Chevalier filed her complaint with the NEOC and EEOC in July 2010 claiming discrimination on the basis of disability, the physician's assistant filled out a medical questionnaire for the NEOC which indicated that Chevalier was not disabled, i.e., did not have difficulty performing any major life activities, and he noted only that she has periodic illness due to Lyme disease.

Pattavina testified that he was aware Chevalier claimed to have Lyme disease and that he recalled attending a safety meeting about the disease. He also testified that between 2003 and when he retired from MUD in 2010, Chevalier did not have difficulty performing her duties and he did not notice a decrease in the quality or quantity of her work. He did remember one time that Chevalier said she needed extra time to complete some reports because of her Lyme disease.

In regard to the hiring decision for the supervisor of field engineering position, Henn testified that in determining which candidate was best qualified, she reviewed information provided by human resources which included each candidate's personnel file and a spreadsheet which had each candidate's date of hiring, positions held, and absence history. She also reviewed the candidates' past performance appraisals.

Henn testified that she reviewed Chevalier's 2004 and 2007 performance appraisals and that there were some comments that caused her concern. The comments included Chevalier's needing to show more professionalism, needing to stay at her desk and concentrate on her job, and needing to not disturb others. These concerns were reflected in both the 2004 and 2007 appraisals.

Pattavina completed another performance appraisal of Chevalier in March 2010, the first since 2007. The performance appraisal took place after her interview for the job at issue, but before the hiring decision was made. The appraisal noted that she needs to show more professionalism, not disturb

others in the office, spend less time away from her work station, and improve on balancing field and office time. It also stated that she needs to "greatly improve prior to her being ready for more responsibility."

Henn testified that there was nothing in Chevalier's performance appraisals to indicate she was suffering from any sort of physical or mental disability, nor was there any indication that she needed or had requested an accommodation for a disability.

Henn also testified that she personally observed Chevalier on an almost daily basis talking and socializing with individuals who worked in the engineering department, which was on a different floor from Chevalier's work station. Henn said she rarely saw other field engineers in the engineering department.

Henn interviewed all 11 applicants for the position and asked all of them the same questions. After making her decision to hire Stroebele, she sent a selection letter to human resources recommending Stroebele for the position and stating the reasons why the other 10 candidates were not selected. Henn testified that there were three candidates that did not meet the minimum qualification requirements for the position. Other reasons for eliminating candidates from consideration included having recently been promoted to a different position, as well as negative remarks on performance appraisals or negative job performance.

In regard to Chevalier, the selection letter stated that she was "not a good candidate," noting that her performance appraisals reflect that she has a difficult time staying at her work station and concentrating on her job, as well as making too many personal telephone calls, disturbing others in the office, and needing a better balance between field and office time. Henn also noted that Chevalier tends to be away from her work area and not in the field, instead socializing with others. Henn concluded that these behaviors did "not exhibit good judgment or professionalism, which is critical in the Supervisor of

Field Engineering position." Henn further noted in the letter that Chevalier's attendance record is lacking, that she lacks the skills to be a "calm, even-keeled supervisor," and that she tended to overreact to negative feedback.

The jury found in favor of MUD on all causes of action, and the district court entered judgment accordingly. Chevalier filed a motion for new trial, which was overruled.

The record in this case is large. Accordingly, additional evidence will be discussed as necessary in the analysis section of the opinion.

ASSIGNMENTS OF ERROR

Chevalier assigns that the trial court erred in (1) overruling her motion for directed verdict on her FMLA retaliation claim; (2) allowing MUD to present expert testimony that Chevalier never had Lyme disease; (3) upholding the jury verdicts; (4) sustaining MUD's objection to exhibit 133, her transcription of a tape-recorded conversation; and (5) overruling her motion for new trial.

STANDARD OF REVIEW

[1,2] A directed verdict is proper 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. *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015). In reviewing that determination, we give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence. *Id.*

[3-5] 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. *Pierce v. Landmark Mgmt. Group*, 293 Neb. 890, 880 N.W.2d 885 (2016). When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for

an abuse of discretion. *Id.* In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *Id.*

[6,7] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Id.* In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidentiary conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

[8,9] We review a trial court's ruling on a motion for a new trial for abuse of discretion. *Balames v. Ginn, supra*. A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

ANALYSIS

Motion for Directed Verdict.

Chevalier first assigns that the trial court erred in overruling her motion for directed verdict on her FMLA retaliation claim. Chevalier's fourth cause of action alleged that MUD retaliated against her for using leave afforded to her under the FMLA. She argues that a directed verdict on that cause of action should have been granted in her favor because the evidence was undisputed that Henn improperly considered leave Chevalier took pursuant to the FMLA, as a result of her Lyme disease, in denying her the promotion.

[10-12] "The [FMLA] provides eligible employees up to twelve work-weeks of unpaid leave in any twelve-month period and prohibits employers from discriminating against employees for exercising their rights under the [FMLA]. 29 U.S.C. §§ 2612, 2615(a)(2) (2000)." *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827, 832 (8th Cir. 2002). Basing an

adverse employment action on an employee's use of leave, or in other words, retaliation for the exercise of FMLA rights, is therefore actionable. *Id.* To establish a prima facie case of retaliation, an employee must show that he or she exercised rights afforded by the FMLA, that an adverse employment action was suffered, and that there was a causal connection between the exercise of rights and the adverse employment action. See *id*.

Chevalier claims that there is no dispute that she satisfied all the elements of a FMLA retaliation claim. She contends there is no question that she qualified for leave intermittently under the FMLA starting in 2007 and going forward based on her Lyme disease and that she suffered an adverse employment action in that she did not get the supervisor of field engineering promotion. Chevalier focuses her argument on the third requirement of a prima facie case—a causal connection between her exercise of rights and the adverse employment action. She contends that there was a causal connection because Henn improperly considered her leave under the FMLA in denying her the promotion.

Before addressing Chevalier's causal connection argument, we first note that the evidence does not demonstrate that she qualified for leave under the FMLA based on her Lyme disease, as she contends. The evidence does not show that Chevalier's Lyme disease was a serious health condition eligible for leave under the FMLA. MUD had no record that she ever applied for leave under the FMLA based on a chronic medical condition, such as Lyme disease. Bonnie Savine, MUD's director of human resources, testified that an employee would have to apply for such leave and have it approved, and then when work days were missed, the employee would have to identify the absence as leave under the FMLA for it to be considered as such. Human resources records of Chevalier's absences gave no indication any absences were related to Lyme disease or a FMLA-approved absence. Rather, each absence was coded as only a sick day.

In regard to Chevalier's argument that Henn considered her FMLA absences in denying her the promotion, the evidence shows that Henn did consider her past attendance history. Henn testified that she considers each employee's attendance record when making a promotion decision. She testified that she reviewed Chevalier's absence history as provided by human resources. She also relied on past appraisals, which stated Chevalier's number of absences and the total number of work hours missed due to illness. Henn's reasons for not promoting Chevalier, as set forth in the selection letter, included the ongoing concerns with her attendance.

Although Henn considered Chevalier's past attendance record, she testified that she did not know what hours or days of sick leave, if any, were related to Chevalier's Lyme disease or were FMLA-approved absences. She only knew how many times and how many hours Chevalier missed work as a result of being sick. For instance, her 2007 performance appraisal, which Henn reviewed, stated that she had missed work due to illness 139.5 hours over nine occasions in the past year. As previously stated, the absence history from human resources gave no indication any absences were related to Lyme disease or were FMLA-approved absences; each absence was coded as only a sick day. Therefore, the evidence does not show that Henn retaliated against Chevalier by relying on her FMLA absences in denying her the promotion.

A directed verdict is proper 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. In reviewing that determination, we give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence. *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

The evidence did not indisputably show that any absences taken by Chevalier were taken pursuant to the FMLA, nor did it indisputably show that Henn considered the FMLA-approved absences in denying her the promotion. The evidence showed

that Henn considered attendance when making the promotion decision, but that Henn did not know or have any reason to believe that any of Chevalier's absences were FMLA-approved absences based on a disability. Accordingly, the trial court did not err in overruling Chevalier's motion for directed verdict on her FMLA retaliation claim.

MUD's Expert Testimony as to Chevalier's Lyme Disease.

Chevalier next assigns that the trial court erred in allowing MUD to present expert testimony that Chevalier did not have Lyme disease. She argues that MUD conceded she was on qualifying leave under the FMLA and that MUD cannot now challenge whether she had a disability necessitating FMLA leave.

Chevalier challenges the admission into evidence of a videotaped deposition of Dr. Cezarina Mindru, who specializes in internal medicine and infectious disease, as well as a transcript of his deposition. Chevalier did not object to either exhibit, and the videotaped deposition was played for the jury. In the deposition, Mindru stated that it was his opinion within a reasonable degree of medical certainty that based on a February 2007 blood test, Chevalier did not have Lyme disease. He also testified that a December 2006 blood test indicated that Chevalier did not have Lyme disease. Mindru further stated that it was his opinion within a reasonable degree of medical certainty that Chevalier was not disabled as a result of the symptoms she complained of.

After the videotaped deposition was played, other exhibits that were referenced during the deposition were offered into evidence, including Mindru's curriculum vitae, the February 2007 and December 2006 laboratory test results, and Mindru's medical report. Chevalier only objected to the medical report, and the objection was sustained.

Chevalier argues that MUD was estopped from presenting expert evidence that Chevalier did not have Lyme disease

because MUD conceded she was on qualifying leave under the FMLA. Chevalier cites to testimony from Savine in support of her allegation. However, the testimony that Chevalier refers to has nothing to do with Chevalier's Lyme disease. The testimony relied on by Chevalier refers to supplemental sick leave Chevalier took in 2012 and 2013 as a result of anxiety and depression. Savine stated that Chevalier took leave from work for 6 months in 2012 and 2013 pursuant to MUD's supplemental sick leave program. She testified that the supplemental sick leave ran concurrent with leave pursuant to the FMLA, at least for up to 12 workweeks. Thus, the evidence Chevalier relies on only shows that Chevalier took qualifying leave under the FMLA in 2012 and 2013 as a result of anxiety and depression. It does not show that MUD conceded she was on leave under the FMLA as a result of her Lyme disease.

Chevalier claims she was diagnosed with Lyme disease in 2006, and there is some evidence of this. However, as previously discussed, there is no evidence that she took any leave under the FMLA based on a diagnosis of Lyme disease or that she made any requests for leave under the FMLA between 2006 and 2009. Her sick days during those years are coded as only sick days, and there was no indication that those days were related to Lyme disease or were FMLA-approved absences. Savine testified that she was not aware that any of Chevalier's absences prior to January 2012 were approved pursuant to the FMLA. MUD did not concede that Chevalier took approved leave under the FMLA prior to 2012 and did not concede that she took any leave under the FMLA as a result of Lyme disease.

We also note that Chevalier did not file a motion in limine in regard to Mindru's testimony, nor was there a *Daubert*/*Schafersman* challenge to exclude Mindru's testimony. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). In

addition, Chevalier did not object to the admission of Mindru's videotaped deposition at trial.

Further, Chevalier alleged she was discriminated against in the promotion decision because of her disability, Lyme disease. Thus, Chevalier made her disability from Lyme disease an issue at trial. MUD was entitled to present evidence in regard to whether Chevalier had Lyme disease, and if she did, whether she was disabled as a result. Chevalier opened the door on the issue, making Mindru's testimony relevant. This assignment of error is without merit.

Jury Verdicts.

Chevalier assigns that the trial court erred in upholding the jury verdict on her gender discrimination claim because no reasonable jury could find that MUD's stated reasons for hiring Stroebele over her were not pretexts for unlawful discrimination.

Chevalier sought to prove that she was not promoted because of gender discrimination and that MUD's stated reasons for promoting a male colleague, Stroebele, instead of her were pretextual. Chevalier asserted that she and the two other female applicants, Sherri Meisinger and Kristina Hartley, were better qualified than Stroebele. MUD maintained that it hired Stroebele because he was the best qualified person for the job.

[13] The Nebraska Supreme Court has adopted a three-part test, commonly referred to as the "*McDonnell Douglas* test," for purposes of construing the Nebraska Fair Employment Practice Act in disparate treatment cases. See *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999). See, also, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The three-part *McDonnell Douglas* test has been set forth by our Supreme Court previously:

> "First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of

> discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' . . . Third, should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

Harris v. Misty Lounge, Inc., 220 Neb. 678, 682, 371 N.W.2d 688, 691 (1985) (citations omitted) (quoting *Zalkins Peerless Co. v. Nebraska Equal. Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

[14,15] A prima facie case of gender discrimination requires the plaintiff to prove that he or she (1) is a member of a protected class, (2) was qualified to perform the job, (3) suffered an adverse employment action, and (4) was treated differently from similarly situated persons of the opposite sex. *Helvering v. Union Pacific RR. Co.*, 13 Neb. App. 818, 703 N.W.2d 134 (2005). The plaintiff bears the burden to first prove to the fact finder by a preponderance of the evidence a prima facie case of discrimination. *Id*.

[16,17] Once the plaintiff has established a prima facie case of discrimination, the burden of production shifts to the employer to rebut the prima facie case by producing "'clear and reasonably specific'" admissible evidence that would support a finding that unlawful discrimination was not the cause of the employment action. *Hartley v. Metropolitan Util. Dist.*, 294 Neb. 870, 893, 885 N.W.2d 675, 694 (2016). When the employer articulates a legitimate, nondiscriminatory reason for the decision, raising a genuine issue of fact as to whether it discriminated against the employee, the employer's burden of production created by the employee's prima facie case is satisfied and drops from the case. *Id.*

[18] After the employer has presented a sufficient, neutral explanation for its decision, the question is whether there is

sufficient evidence from which a jury could conclude that the employer made its decision based on the employee's protected characteristic, despite the employer's proffered explanation. *Hartley v. Metropolitan Util. Dist., supra*. At this stage, the employee "'must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."'" *Id.* at 894, 885 N.W.2d at 694, quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). "'That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence."'" *Id.* at 894, 885 N.W.2d at 694.

The supervisor of field engineering position was posted on January 20, 2010. The supervisor was responsible for planning, directing, and supervising the work of 17 field engineering and utility locator personnel of the plant engineering division. There were several minimum requirements for the position, including "two years of college in an area related to Engineering. Four-year Engineering, or Engineering Technology degree preferred"; a "[m]inimum five (5) years' experience in Engineering or gas/water operations with progressive responsibilities"; and "[m]ust have utility locating experience in the last five (5) years, preferable in an ongoing capacity. Utility Locator operator qualification preferred." Utility locating is the process of locating existing gas or water utilities in the field.

Chevalier contends that MUD's claim that Stroebele was the better qualified candidate is pretexual because he did not meet all of the qualifications for the position, specifically the education requirement. As previously noted, the supervisor of field engineering posting required that eligible candidates have a minimum of 2 years of college in an area related to engineering. Chevalier contends that most of Stroebele's classes were not engineering related and that Stroebele did not complete his

2-year degree in general studies until May 2011, after he had been in the position for a year.

Chevalier contends that she and the other two female candidates, Meisinger and Hartley, had the requisite education and that their education was engineering focused. Chevalier attended a vocational technical school for 2 years, where she studied drafting. She got a certificate upon completion of the program, but not an associate's degree. Hartley had a bachelor's degree in interior design, and Meisinger had a bachelor's degree in design engineering technology and an associate's degree in construction engineering technology.

Although Chevalier contends that Stroebele did not meet the education requirement, Savine testified that he did. She explained that human resources looks primarily at how many years of schooling a candidate has. She testified that in her opinion, 2 years of college is the equivalent of 48 hours of course credit. In January 2010, when the job was posted, Stroebele had a total of 70.5 credit hours from college courses. She further testified that MUD interprets the language "in an area related to Engineering" very broadly and that there is no standard for determining what courses qualify as being engineering related or any specifically prescribed courses. Savine also testified that the job Stroebele held before he was promoted to supervisor of field engineering had the same education requirement—2 years of college in an area related to engineering—and that he met the requirement at the time he took that position in 2005.

Chevalier also argues that Stroebele lacked supervisory and other experience compared to herself and the other female candidates. The job required that the successful candidate have a "minimum five (5) years' experience in Engineering or gas/water operations with progressive responsibilities." Chevalier contends that she and the two other female candidates had more relevant experience and more seniority than Stroebele.

Stroebele began working for MUD in 1998 as a pipelayer and later as a machine operator, both in the construction

area of MUD. He moved to the engineering department in September 2000, where he worked as a field engineer II. In 2005, he was hired by Henn as a senior engineering technician. He remained in this position, with Henn as his supervisor, until his promotion to supervisor of field engineering in 2010. Chevalier notes that Stroebele did not have any supervisory responsibilities in any of his prior positions. However, there was no requirement of any supervisory experience. She also points out that Stroebele had less seniority than the three female candidates, but seniority was not listed as a factor considered in the promotion decision.

Chevalier had been employed by MUD since 1993. She started working as a drafter, and in 1995, she became a field locator. She advanced to the position of field engineer II in 2005 and field engineer I in 2009. Chevalier contends that all of her experience has been in engineering-related areas—drafting, locating, and field engineering. She had been a locator for 10 years before being promoted to a field engineer. She testified that locators and field engineers are both areas that the supervisor of field engineering would supervise. Her past experience also included helping train field services employees to use a computer program to look up services when out in the field. She also wrote the test taken by locators to demonstrate their ability to locate.

Chevalier contends that the other two women passed over for the promotion also had superior work experiences compared to Stroebele. Hartley had been working for MUD for almost 31 years. She started out working in customer service and then transferred to the drafting department where she worked her way up from a drafting technician IV to a senior drafting technician. She then became a senior engineering technician, a position she held for 16 years.

Meisinger had worked full time for MUD since 1990. She started out in the drafting department as a draftsperson and later moved to field engineering. After field engineering, she took a position as a design engineering technician and later

became a supervisor of drafting. She was in the engineering department for 20 years before she took the purchasing department position she had at the time of trial.

Chevalier further argues that performance appraisals completed in 2010 were used as a tool to justify Henn's decision to promote a less-qualified man to the position. Chevalier had not been given an appraisal for 3 years prior to the appraisal she received in March 2010, during the time the promotion decision was being made. Similarly, Hartley had not been given an appraisal for 7 years before being evaluated in February 2010. Chevalier suggests that the appraisals were done for the purpose of portraying the female candidates in a negative light and could be used to justify its decision to promote Stroebele. Chevalier specifically directs our attention to the language in her 2010 appraisal, which states: "[Chevalier n]eeds to show more professionalism, not disturb others in . . . Engineering. [Chevalier] needs to show improvement on balancing field and office time. While [Chevalier] has many skills, she needs to greatly improve prior to her being ready for more responsibility." The evidence shows, however, that these concerns or similar concerns were not new and were reflected in previous appraisals. The comments in her 2010 appraisal did not reflect anything new in regard to Chevalier's work habits.

Hartley's appraisal indicated that she did not show the potential for additional responsibilities, specifically noting that she needed to work on "her listening and communication skills."

Although the timing of the 2010 appraisals may seem suspicious, there was evidence that they were done as a result of MUD's requiring that all employees have a current appraisal. In an internal memorandum dated April 20, 2009, human resources encouraged all supervisors to get their employee files up to date, noting there had been several job selection grievances that were difficult to evaluate without written documentation of that employee's performance. Savine

testified that in 2009, annual appraisals were not being done by all supervisors. An audit of appraisals was conducted in 2009 which showed that in the plant engineering division, where Chevalier and Hartley both worked, about half of the 28 employees had not had an appraisal since 2007. Several male and female employees had not had appraisals since 2003, like Hartley. MUD's board of directors discussed the matter in June 2009, and in November 2009, MUD's president vowed to the board that the appraisals would be caught up and done in a timely manner going forward. In April 2010, the president indicated to the board that all supervisors were up to date on their performance appraisals.

Also, the 2010 appraisals of Chevalier and Hartley were not the only information Henn relied on in determining that neither of them was the strongest candidate for the supervisor of field engineering position. Henn also relied on each candidate's personnel file; a spreadsheet which had each candidate's date of hiring, positions held, and absence history; past performance appraisals; and interviews she conducted with each candidate. Further, in regard to Hartley, Henn was her supervisor so she had knowledge of her day-to-day work habits.

Chevalier also argues that Henn changed the qualification requirements for the supervisor of field engineering position for the purpose of disqualifying Meisinger from consideration. Before the position was posted, Henn added the requirement that the applicant must have recent locating experience, within the past 5 years. Before Henn's changes, locating experience was not required for the position. Meisinger had previous locating experience, but it was more than 5 years earlier. The change in the job requirements also disqualified one of the male candidates.

Savine testified that a supervisor is usually the one who recommends that the requirements for a job be changed, but others have to agree to it and give their approval. Specifically, she testified that Henn's changes to the requirement for the supervisor of field engineering position would have been

approved by the vice president of engineering and construction, as well as by human resources.

Henn testified that she initiated the change in the job requirements to require recent locating experience, but the changes were approved by her supervisor and by human resources. She testified that she made the change because Pattavina, who was retiring from the supervisor of field engineering position, did not know how to utility locate. She testified that this caused issues in the past and that she believed it would be more efficient if the supervisor could locate. She also testified that when she redrafted the job requirements, she did not know who was going to apply for the position.

The evidence is clear that Chevalier made a prima facie case of discrimination (she was a member of a protected group; was qualified and applied for a promotion; was rejected; and a similarly situated employee, not part of the protected group, was promoted instead). MUD produced evidence that could support a finding that unlawful discrimination was not the cause of the promotion decision and that it promoted Stroebele over Chevalier because he was the better qualified candidate. The jury apparently found that Chevalier did not prove that MUD's proffered reason was a pretext for unlawful discrimination. There was sufficient evidence to support the jury verdicts, and we find no merit to Chevalier's assignment of error.

Sustaining of Objection to Exhibit 133.

Chevalier next argues that the trial court erred in sustaining MUD's objection to exhibit 133, her own transcription of a tape-recorded conversation between herself and Patrick Tripp, a MUD attorney. In April 2011, about 10 months after Chevalier had filed her discrimination claim, she was called into Tripp's office and questioned about an obscene drawing that included a picture of a construction foreman. The drawing had been copied and sent to various MUD employees through

interoffice mail. After MUD conducted an investigation, it concluded that Chevalier had distributed the drawing, and she was suspended from work without pay for 3 days.

Without informing Tripp, Chevalier recorded their conversation in April 2011 when she was called into his office. She then transcribed the meeting because the recording was "kind of muffled." She offered the transcription into evidence, exhibit 133, contending that it was evidence of retaliation against her for filing a discrimination claim. MUD objected based on foundation and not the best evidence, and the court sustained the best evidence objection.

When Tripp testified, he stated that he had listened to Chevalier's recording of their meeting and that it was "pretty much incomprehensible." During a break at trial, he listened to the tape-recorded conversation again and read Chevalier's transcription. He testified that he could not tell if the transcript was accurate or not because the recording was "indecipherable." Chevalier offered exhibit 133 into evidence a second time, and MUD objected based on foundation. The court sustained MUD's objection.

[19,20] Chevalier contends that exhibit 133 should have been admitted into evidence because the original recorded conversation was unavailable due to the fact that it was "kind of muffled" and would have been hard for the jury to understand. However, as the trial court initially ruled, exhibit 133 was not the best evidence of the conversation between Chevalier and Tripp. The best evidence rule, Neb. Evid. R. 1002, Neb. Rev. Stat. § 27-1002 (Reissue 2016), is a rule of preference for the production of the original of a writing, recording, or photograph when the contents of the item are sought to be proved. See *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000), *overruled on other grounds, State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). The purpose of rule 1002 is the prevention of fraud, inaccuracy, mistake, or mistransmission of critical facts contained in a writing, recording, or photograph when its contents are an issue in a proceeding. By its

terms, rule 1002 applies to proof of the contents of a recording. See *id.*

Although exhibit 133 was excluded from evidence, Chevalier testified at length about the conversation with Tripp, as well as the outcome of the investigation. Tripp also testified about the conversation he had with Chevalier in April 2011 and the investigation into the obscene drawing. Accordingly, there was other evidence of the April 2011 conversation between Chevalier and Tripp.

In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *Pierce v. Landmark Mgmt. Group*, 293 Neb. 890, 880 N.W.2d 885 (2016). The exclusion of exhibit 133 did not unfairly prejudice a substantial right of Chevalier's. Accordingly, the trial court did not abuse its discretion in sustaining MUD's objection to exhibit 133.

Motion for New Trial.

Chevalier's last assignment of error is that the trial court erred in overruling her motion for new trial. Chevalier raised the same issues in her motion for new trial that she raises in her other assignments of error before us and which are discussed above. Having found no merit to Chevalier's first four assignments of error, we conclude that the trial court did not err in overruling her motion for new trial.

CONCLUSION

We conclude that the trial court did not err in overruling Chevalier's motion for directed verdict on her FMLA retaliation claim; allowing MUD to present expert testimony that Chevalier never had Lyme disease; entering judgment on the jury verdicts; sustaining MUD's objection to exhibit 133, her transcription of a tape-recorded conversation; and overruling her motion for new trial. Accordingly, the trial court's judgment in favor of MUD is affirmed.

Affirmed.

State of Nebraska, appellee, v. Josiah L. Scherbarth, appellant.

900 N.W.2d 213

Filed July 18, 2017. No. A-16-683.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Appeal and Error.** An appellate court independently reviews questions of law in appeals from the county court.
5. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
6. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the trial court.
7. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
8. **Courts: Appeal and Error.** Despite a failure to file a particular statement of error in the district court, a higher appellate court may still consider the errors actually considered by the district court.

9. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence.
10. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
11. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
12. **Criminal Law: Motor Vehicles: Intent.** It is clear that one cannot commit the greater offense of willful reckless driving without simultaneously committing the lesser offense of reckless driving.
13. ____: ____: ____. Distinction between reckless driving and willful reckless driving is determined by the driver's state of mind.
14. ____: ____: ____. Indifferent or wanton disregard for the safety of others or their property is the fundamental characteristic of reckless driving. Willful reckless driving is characterized by a deliberate, as distinguished from an indifferent, disregard for the safety of others or their property.
15. ____: ____: ____. A scenario where a motorist drove in willful disregard while not also driving with an indifferent or wanton disregard for the safety of others is not plausible.
16. **Evidence: New Trial: Double Jeopardy: Appeal and Error.** If evidence is not sufficient to sustain a verdict after an appellate court finds reversible error, then double jeopardy forbids a remand for a new trial.
17. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Sheridan County, Travis P. O'Gorman, Judge, on appeal thereto from the County Court for Sheridan County, Russell W. Harford, Judge. Judgment of District Court reversed, and cause remanded for further proceedings.

Bell Island, of Island & Huff, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Moore, Chief Judge, and Inbody and Riedmann, Judges.

Moore, Chief Judge.

INTRODUCTION

Josiah L. Scherbarth appeals an order of the district court for Sheridan County affirming his conviction in the county court for willful reckless driving. On appeal, Scherbarth argues that the county court erred in failing to instruct the jury on the lesser-included offense of reckless driving, in determining no prosecutorial misconduct occurred during trial, and in finding sufficient evidence to support the conviction. For the reasons set forth below, we reverse the order of the district court and remand the cause for further proceedings.

FACTUAL BACKGROUND

On March 20, 2015, Trooper Kyle Kuebler of the Nebraska State Patrol was on duty patrolling Highway 20 in Sheridan County, Nebraska. The road in question is a two-lane stretch of highway. Around 5 or 5:30 p.m., as Kuebler was driving east, he spotted a Chevy Silverado truck as it was traveling westward. The truck was traveling 70 m.p.h. in a 65-m.p.h. zone, as clocked by Kuebler's radar. Kuebler observed the truck move onto the shoulder of the highway and pass two vehicles on the right side. The driver's side tires remained on the pavement; however, the passenger's side tires were off the road. The two vehicles passed by the truck were a "truck tractor, semitrailer combination" and a pickup truck. The shoulder was approximately 12 feet wide and the highway was straight at this location. The weather conditions were clear and sunny at the time of the incident. Kuebler was able to see about half a mile down the road.

Kuebler testified that the amount of dirt being thrown up behind the Chevy truck was what most caught his attention. Kuebler watched the truck as it passed. Kuebler did not observe the other vehicles slowing down, moving over, or otherwise reacting as the truck drove past. Kuebler turned his patrol cruiser around and initiated a traffic stop of the truck. Kuebler approached the truck and made contact with the driver, who was identified as Scherbarth. A patrol cruiser video recording of the incident and interaction between Kuebler and Scherbarth shows Kuebler asking Scherbarth a variety of questions, such as "[w]hat were you doing back there?" and "you think that's a good idea to pass two people on the shoulder?" Scherbarth responded that he was "just horsing around"; admitted it was not a good idea and he should have waited; and stated it was "completely stupid," he could have caused an accident, and he knew he should not have done it.

PROCEDURAL BACKGROUND

On March 25, 2015, the State filed a complaint in the county court for Sheridan County, charging Scherbarth with willful reckless driving, first offense, in violation of Neb. Rev. Stat. § 60-6,214 (Reissue 2010), a Class III misdemeanor pursuant to Neb. Rev. Stat. § 60-6,216 (Reissue 2010).

On October 20, 2015, trial was held before the county court. Kuebler was the only witness to testify, and his testimony was as set forth above. The State also offered into evidence the video recording of the incident and interaction between Kuebler and Scherbarth. Following the completion of testimony, Scherbarth made a motion for directed verdict, arguing the evidence was insufficient as to willful reckless driving. The court overruled this motion.

A jury instruction conference was subsequently held. Scherbarth requested that the court instruct the jury on the lesser-included offense of reckless driving. The court denied this request based on its belief that reckless driving is not a lesser-included offense of willful reckless driving.

In the midst of and following closing arguments, Scherbarth twice moved for a mistrial based upon various comments made by the prosecution during trial. During opening statements, the prosecutor said, "[Y]ou're not going to hear from [Kuebler] any statements made by [Scherbarth] in regard to any reason why he might have decided to pass on the road that was legitimate, right? That's not going to happen." During closing arguments, the prosecutor stated, "[Y]ou'll understand that there has been no evidence shown by the defense — or I should say any evidence the State brought forth today, there's no reasonable doubt presented by the defense." The prosecutor further stated, "[Scherbarth] never provided any excuse or reason which would exonerate him from intentionally doing the act of driving around on and off the shoulder, around these two vehicles at 70-plus miles per hour. And you heard [Kuebler] testify to that, clearly." Finally, the prosecutor stated, "I don't know much about defense counsel's charade here, what he is trying to tell us here." Scherbarth's counsel immediately objected to this latter comment as improper. The court overruled this objection, but instructed the prosecutor to "keep it to the facts." The court overruled both motions for mistrial.

The jury returned a verdict of guilty on the charge of willful reckless driving. The court imposed a $500 fine upon Scherbarth, and his license was revoked for 30 days.

Scherbarth appealed to the district court, and in his initial assignments of error, he asserted that (1) the evidence was insufficient to support his conviction and (2) the county court erred in failing to grant a mistrial based on the prosecutor's alleged misconduct. Several months later, Scherbarth filed an amended assignments of error, which included an additional assertion that the county court erred in failing to instruct the jury on the lesser-included offense of reckless driving.

On June 22, 2016, the district court entered an order affirming the conviction. The court first addressed whether Scherbarth's additional assigned error was properly before it.

The court found that there was no provision in the rules which allows a party to "'Amend'" assignments of error and that Neb. Ct. R. § 6-1452(A)(7) (rev. 2011) (appeals from county court to district court; statement of errors) required Scherbarth to file his assignments of error within 10 days of the filing of the bill of exceptions. The rule further provides that review is limited to the errors assigned and discussed, but the court may exercise discretion and notice a plain error not assigned. Because the amended assignments of error were filed nearly 4 months after the initial assignments of error were filed, the district court determined that the amended assignments of error should not be allowed.

Notwithstanding this holding, the district court proceeded to consider the additional assigned error, recognizing a trial court's duty to properly instruct the jury regardless of whether the court is requested to do so. The court agreed that reckless driving is a lesser-included offense of willful reckless driving and that the county court erred in failing to give this instruction. However, the district court went on to find that the failure to give this instruction was not prejudicial. The court otherwise sustained the findings of the county court, holding that sufficient evidence supported Scherbarth's conviction and that the court did not err in refusing to grant a mistrial based on alleged prosecutorial misconduct.

Scherbarth subsequently perfected this appeal.

ASSIGNMENTS OF ERROR

Scherbarth assigns, restated: (1) The county court erred in failing to instruct the jury on the lesser-included offense of reckless driving, and the district court erred in determining this amounted to harmless error; (2) the county court erred in determining there was no prosecutorial misconduct through commenting on Scherbarth's failure to present evidence and implying defense counsel was dishonest; and (3) the district court erred in determining there was sufficient evidence to support a conviction.

STANDARD OF REVIEW

[1-5] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion. *State v. Avey*, 288 Neb. 233, 846 N.W.2d 662 (2014). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *Id.* When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. But an appellate court independently reviews questions of law in appeals from the county court. *Id*. When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court. *Id*.

[6,7] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the trial court. *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015). See *State v. Loyuk*, 289 Neb. 967, 857 N.W.2d 833 (2015). See, also, *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013). Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

ANALYSIS

Scherbarth asserts that the county court erred in denying his request for a jury instruction on the lesser-included offense of reckless driving and that the district court erred in finding this denial to be harmless error.

[8,9] Before addressing the merits of this argument, we consider the State's contention that this error is not preserved for appellate review due to Scherbarth's failure to properly include it in a timely statement of errors. We acknowledge that the late amendment of Scherbarth's assignments of error,

to include failure to instruct on a lesser-included offense, may have run afoul of court rules. See § 6-1452(A)(7). However, despite a failure to file a particular statement of error in the district court, a higher appellate court may still consider the errors actually considered by the district court. See *First Nat. Bank of Omaha v. Eldridge*, 17 Neb. App. 12, 756 N.W.2d 167 (2008). The district court considered the merits of the additional assigned error, recognizing a trial court's duty to properly instruct the jury. See *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004) (whether requested to do so or not, trial court has duty to instruct jury on issues presented by pleadings and evidence). The district court chose to review this assigned error, which we will likewise now address.

[10] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Erickson, supra*.

[11] 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. *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

[12-15] It is clear that one cannot commit the greater offense of willful reckless driving without simultaneously committing the lesser offense of reckless driving. Neb. Rev. Stat. § 60-6,213 (Reissue 2010) establishes that "[a]ny person who drives any motor vehicle in such a manner as to indicate an *indifferent or wanton disregard* for the safety of persons or property shall be guilty of *reckless driving*." (Emphasis supplied.) Section 60-6,214 sets forth that "[a]ny person who drives any motor vehicle in such a manner as to indicate a

willful disregard for the safety of persons or property shall be guilty of *willful reckless driving*." (Emphasis supplied.) The only distinction between these offenses is intent. See *State v. Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989) (distinction between reckless driving and willful reckless driving is determined by driver's state of mind). See, also, *State v. Green*, 182 Neb. 615, 156 N.W.2d 724 (1968) (indifferent or wanton disregard for safety of others or their property is fundamental characteristic of reckless driving; willful reckless driving is characterized by deliberate, as distinguished from indifferent, disregard for safety of others or their property). A scenario where a motorist drove in "willful disregard" while not also driving with an "indifferent or wanton disregard" for the safety of others is not plausible.

Although the district court found the first prong of the requirement to instruct on a lesser-included offense (the elements test) to be satisfied, it did not specifically address the second prong of the requirement: whether there also existed evidence producing a rational basis for acquitting Scherbarth of willful reckless driving and convicting him of reckless driving. Nevertheless, the district court found it was error not to give the lesser-included instruction, thereby implicitly finding that the second prong was satisfied. We agree. The record contains evidence providing a rational basis for acquitting Scherbarth of willful reckless driving and convicting him of reckless driving. In other words, the actions of Scherbarth could be construed by the fact finder to be an indifferent or wanton disregard, as opposed to an intentional disregard, for the safety of persons or property.

Despite having found that it was error to not give the lesser-included offense instruction, the district court determined that Scherbarth was not prejudiced by the failure to instruct on the lesser-included offense of reckless driving. In reaching this conclusion, the district court stated that the failure to instruct on the lesser-included offense

> was not prejudicial to [Scherbarth] because the jury rejected the evidence that would have supported a finding that only the lesser included offense was committed. The jury found [Scherbarth] guilty of willful reckless driving, thus rejecting the contention that he acted only with an "indifferent or wanton disregard." In view of the actual verdict returned by the jury, there is no reasonable and plausible basis for finding that the instructional error affected the jury's verdict.

We disagree with the district court's determination that Scherbarth was not prejudiced by failure to instruct the jury on the lesser-included offense of reckless driving. The harm in failing to give the lesser-included instruction in this case is that the jury was not presented with an option of finding that the evidence supported a conviction for reckless driving as opposed to willful reckless driving. The jury could not have "rejected" finding that Scherbarth acted with "'indifferent or wanton'" disregard, as stated by the district court, because it was not provided with that option in the instructions. Rather, the jury was only given the option of finding Scherbarth guilty of the greater offense of willful reckless driving or not guilty of any crime. Had the jury been given the option of the lesser-included offense, it could have concluded that Scherbarth's actions were reckless, but were only indifferent or wanton as opposed to intentional.

A review of Nebraska case law demonstrates that incidents of willful reckless driving commonly involve some combination of a high level of speeding that is particularly dangerous based on the circumstances, such as speeding on a heavily populated roadway; fleeing arrest; hitting other vehicles or property (or the threat of this occurring); road rage; driving through stop signs and red lights; or other forms of particularly erratic driving. See, *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998); *State v. Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989); *State v. Cook*, 212 Neb. 718, 325 N.W.2d 159 (1982); *State v. DiLorenzo*, 181 Neb. 59, 146 N.W.2d

791 (1966); *State v. Eberhardt*, 179 Neb. 843, 140 N.W.2d 802 (1966).

On the other hand, reckless driving cases often involve less extreme actions, such as moderate speeding, erratic lane changes, and other forms of irresponsible driving. See, *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999); *State v. Douglass*, 239 Neb. 891, 479 N.W.2d 457 (1992); *State v. Green*, 238 Neb. 475, 471 N.W.2d 402 (1991).

The present case involved moderate speeding and passing vehicles on the shoulder, arguably placing persons and property at risk of harm. However, the facts could be construed to show either indifference on the part of Scherbarth or an intentional and deliberate disregard for the safety of others or property on the part of Scherbarth. Under Nebraska jurisprudence and the facts of this case, we cannot say that the jury could not have found that Scherbarth's acts lacked intent. See, e.g., *State v. Howard*, 5 Neb. App. 596, 560 N.W.2d 516 (1997) (error to not give instruction on lesser-included offense of careless driving along with instruction on reckless driving). Based on the evidence in this case, a jury instruction on reckless driving was warranted and Scherbarth was prejudiced by the failure to give the instruction as a lesser-included offense of willful reckless driving.

[16] We reverse the order of the district court, and we remand the cause with directions to the district court to reverse the order of the county court and remand the matter to the county court for further proceedings. A new trial is not precluded by double jeopardy because sufficient evidence existed upon which to convict Scherbarth of either offense. See *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015) (if evidence is not sufficient to sustain verdict after appellate court finds reversible error, then double jeopardy forbids remand for new trial).

[17] Because we are reversing the judgment and remanding the cause for further proceedings, we need not address Scherbarth's prosecutorial misconduct and sufficiency of the

evidence arguments. See *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

CONCLUSION

Upon our review, we find the district court sitting as an intermediate appellate court erred in finding Scherbarth was not prejudiced by the failure to provide an instruction on the lesser-included offense of reckless driving. The district court's order is reversed, and the cause is remanded to the district court with directions to reverse the order of the county court and to remand the matter to the county court for further proceedings.

Reversed and remanded for
further proceedings.

State of Nebraska on behalf of Dawn Lockwood, appellant, and Dawn Lockwood, appellee, v. Travis Laue, appellee.

900 N.W.2d 582

Filed August 1, 2017. No. A-16-627.

1. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion.
3. **Child Support: Actions: Final Orders.** Upon receipt of a child support referee's findings and recommendations, the district court is provided the opportunity to have a further hearing and review regarding the recommendation, and has the ability to accept or reject all or any part of the report before its final disposition in ratifying or modifying the recommendations of the referee.
4. **Equity.** In an equitable action, the district court is vested with broad equitable powers and discretion to fashion appropriate relief.
5. **Child Support: Equity.** An exception hearing to a child support referee's report is an equitable action, and it is within the discretion of the district court to allow the presentation and receipt of new or additional

evidence at an exception hearing upon receiving the referee's findings and recommendations.

6. **Child Support: Actions: Final Orders.** The child support referee's recommendation is a nonbinding recommendation, and the final determination is left to the district court.
7. **Child Support: Equity.** As the district court is provided the discretion to accept or reject all or any part of the referee's report and ratify or modify the referee's findings and recommendations, so shall the district court in a court of equity have the discretion to receive additional or new evidence at an exception hearing.
8. **Child Support: Appeal and Error.** When a child support referee makes a report and no exception is filed, the district court reviews the referee's report de novo on the record.
9. **Child Support: Equity.** If an exception is filed to a child support referee's report, the party filing an exception is entitled to a hearing and the district court as a court of equity has the discretion to allow the presentation of new or additional evidence.

Appeal from the District Court for Buffalo County: William T. Wright, Judge. Affirmed.

Shawn R. Eatherton, Buffalo County Attorney, and Andrew W. Hoffmeister for appellant.

Bergan E. Schumacher, of Bruner Frank, L.L.C., for appellee Dawn Lockwood.

Moore, Chief Judge, and Inbody and Riedmann, Judges.

Inbody, Judge.

INTRODUCTION

The State of Nebraska appeals the decision of the Buffalo County District Court finding that Dawn Lockwood was not in contempt of court for failing to pay court-ordered child support and in refusing to allow the State to present additional evidence at the exception hearing to the referee's report.

STATEMENT OF FACTS

In July 2014, the district court ordered Lockwood to pay $50 per month in child support. In December 2015, the State

filed an affidavit and application for an order to show cause regarding Lockwood's failure to pay child support. The district court ordered Lockwood to appear to show cause why she should not be held in contempt.

In February 2016, the district court child support referee held a hearing on the order to show cause. Lockwood was represented by a court-appointed attorney. The State indicated Lockwood was delinquent in the amount of $791.85 in child support. The State offered Lockwood's child support payment history, which was received into evidence. The child support payment history indicated Lockwood had not paid child support since May 2015. The referee stated that the exhibit created a rebuttable presumption that Lockwood was in willful and contumacious civil contempt of the district court's order to pay $50 a month in child support. The referee stated that because the exhibit created a rebuttable presumption, the burden of proof shifted to Lockwood to convince the court she was not in contempt. The referee allowed Lockwood to proceed with evidence.

Lockwood testified that in July 2014, when the child support order was entered, she was in prison in Topeka, Kansas, after turning herself in on a warrant in April of that year. After her release in August 2014, she found a job at a motel earning $8 an hour, but left after 5 months because her physical limitation of "bulging disks [did not allow her] to stoop." Following working at the motel, Lockwood then worked at a fast-food restaurant for about 6 months, initially earning $7.50 an hour until she was promoted to general manager earning $10 an hour. After Lockwood was terminated from that job, she worked at a convenience store for a couple months, earning $10 an hour. Lockwood was then jailed in Buffalo County from July 2015 until January 2016. Lockwood stated she did not have a current driver's license because it was suspended for failure to pay child support while she was in jail. Lockwood also indicated that although her husband was employed full time, they were currently living in a hotel and she was

cleaning rooms there to receive reduced rent. Lockwood stated that since her release from jail, she has worked with a vocational rehabilitation program to develop an individualized plan for employment. Lockwood also indicated that she is working in coordination with a nonprofit agency to gain employment skills, namely obtaining and maintaining a job, and community support, including budgeting and bill paying. Lockwood stated she had submitted employment applications to 12 different businesses, provided a journal indicating the jobs to which she had applied, with copies of electronic and paper job applications she completed, and she informed the referee of interviews resulting from the applications. Lockwood informed the referee that her nonpayment of child support was not intentional, that she was doing everything in her power to obtain employment in order to pay her child support obligation, and that she intended to pay off the child support obligation as soon as she gained employment.

On cross-examination, Lockwood indicated she was in jail for 1 day in July 2015 and again from October 2015 to January 2016. When the State asked Lockwood about what efforts she made to be employed from April to October 2015, Lockwood stated that she was seeing her psychiatrist on a regular basis to get her medication stabilized for treatment of a mental illness disability. During that time, Lockwood cleaned rooms for a reduced rent at a hotel for approximately $20 per room.

On redirect examination, Lockwood stated that she suffers from severe social anxiety and schizoaffective disorder, but she was taking medication to help keep it controlled. Lockwood also said that she was actively seeking employment despite her mental illness disability. Lockwood acknowledged that she was behind in rent, "barely making ends meet," and also having difficulty because she did not have a driver's license.

At the conclusion of the evidence and closing arguments, the referee stated: "The [c]ourt finds[,] as counsel pointed out, the burden is by clear and convincing evidence that . . .

Lockwood is in contempt. I fail to find that the State has met its burden. A $50 order isn't much, and I don't recall ever —." The State interrupted, claiming, "I think you mean the defendant[,] not the State." In response, the referee stated, "We'll sort it out. The caption is no longer up to date. We need to find — I need to find by clear and convincing evidence that you're in contempt. I just don't find it. You've made a lot of efforts." The referee found that Lockwood could not pay the child support during the months she was incarcerated. The court noted Lockwood's mental health breakdown, her need for medication, and that she bartered her rent by doing work where she was residing. The referee stated, two more times, "I just don't find the State's met its burden."

In its March 2016 report, the referee initially indicated that the State established a prima facie case of contempt against Lockwood for being delinquent in her child support obligation. The report acknowledged that Lockwood was incarcerated "for significant periods of time" since the July 2014 child support order was entered, she received discounted rent for housekeeping services, her incarceration did not cause a willful or intentional act of nonpayment of child support, her four felony convictions reduced her ability to be gainfully employed, and she provided significant documentation of her efforts to gain employment. The referee's report stated: "Based upon the totality of the evidence received and arguments submitted, the State did not meet its burden of proof by clear and convincing evidence that the obligor willfully or intentionally failed to pay child support." Consequently, the referee's report recommended the district court order the dismissal of the order to show cause without prejudice.

Following the filing of the referee's report with the district court, the State filed an exception to the report, claiming that the State provided sufficient proof Lockwood was in contempt for failing to pay previously ordered child support and that the referee should not have recommended dismissal of the order to show cause.

In May 2016, the district court held a hearing on the exception filed by the State. The court initially said that the hearing was on an appeal; in response, the State informed the court that it was an exception, not an appeal. The bill of exceptions from proceedings with the referee were received into evidence. The State informed the court that the hearing was a trial de novo and, as a result, the State wanted to offer additional evidence consisting of Lockwood's pay history and wage history. Lockwood objected to the receipt of the State's additional evidence, claiming that the evidence was not relevant because the hearing was based on whether the referee was correct. The court stated its opinion that the hearing was de novo on the record and received the exhibits conditionally, deferring its decision, to determine relevancy until the court could determine the appropriate standard of review. Consequently, the State made an offer of proof regarding the exhibits.

Also at the hearing, the State argued it is the child support obligor's burden to show whether nonpayment of child support is not willful and contumacious. The State additionally claimed that the hearing taking place with the court was a contempt hearing. In response, Lockwood claimed that the hearing was solely a review of the referee's findings. The court instructed the parties to submit simultaneous briefs.

In its June 2016 order, the district court overruled the State's exception and dismissed the order to show cause. In its order, the court stated that it did not receive or consider the additional evidence presented by the State at the exception hearing because additional evidence was "irrelevant," since the hearing was de novo on the record. The court determined that the State met its initial burden of establishing a prima facie case of Lockwood's child support arrearage and that the burden then shifted to Lockwood to establish the arrearage was not the result of a willful act. The court agreed with the referee and determined that, based upon its review of the received evidence, Lockwood overcame the presumption that

she was willfully and contumaciously in contempt because she established she did not have the ability to pay at the time of the hearing with the referee.

The State timely filed this appeal.

ASSIGNMENTS OF ERROR

The State contends the district court erred in failing to find Lockwood in contempt of court in consideration of all the facts given to the court, particularly that she overstated her time spent in jail and admitted to bartering her earnings in exchange for reduced rent, while ignoring evidence that Lockwood had been in the past and was at the time of the hearing employed in exchange for a reduced rate of rent.

The State further contends that the district court erred when, at the exception hearing to the referee's report, the court refused to allow the State to present additional evidence of more periods of nonpayment and Lockwood's wage earning history.

STANDARD OF REVIEW

[1] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Klein v. Oakland/Red Oak Holdings*, 294 Neb. 535, 883 N.W.2d 699 (2016).

[2] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether

a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion. *Martin v. Martin*, 294 Neb. 106, 881 N.W.2d 174 (2016).

ANALYSIS

Additional Evidence at Exception Hearing to Referee's Report

The State contends the district court abused its discretion when it did not receive or consider the additional evidence regarding Lockwood's period of nonpayment and wage earning history presented by the State at the exception hearing.

Regarding the assignment of a case to a child support referee, the right to file an exception to the referee's recommendations, and the district court's adoption or rejection of the referee's recommendation, Neb. Rev. Stat. § 43-1613 (Reissue 2016) provides:

> In any and all cases referred to a child support referee by the district court . . . the parties shall have the right to take exceptions to the findings and recommendations made by the referee and *to have a further hearing* before such court for final disposition. The court upon receipt of the findings, recommendations, and exceptions shall review the child support referee's report and may accept or reject all or any part of the report and enter judgment based on the court's own determination.

(Emphasis supplied.)

Moreover, Neb. Ct. R. § 4-110 provides further guidelines when a party exercises the right to take exception following the recommendations made by the child support referee. Section 4-110 states:

> In all cases referred by a child support referee, the parties shall have the right to take exception within 14 days to the findings and recommendations of the referee and to have a review by the district court before final

> disposition. Upon receiving the findings and recommendations, the district court shall conduct a review on the report of the referee and in the court's discretion may ratify or modify the recommendations of the referee and enter judgment based thereon, with the rights of appeal and to move for rehearing reserved to all parties.

[3,4] Upon receipt of a child support referee's findings and recommendations, the district court is provided the opportunity to have a further hearing and review regarding the recommendation, and has the ability to accept or reject all or any part of the report before its final disposition in ratifying or modifying the recommendations of the referee. While we have found no statutory authority which specifically authorizes or does not authorize the propriety of receiving new evidence in the district court, the statutory language states that after the report of the referee is filed and an exception is filed, the district court conducts a further hearing. This is an equitable action, and the district court is vested with broad equitable powers and discretion to fashion appropriate relief in equity cases. See *City of Beatrice v. Goodenkauf*, 219 Neb. 756, 366 N.W.2d 411 (1985) (action in equity vests trial court with broad powers authorizing any judgment under pleadings). We note that an evidentiary hearing or trial before a district court has been held in some instances prior to final disposition. See, *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 12, 554 N.W.2d 769, 777 (1996) (appellant "fails to direct us to any part of the record *where the district court or the district court referee* refused to allow [him] to testify or present evidence in support of [retroactive child support]") (emphasis supplied); *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994) (following referee's recommendations, district court held evidentiary hearing); *State on behalf of Dady v. Snelling*, 10 Neb. App. 740, 741, 637 N.W.2d 906, 908 (2001) (appellant "filed an exception to the referee's report, and a trial was conducted before the district court").

[5-7] Based upon our review of the statute and current case law, we determine that because this is an equitable action, it is within the discretion of the district court to allow the presentation and receipt of new or additional evidence at an exception hearing upon receiving the referee's findings and recommendations. Both § 43-1613 and § 4-110 provide that the referee's recommendation is a nonbinding recommendation, and the final determination is left to the district court. As the district court is provided the discretion to accept or reject all or any part of the referee's report and ratify or modify the referee's findings and recommendations, so shall the district court in a court of equity have the discretion to receive additional or new evidence at an exception hearing.

[8,9] As mentioned previously, there is no statutory authority on whether the district court can receive additional evidence at an exception hearing or whether it is a hearing de novo on the record. The authority suggests that when a referee makes a report and no exception is filed, the district court reviews the referee's report de novo on the record. However, if an exception is filed, the party filing an exception is entitled to a hearing and the district court as a court of equity has the discretion to allow the presentation of new or additional evidence. In this case, the district court did not receive or consider any additional evidence presented by the State at the exception hearing, stating that it was "irrelevant." The State made an offer of proof regarding the additional evidence it wished the district court to consider. However, this additional evidence was cumulative, particularly because, at oral argument, the State acknowledged that the evidence in its offer of proof was not as strong in comparison to Lockwood's admissions.

Based upon the review of the totality of the evidence and the State's offer of proof, we find that the district court's determination in denying the State's request to offer additional evidence consisting of Lockwood's pay history and wage history at the exception hearing was not error.

Factual Findings Regarding Lockwood's Ability to Pay Child Support and Determination That Lockwood Was Not in Contempt of Court

The State contends the district court abused its discretion by not finding Lockwood in contempt of court, particularly after all of the facts presented to the court showed that Lockwood overstated the time she spent in jail and admitted to bartering her earnings in exchange for reduced rent. Additionally, the State argues that the district court erred in its factual findings that Lockwood had no present ability to pay child support.

Given our review of the record, the State's offer of proof, and the totality of the evidence, we cannot say that the court erred in its factual findings. And, given these findings, we cannot say that the court erred in determining Lockwood was unable to pay child support and was not in contempt of court. Therefore, we find the State's assertions to be without merit.

CONCLUSION

We conclude the district court did not err in denying the State's request to present additional evidence at the exception hearing regarding Lockwood's period of nonpayment and wage earning history. Accordingly, we affirm the district court's order finding that Lockwood was not in contempt for failing to pay court-ordered child support and refusing to allow the State to present additional evidence at the exception hearing to the referee's report.

Affirmed.

State of Nebraska, appellee, v. Barbara J. Williams, appellant.

901 N.W.2d 334

Filed August 8, 2017. No. A-16-910.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Motions for Mistrial: Pleadings: Prosecuting Attorneys: Intent: Appeal and Error.** While the denial of a plea in bar generally involves a question of law, an appellate court reviews under a clearly erroneous standard a finding concerning the presence or absence of prosecutorial intent to provoke the defendant into moving for a mistrial.
4. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.
5. **Double Jeopardy: Motions for Mistrial.** It is the general rule that where a court grants a mistrial upon a defendant's motion, the Double Jeopardy Clause does not bar a retrial.
6. **Motions for Mistrial: Prosecuting Attorneys: Intent: Proof.** It is the defendant's burden to prove that the prosecuting attorney engaged in misconduct intended to provoke a mistrial, and the trial court's finding regarding whether the prosecuting attorney intended to cause a mistrial is a finding of fact.
7. ____: ____: ____: ____. Factors that a court may consider in determining whether the prosecutor intended to provoke the defendant into moving for a mistrial include the following: (1) whether there was a sequence of overreaching or error prior to the errors resulting in the mistrial; (2) whether the prosecutor resisted the motion for mistrial; (3) whether the prosecutor testified, and the court below found, that there was no intent to cause a mistrial; (4) the timing of the error;

(5) whether the record contains any indication that the prosecutor believed the defendant would be acquitted; (6) whether a second trial would be desirable for the government; and (7) whether the prosecutor proffered some plausible justification for his or her actions.

8. **Records: Appeal and Error.** It is incumbent upon an appellant to supply a record which supports his or her appeal; absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

Thomas P. Strigenz, Sarpy County Public Defender, and Colleen M. Hassett for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Pirtle, Judge.

INTRODUCTION

Barbara J. Williams appeals the order of the district court for Sarpy County which denied her plea in bar following a mistrial and denied her motion for other relief. For the reasons that follow, we affirm.

BACKGROUND

Williams was charged with one count of child abuse, a Class IIIA felony. Williams provided nursing care for a minor child who was disabled and nonverbal. On July 18, 2014, Williams cared for the child from 8 a.m. to 6 p.m. After her shift ended, the parents cared for the child. That evening, the parents discovered a skin injury on the child and drove her to a hospital for treatment. Williams denied that the injury occurred during her shift.

Prior to trial, the parties agreed to stipulate to the introduction of the cell phone records of Williams and the child's

parents, and no records custodian from the service provider was called to testify. One exhibit agreed upon by the parties was a chart listing all of the incoming and outgoing calls made by the child's mother on the day of the incident. The chart included the calling number, the called number, the digits dialed, whether the call was inbound or outbound, and the duration of the call in seconds. The chart included the start date and end date of each call, showing the date and time in military time. The chart also included a column labeled "NEID" and the data in that column was shown as a two- or three-digit numerical value. A document titled "Key to Understanding CDMA Call Detail Reports" was provided. The key states that "NEID . . . reflects which network element handled the call."

A jury was empaneled and sworn on Tuesday, May 10, 2016, and evidence was adduced from May 10 through 13. The child's mother testified regarding the timeline in which she discovered her child's injuries and called her friend, who was a nurse, prior to taking the child to the hospital for medical treatment. The defense focused on the timing and number of calls made by the mother before seeking medical treatment.

At some point during the second day of the trial, a deputy county attorney recalled a case in which times represented in cell phone records were recorded in different area codes, so the values were "off by an hour." During a trial recess, the deputy county attorney spoke to a representative from the service provider and confirmed that some of the mother's calls were shown in mountain time, even though the calls were placed within the central standard time zone. One of the State's witnesses, a detective, obtained a separate key for understanding the cell phone records, which included the locations of the cellular towers which corresponded with the NEID values on the cell phone logs. This information was not relayed to defense counsel.

The detective testified on Friday, May 13, 2016. He testified that the "NEID" column of the cell phone records relate

to the location of the cellular tower and that it "could be in a different part of the country" from where the call was initiated. On cross-examination, he was questioned about the location of the cellular towers through which Williams' calls were routed. He did not indicate that he had received a new key from the service provider or indicate that the records in evidence were inaccurate or incomplete.

The State rested its case in chief on Friday, May 13, 2016. That day, a representative from the service provider confirmed the availability to testify regarding the location of the NEID and its impact on the time stamps in the call log.

Williams began presenting her defense, including the affidavit of an expert witness who relied, in part, on the assumption that the times in the call log were all recorded in central standard time. The State announced that it had received information discrediting the chronological accuracy of the cell phone records and that it intended to adduce that evidence on rebuttal.

Williams moved for a mistrial, and the district court sustained her motion. The court found that this case was premised, in large part, on the cell phone records and that the State's late disclosure of evidence discrediting the accuracy of the records "put the defense in an untenable position." The court found that simply disallowing the State's rebuttal evidence was not a sufficient remedy and that a mistrial was necessary.

On May 20, 2016, Williams filed a motion for relief seeking the following: (1) an order dismissing the charges against her; (2) an order finding the State in contempt of written and verbal court orders regarding pretrial matters; (3) an order directing the State to pay her expert witness fees, her attorney fees, and the costs incurred at trial on May 11 through 13; and/or (4) an order directing the State to reimburse her for the wages she lost as a result of attending trial on May 11 through 13. On May 23, Williams filed a plea in bar, asserting that retrial of the State's charge against her should be barred by the

prohibition against double jeopardy. She asserted that the State failed to timely disclose material information and acted with the intent "to goad [her] into moving for mistrial."

On June 30, 2016, a hearing was held on Williams' motions. The following exhibits were offered and received into evidence: two trial exhibits containing cell phone records, as well as a key for understanding the service provider's records; a transcript of the motion for mistrial proceedings; a transcript of the detective's trial testimony; a deposition of Williams' employer; and affidavits from Williams, her counsel, and counsel for the State.

The court made factual findings on each of the factors set forth in *State v. Muhannad*, 286 Neb. 567, 837 N.W.2d 792 (2013) (*Muhannad I*), specifically regarding whether the State intended to provoke Williams into moving for mistrial. The district court found the State did not have the intent to goad Williams into moving for mistrial, and the court denied Williams' plea in bar and her motion for other relief. Williams timely appealed.

ASSIGNMENTS OF ERROR

Williams asserts the district court erred in overruling her motion for plea in bar. She also asserts the district court erred in denying her motion for other relief.

STANDARD OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law. *State v. Arizola*, 295 Neb. 477, 890 N.W.2d 770 (2017). On a question of law, an appellate court reaches a conclusion independent of the court below. *Id.*

[3] While the denial of a plea in bar generally involves a question of law, we review under a clearly erroneous standard a finding concerning the presence or absence of prosecutorial intent to provoke the defendant into moving for a mistrial. *State v. Muhannad*, 290 Neb. 59, 858 N.W.2d 598 (2015) (*Muhannad II*).

[4] Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion. *State v. Russell*, 292 Neb. 501, 874 N.W.2d 8 (2016).

ANALYSIS

Plea in Bar.

The parties do not dispute the propriety of the mistrial. The issue is whether concepts of double jeopardy bar a retrial and, thus, whether the court should have granted Williams' plea in bar.

[5,6] It is the general rule that where a court grants a mistrial upon a defendant's motion, the Double Jeopardy Clause does not bar a retrial. *Muhannad II.* There is a "'"narrow exception"'" to this general rule. *Id.* at 65, 858 N.W.2d at 604. In *Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982), the U.S. Supreme Court held that where a defendant moves for and is granted a mistrial based upon prosecutorial misconduct, double jeopardy bars retrial when the "conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." In *Muhannad I*, the Nebraska Supreme Court declined to extend exceptions discussed in *Oregon v. Kennedy* beyond situations where the prosecutor intended that misconduct would provoke a mistrial. It is the defendant's burden to prove this intent, and the trial court's finding regarding whether the prosecuting attorney intended to cause a mistrial is a finding of fact. *Muhannad I.*

Williams asserts that the court erred in overruling her plea in bar because there was sufficient evidence that the State failed to disclose evidence to the defense with the intent to provoke the defense to move for a mistrial. Williams asserts that the prosecutor purposely questioned the detective in a way that would provoke cross-examination by Williams' counsel which would "'open the door'" for rebuttal, using the newly discovered key which had not been disclosed to the defense.

See brief for appellant at 6. She asserts the prosecutor deliberately courted a mistrial, making normal sanctions inadequate. She cites case law which states that a "'scheming prosecutor cannot be rewarded by being handed the very thing toward which he connived.'" *Muhannad I*, 286 Neb. at 578, 837 N.W.2d at 801.

[7] In *Muhannad I*, the Nebraska Supreme Court set forth a list of objective factors derived from and articulated by state and federal courts for consideration when determining whether prosecutors intended to provoke the defense into moving for a mistrial. These factors included, but were not limited to, the following: (1) whether there was a sequence of overreaching or error prior to the errors resulting in the mistrial; (2) whether the prosecutor resisted the motion for mistrial; (3) whether the prosecutor testified, and the court below found, that there was no intent to cause a mistrial; (4) the timing of the error; (5) whether the record contains any indication that the prosecutor believed the defendant would be acquitted; (6) whether a second trial would be desirable for the government; and (7) whether the prosecutor proffered some plausible justification for his or her actions. See *Muhannad I*.

In this case, the district court considered each of those factors and determined that the evidence was insufficient to support a finding that the State failed to make its disclosure to the defendant with the intent to goad the defense into moving for a mistrial. The court stated that the prosecutors proffered what they believed to be a plausible justification for their failure to timely disclose the newly discovered information—they believed that the information could be reserved for rebuttal. The court noted that this belief was mistaken and resulted in inaccurate information continually being presented to the jury. The court found that although the failure to disclose the information did constitute misconduct, it did not meet the narrow and rigorous standards set out in *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982), and *Muhannad I*.

[8] We note that on appeal, Williams asserts that "the Court had made repeated admonitions to [the State's] counsel to more efficiently use time at trial" in support of her argument that the State intended to extend the trial into the following week until a rebuttal witness became available. Brief for appellant at 9. The record before us contains no evidence of any such admonitions. It is incumbent upon an appellant to supply a record which supports his or her appeal. *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016). Absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed. *Id.*

Upon our review, the record supports the trial court's conclusions. The record before us does not demonstrate a sequence of overreaching or error prior to the error resulting in the mistrial. The prosecutors submitted affidavits stating that they had no intention of causing a mistrial and that they believed the evidence was sufficient to gain a conviction. It does not appear from the record that the State intentionally committed prosecutorial misconduct or intended that such conduct would provoke a mistrial. Therefore, we find that the district court's determination was not clearly erroneous and that Williams' plea in bar was properly denied.

Motion for Other Relief.

Williams asserts the district court erred in denying her motion for other relief because the State's "knowing failure to timely disclose material evidence to [Williams] squandered significant financial and other resources of the Court, [Williams'] counsel and [Williams] herself." Brief for appellant at 12.

As previously discussed, the district court determined that, because the State did not act with the intent to provoke a mistrial, the motion for other relief must also fail and be denied. Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion. *State v. Russell*, 292 Neb. 501, 874 N.W.2d 8 (2016).

When considering Williams' motion for mistrial, the district court disagreed with the State's actions in accordance with the "mistaken" belief that the prosecutors were not required to inform the defense of the newly discovered evidence they intended to use for rebuttal. However, the district court determined that there was nothing "nefarious" in the State's action. So, while sanctions could have been ordered, the district court chose not to order them, and we find no abuse of discretion in denying Williams' motion for other relief.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court denying Williams' plea in bar and her motion for other relief.

Affirmed.

Randle S. Jensen, an individual, appellant, v. Champion Window of Omaha, LLC, appellee.

900 N.W.2d 590

Filed August 15, 2017. No. A-16-780.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Appeal and Error.** When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
3. **Claim Preclusion.** The doctrine of claim preclusion applies when there are two proceedings and the following four requirements are satisfied: (1) there was a final judgment on the merits in the prior action; (2) the judgment was entered by a court of competent jurisdiction; (3) both the prior and the subsequent actions involved the same cause of action; and (4) both the prior and subsequent actions were between the same parties or persons in privity with them.
4. **Judgments: Claim Preclusion.** A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.
5. **Actions: Claim Preclusion.** A party who could have raised claims in a prior action but failed to do so is precluded from raising those claims in a subsequent action.
6. ____: ____. Where a federal court dismisses the filed federal causes of action with prejudice but reserves and dismisses the state law

claims filed contemporaneously, the only claims reserved are those expressly dismissed without prejudice. Any other state law claims arising from the same factual scenario but not brought in the federal lawsuit are precluded.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Terry B. White, of Carlson & Burnett, L.L.P., for appellant.

Sarah J. Millsap and Kenneth M. Wentz III, of Jackson Lewis, P.C., for appellee.

Inbody, Riedmann, and Arterburn, Judges.

Arterburn, Judge.

INTRODUCTION

Randle S. Jensen appeals from an order of the district court which granted a motion to dismiss in favor of Champion Window of Omaha, LLC (Champion). On appeal, Jensen argues the district court erred in dismissing his claims for negligent and intentional infliction of emotional distress based on claim preclusion. For the reasons set forth below, we affirm.

BACKGROUND

Jensen worked several years at Champion as an installation manager. Jensen's employment was terminated on August 12, 2013. Following his termination, Jensen filed a charge of discrimination with the federal Equal Employment Opportunity Commission (EEOC), which cross-filed his complaint with the Nebraska Equal Opportunity Commission (NEOC). Jensen alleged Champion discriminated against him based on his sex, retaliated against him for reporting sexual harassment, and retaliated against him for reporting alleged violations of building codes and regulations.

On September 2, 2014, the NEOC issued a notice indicating it found no reasonable cause to support Jensen's allegations.

The notice stated that Jensen had 90 days after the receipt of the notice to file suit. On December 1, Jensen filed a federal action in the U.S. District Court for the District of Nebraska. Jensen's federal complaint alleged violations of title VII of the Civil Rights Act of 1964 and violations of the Nebraska Fair Employment Practice Act. The federal court granted summary judgment in favor of Champion on December 8, 2015. The federal court dismissed Jensen's title VII claims with prejudice and declined to exercise supplemental jurisdiction over his state law claims. The federal court expressly reserved Jensen's state law claims and dismissed them without prejudice.

On February 26, 2016, Jensen filed a complaint in the district court for Douglas County. Jensen's complaint in the district court was nearly identical to the complaint filed in federal court. Jensen filed an amended complaint in the district court on March 29. This complaint was nearly identical to his previous complaints, except that Jensen added a claim titled "Negligent and/or Intentional Infliction of Emotional Distress by Champion — In Violation of Nebraska Laws." Jensen relied on the same factual basis for all of his claims, as he incorporated the factual basis by reference for each claim.

Champion filed a motion to dismiss on April 11, 2016. The district court granted Champion's motion to dismiss in an order dated July 20, 2016. In reaching its decision, the court took judicial notice of Jensen's federal complaint. The court determined that Jensen's retaliation claims were barred because they were not filed in a timely manner pursuant to the NEOC order. The court also found that Jensen's emotional distress claims were barred because they arose out of the same cause of action as alleged in the federal complaint and were not expressly reserved in the federal court's order. Jensen appeals only the district court's granting of Champion's motion to dismiss with regard to his emotional distress claims.

Jensen assigned no error to the district court's finding that his retaliation claims were time barred. Therefore, we will not address that issue.

ASSIGNMENT OF ERROR

Jensen argues, restated, that the district court erred in granting Champion's motion to dismiss his emotional distress claims.

STANDARD OF REVIEW

[1,2] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016). When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions. *Id.*

ANALYSIS

Jensen argues that his claims for emotional distress should not have been dismissed, because the federal court did not retain jurisdiction over his state law claims, and that he was therefore free to amend his complaint to add an additional state law claim.

[3,4] The doctrine of claim preclusion applies when there are two proceedings and the following four requirements are satisfied: (1) there was a final judgment on the merits in the prior action; (2) the judgment was entered by a court of competent jurisdiction; (3) both the prior and the subsequent actions involved the same cause of action; and (4) both the prior and subsequent actions were between the same parties or persons in privity with them. See *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013). A judgment on the merits, rendered in a former suit between the same

parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. See *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008).

There is a split of authority on the very narrow issue before us: When a federal court disposes of federal claims brought before it in pretrial motions and expressly declines to exercise supplemental jurisdiction over the included state law claims, is a party precluded, in a subsequent action filed in state court, from bringing an additional state law claim that was not expressly reserved by the federal court? Upon our review of the claim in this case, we find that Jensen should be precluded from bringing a new claim in the subsequent action.

The Restatement (Second) of Judgments § 25 comment *e*. (1982) provides:

> A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.

Some courts have adopted the exception that if the court in the first action would clearly have declined to exercise

jurisdiction as a matter of discretion, then a second action in a competent court presenting the omitted theory or ground should be held not precluded. See, *Pierson Sand v Keeler Brass*, 460 Mich. 372, 596 N.W.2d 153 (1999); *Parks v. City of Madison*, 171 Wis. 2d 730, 492 N.W.2d 365 (Wis. App. 1992); *Sattler v. Bailey*, 184 W. Va. 212, 400 S.E.2d 220 (1990); *Merry v. Coast Community College Dist.*, 97 Cal. App. 3d 214, 158 Cal. Rptr. 603 (1979).

However, the Restatement (Second) of Judgments § 26(b) (1982) further states that a plaintiff's claim is not precluded by a final judgment if the court in the first action has expressly reserved the plaintiff's right to maintain the second action. This is contingent upon the court expressly reserving a plaintiff's ability to bring a particular claim. *Id.* When a court splits a cause of action by dismissing one part with prejudice and one part without prejudice, the only claims reserved are those expressly dismissed without prejudice. Some courts have adopted this view and have held that any state claims not reserved by the federal court are precluded. See, *Korn v. Paul Revere Life Ins. Co.*, 83 Mass. App. 432, 984 N.E.2d 882 (2013); *Lambert v. Iowa Dept. of Transp.*, 804 N.W.2d 253 (Iowa 2011).

The jurisdictions that have adopted the exception cited above rely heavily on whether the federal court would have declined to exercise supplemental jurisdiction. See *Pierson Sand, supra*. Those jurisdictions reason that a federal court will typically not exercise supplemental jurisdiction over state law claims once it has disposed of the federal claims pretrial. These jurisdictions reason that since the federal court clearly would have dismissed the state law claims without prejudice, then it is of no consequence if the party adds additional state law claims in state court.

The jurisdictions that have declined to adopt the above exception clearly disfavor attempting to divine or speculate what the federal court would have done if it were presented

with the state law claim that was added after dismissal of the case. See *Korn, supra*. Additionally, these jurisdictions believe the exception undercuts the broader principles against claim splitting and judicial economy. They reason that whether the party intentionally or inadvertently omitted the additional claim in the federal lawsuit, the party should not receive a second opportunity to litigate its claim based on the same factual scenario.

[5,6] We were unable to find a Nebraska case that deals with this specific issue. However, we believe that our case law is clear that a party must bring all claims in its initial action. A party who could have raised claims in a prior action but failed to do so is precluded from raising those claims in a subsequent action. See *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007). The key words here are "could have raised." If the party could not have raised the claims in the prior action, perhaps because the court in the prior action lacked jurisdiction over them or because the claims had not yet matured, then the judgment in the prior action would not preclude the assertion of those claims in a subsequent action. See *id.* Therefore, we adopt the view that where a federal court dismisses the filed federal causes of action with prejudice but reserves and dismisses the state law claims filed contemporaneously, the only claims reserved are those expressly dismissed without prejudice. Any other state law claims arising from the same factual scenario but not brought in the federal lawsuit are precluded.

Because the federal court did not expressly reserve Jensen's claims for emotional distress, Jensen is precluded from bringing these additional claims that could have been brought before the federal court. It is clear from the pleadings that Jensen is alleging identical facts as a basis for his emotional distress claims as were pled in the claims brought in federal court. There was a final judgment on the merits of his federal

claims. The federal court was a court of competent jurisdiction. Both the federal and state actions involved the same facts and the same causes of action. Both the prior and subsequent actions were between the same parties. The claims of emotional distress arose during the same occurrences as his other claims. Therefore, the district court did not err in granting Champion's motion to dismiss the claims based on claim preclusion.

CONCLUSION

We find that, based on claim preclusion, the district court did not err in granting Champion's motion to dismiss the claims.

Affirmed.

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HEADNOTES

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