THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

NOVEMBER 21, 2003 and MAY 20, 2004

IN THE

Supreme Court of Nebraska

VOLUME CCLXVII

PEGGY POLACEK

OFFICIAL REPORTER

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BY PEGGY POLACEK, REPORTER OF THE SUPREME COURT
AND THE COURT OF APPEALS

For the benefit of the State of Nebraska

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WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

JOHN F. IRWIN, Chief Judge
EDWARD E. HANNON, Associate Judge[1]
RICHARD D. SIEVERS, Associate Judge
EVERETT O. INBODY, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge[2]

PEGGY POLACEK ..... Reporter
LANET ASMUSSEN ..... Clerk
JOSEPH C. STEELE ..... State Court Administrator[3]
FRANK E. GOODROE ..... State Court Administrator[4]

[1]Until December 31, 2003
[2]As of January 5, 2004
[3]Until December 31, 2003
[4]As of December 31, 2003

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel Bryan, Jr.	Auburn
		Vicky L. Johnson,	Wilber
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
Third	Lancaster	Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
Fourth	Douglas	Robert V. Burkhard	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Richard J. Spethman	Omaha
		Gerald E. Moran	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha
		J. Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke Alan G. Gless Michael Owens Mary C. Gilbride	Columbus Seward Aurora Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist Maurice Redmond John E. Samson	Blair Dakota City Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz Patrick G. Rogers	Wayne Norfolk
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Ronald D. Olberding	Burwell
Ninth	Buffalo and Hall	John P. Icenogle James Livingston Teresa K. Luther	Kearney Grand Island Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Stephen Illingworth Terri Harder	Hastings Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell John P. Murphy Donald E. Rowlands II James E. Doyle IV	McCook North Platte North Platte Lexington
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson Robert O. Hippe Brian Silverman Randall L. Lippstreu Kristine R. Cecava	Chadron Gering Alliance Gering Sidney

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Larry F. Fugit	Papillion
		Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd Hutton	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Jack B. Lindner	Lincoln
		Mary L. Doyle	Lincoln
		Laurie J. Yardley	Lincoln
		Jean A. Lovell	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
Fifth	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary F. Hatfield	Central City
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith	Fremont
		C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
		Douglas Luebe	Hartington
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Philip R. Riley	Creighton
		Richard W. Krepela	Madison
		Donna F. Taylor	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman	Ainsworth
		Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack Robert Ott	Hastings
		Robert A. Ide	Holdrege
		Michael Offner	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Cloyd Clark	McCook
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
		Edward D. Steenburg	Ogallala
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		James L. Macken	Gering
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		C.G. Wallace	Kimball

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
	Linda S. Porter	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Ronald L. Brown	Lincoln
James M. Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 266

MARIETTE CHIZOMA ACHIGBU
THOMAS JOSEPH ANDERSON
JEFFREY THOMAS BAKER
JAMES LEWIS BECKMANN
PHILLIP ANDREW BELIN
LARS FREDRICK BERGSTROM
JAMES A. CAMPBELL
BRIAN R. CAREY
JENNIFER ALICE CARTER
REBECCA M. CARTWRIGHT
RUSSELL SHERMAN COLLINS
CARLY COPPOCK
WALTER DEMOND
LYLE WILLIAM DITMARS
KAREN P. DOUGLAS
SVETLANA DRISCOLL
NICOLE ENGELHARDT
JEFFREY L. FOX
JULIE K.W. GAWRYCH
JEFFREY ALAN GEDBAW
KYLE J. GILSTER
MICHAEL D. GOSS
DENNIS MICHAEL GRAY
SHAWN MICHAEL GRIMSLEY
TAG RYAN HERBEK
LISA M. HINRICHSEN
FRANK IRELAND HOPPE
MONICA HOPPE
FREDERICK G. HUDSON
MARK HUDSON
T. MITCHELL HUDSON, JR.
KEITH ALAN JOHNSON
KRISTINA M. KAEDING
LAURIE LYNNE KALIVAS-GIBNEY
EDWARD D. KELLY
WENDY ANNE LASSEY
RENEE D. MARTINEZ-JUNCK
HOLLIE M. MASON
PAUL BERNARD MENGEDOTH
MEREDITH J. MORGANS
STACY L. MORRIS
NATALIE OSORIO NOWAK
JOSHUA O'DONNELL
KAREN LEE O'HARA
MELISSA S. OLES
KATHERINE HANSFORD OWEN
KENNY R. PADILLA
ANDEE G. PENN
CHRISTOPHER LEE PETERSON
TODD L. PETERSON
JOHN GARDINER PIEPER
SHANE JOSEPH PLACEK
ELENA JANE REVEIZ
SCOTT JAY ROGERS
NELSON O. ROPKE
JOSEPH J. RUPP
MARK ANTHONY RYAN
CHRISTINA SCHMIEDING
NATHAN ELIOT SEILER
JEFFREY FRANKLIN SHOEMAKER
ELIZABETH SIPPERLEY
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AARON F. SMEALL
CASSANDRA STAJDUHAR
MARANEE L. STOWELL
ALEXANDER STRAATMANN
CLAUDIA STRINGFIELD
TOBIAS JOHN TEMPELMEYER
JAMES A. THOMAS
DAYLE L. WALLIEN
MICHAELA EILEEN WELNIAK
MARK W. WILLIAMS
CHRISTOPHER M. WILSON
JUSTIN RUSK WYATT

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No. S-01-770: **Finney v. Finney**. Petition for further review affirmed in part, and in part modified and remanded with directions. Per Curiam.

No. S-02-336: **Moulton v. Mahlin**. Affirmed. Connolly, J.

No. S-02-393: **Gabel v. Polk Cty. Bd. of Comrs**. Appeal dismissed. Gerrard, J.

No. S-02-418: **Davis v. Allen**. Affirmed as modified in part, and in part reversed and remanded with directions. Stephan, J.

No. S-02-800: **Eickhoff v. McNamara**. Affirmed. Wright, J.

No. S-02-1052: **In re Estate of Norine**. Affirmed. McCormack, J.

No. S-02-1243: **Kracl v. American Family Ins. Group**. Reversed and remanded with directions. Connolly, J.

No. S-03-571: **In re Adoption of Grace B**. Affirmed. Gerrard, J.

No. S-03-585: **In re Interest of Eric O. & Shane O**. Dismissed. Per Curiam.

No. S-03-667: **In re Water Appropriation A-12151**. Affirmed. Connolly, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-02-417: **Lewandowski v. Burlington Northern Santa Fe Ry. Co**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs and fees.

No. S-02-1287: **Glantz v. Britten**. Judgment affirmed. See, rule 7A(1); *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002); *Glantz v. Hopkins*, 261 Neb. 495, 624 N.W.2d 9 (2001).

No. S-02-1338: **Patton v. Patton**. Pursuant to rule 8E, stipulation allowed; appeal dismissed with prejudice at cost of appellant.

Nos. S-03-071 through S-03-074: **State v. Johnston**. Judgment and sentence in No. S-03-071 affirmed as modified. See *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000). Judgment and sentence in No. S-03-072 affirmed as modified. See Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Supp. 2003). Judgments in Nos. S-03-073 and S-03-074 affirmed.

No. S-03-334: **InfoUSA, Inc. v. CMS Group, Ltd**. Motion of appellee to dismiss appeal granted. See rule 7B(1).

No. S-03-541: **State v. Boppre**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-03-575: **State v. Richards**. Judgment of Court of Appeals affirmed.

No. S-03-635: **State v. Tucker**. Appellee's motion for summary affirmance is denied. However, based upon appellant's representation in his written objection to such motion that in this postconviction action, he is alleging ineffective assistance of counsel in a prior postconviction appeal, the court determines on its own motion that no error of law appears and that a detailed opinion would have no precedential value. See, *State v. Dandridge*, 264 Neb. 707, 651 N.W.2d 567 (2002), and *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001) (holding that there is no constitutional guarantee of effective assistance of counsel in postconviction action); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003) (holding that for postconviction relief to be granted under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), claimed infringement must be constitutional in dimension). Affirmed. See rule 7A(1).

No. S-03-703: **United Kingdom on behalf of Franklin v. Shapiro**. Appeal dismissed, with prejudice, each party to pay own costs.

No. S-03-731: **Tremain v. Tremain**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-03-761: **State v. Classe**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-03-762: **State ex rel. Tyler v. Britten**. Reversed and remanded to district court for further consideration in light of *Martin v. Nebraska Dept. of Corr. Servs.*, 267 Neb. 33, 671 N.W.2d 613 (2003). See rule 7A(3).

No. S-03-777: **Fonville v. Britten**. Reversed and remanded to district court for further consideration in light of *Martin v. Nebraska Dept. of Corr. Servs.*, 267 Neb. 33, 671 N.W.2d 613 (2003). See rule 7A(3).

No. S-03-809: **State ex rel. McCartney v. Central National Ins. Co**. Stipulation allowed; appeal dismissed.

No. S-03-833: **Smith v. Fire Ins. Exch. of Los Angeles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-03-943: **Hageman v. Britten**. Reversed and remanded to district court for further consideration in light of *Martin v. Nebraska Dept. of Corr. Servs.*, 267 Neb. 33, 671 N.W.2d 613 (2003). See rule 7A(3).

No. S-03-945: **State v. Senters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-03-967: **State v. Hessler**. Appellee's motion to dismiss sustained. Appeal dismissed.

No. S-03-991: **State v. Hatcher**. By order of the court, appeal dismissed for failure to file briefs.

No. S-03-1045: **State v. Shelly**. Appellee's suggestion of remand and appellant's motion in support of appellee's suggestion of remand granted. See rule 7C. Judgment vacated, and cause remanded with directions. See, Neb. Rev. Stat. § 29-3001 (Reissue 1995); *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000); *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000).

No. S-03-1081: **State v. Davlin**. Motion of appellee for summary dismissal sustained. Appeal dismissed. See rule 7B(1).

No. S-03-1180: **Jorgensen v. Harmon**. Stipulation allowed; appeal dismissed, and cause remanded for further proceedings.

Nos. S-03-1278 through S-03-1280: **State v. Lotter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-03-1310: **State v. Gonzales-Faguaga**. Appeal dismissed. See rule 7A(2).

No. S-03-1467: **Weeder v. Courtney**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. S-04-188: **State v. Davlin**. Stipulation considered; appeal dismissed.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-00-1051: **Dominium Illinois Three v. Arbor Devel. Group**. Petition of appellant for further review dismissed on February 19, 2004, as having been improvidently granted.

No. S-01-664: **Hughes v. Poykko-Post**. Petition of appellee for further review dismissed on November 26, 2003, as having been improvidently granted.

No. A-01-961: **Glaubius v. YMCA of Norfolk**. Petition of appellant for further review overruled on November 26, 2003.

No. A-01-961: **Glaubius v. YMCA of Norfolk**. Petition of appellee for further review overruled on November 26, 2003.

No. S-01-1014: **Adam v. City of Hastings**, 12 Neb. App. 98 (2003). Petition of appellee for further review sustained on November 13, 2003.

No. A-01-1174: **State v. Trackwell**. Petition of appellant for further review overruled on February 19, 2004.

No. A-01-1179: **Wright v. Wright**. Petition of appellee for further review overruled on November 26, 2003.

No. A-01-1183: **In re Estate of Nelsen**. Petition of appellee for further review overruled on March 17, 2004.

No. A-01-1315: **Pointe Partnership v. City of LaVista**. Petition of appellant for further review overruled on November 13, 2003.

No. A-01-1391: **Maas v. Maas**. Petition of appellant for further review overruled on November 13, 2003.

No. A-02-042: **General Serv. Bureau v. Moller**, 12 Neb. App. 288 (2003). Petition of appellant for further review overruled on January 14, 2004.

No. A-02-139: **MPP, L.L.C. v. Brook Park Invest. Co**. Petition of appellant for further review overruled on November 19, 2003.

No. A-02-139: **MPP, L.L.C. v. Brook Park Invest. Co**. Petition of appellee for further review overruled on November 19, 2003.

No. A-02-263: **Bruckner v. Civil Serv. Comm. of Douglas Cty**. Petition of appellant for further review overruled on November 26, 2003.

No. A-02-287: **Heffelbower v. City of Lincoln**. Petition of appellant for further review overruled on December 10, 2003.

No. A-02-297: **State v. Feldhacker**. Petition of appellant for further review overruled on November 13, 2003.

No. A-02-333: **Ratigan v. Ratigan**. Petition of appellant for further review overruled on December 10, 2003.

No. A-02-355: **FirsTier Bank v. Lane**. Petition of appellant for further review overruled on January 28, 2004.

Nos. A-02-389 through A-02-391: **Sink v. Meints**. Petitions of appellant for further review overruled on November 26, 2003.

Nos. A-02-465, A-02-466: **State v. Pearce**. Petitions of appellant for further review overruled on January 14, 2004.

No. A-02-468: **Meyer v. Broekemeier**. Petition of appellant for further review overruled on November 26, 2003.

No. A-02-468: **Meyer v. Broekemeier**. Petition of appellee for further review overruled on November 26, 2003.

Nos. S-02-559, S-03-076: **Midwest Neurosurgery v. State Farm Ins. Cos.**, 12 Neb. App. 328 (2004). Petitions of appellant for further review sustained on February 25, 2004.

No. A-02-562: **Hibler v. Hibler**. Petition of appellant for further review overruled on December 17, 2003.

No. A-02-564: **Christo v. Christo**. Petition of appellant for further review overruled on February 25, 2004.

No. A-02-564: **Christo v. Christo**. Petition of appellee for further review overruled on February 25, 2004.

No. A-02-618: **Copa v. Maher**. Petition of appellant for further review overruled on February 11, 2004.

No. A-02-673: **State v. Taylor**. Petition of appellant for further review overruled on December 10, 2003.

No. A-02-684: **State v. Lupien**. Petition of appellant for further review overruled on January 27, 2004.

Nos. A-02-764, A-02-1297, A-02-1298: **State v. Obst**, 12 Neb. App. 189 (2003). Petitions of appellants for further review overruled on December 10, 2003.

No. A-02-773: **Welty v. Department of Motor Vehicles**. Petition of appellant for further review overruled on March 17, 2004.

No. A-02-777: **State v. Stooksbury**. Petition of appellant for further review overruled on February 11, 2004.

No. A-02-816: **Bjorklund v. Bergstrom**. Petition of appellee for further review overruled on November 26, 2003.

No. A-02-826: **State v. Trampe**, 12 Neb. App. 139 (2003). Petition of appellant for further review overruled on December 10, 2003.

No. A-02-852: **Conradi v. Eggers Consulting Co**. Petition of appellant for further review overruled on March 17, 2004.

Nos. A-02-893, A-02-894: **Marston v. Selser Two, Inc**. Petitions of appellee for further review overruled on February 25, 2004.

No. A-02-911: **Zierke v. VanHoosen**. Petition of appellant for further review overruled on December 30, 2003.

No. A-02-928: **Stockwell-Davies v. The Larson Company**. Petition of appellee for further review overruled on February 11, 2004.

No. A-02-975: **J.S.P.R. Enters. v. S & B Inc**. Petition of appellant for further review overruled on March 10, 2004.

No. A-02-1000: **Ramos v. Neth**. Petition of appellant for further review overruled on December 30, 2003.

Nos. A-02-1008, A-02-1296: **State v. Harper**. Petitions of appellant for further review overruled on November 13, 2003.

No. A-02-1035: **State v. Sobey**. Petition of appellant for further review overruled on March 17, 2004.

No. A-02-1046: **State v. Wead**. Petition of appellant for further review overruled on April 28, 2004.

No. A-02-1055: **Vagts v. Vagts**. Petition of appellee for further review overruled on April 14, 2004.

No. A-02-1105: **State v. Stuart**, 12 Neb. App. 283 (2003). Petition of appellant for further review overruled on February 11, 2004.

No. S-02-1184: **Richards v. Meeske**, 12 Neb. App. 406 (2004). Petition of appellant for further review sustained on April 14, 2004.

No. S-02-1241: **In re Conservatorship of Hanson**, 12 Neb. App. 202 (2003). Petition of appellee for further review sustained on February 19, 2004.

No. A-02-1257: **Bischoff v. Bischoff**. Petition of appellant for further review overruled on April 28, 2004.

No. A-02-1260: **State v. Conn**. Petition of appellant for further review overruled on December 30, 2003.

No. A-02-1334: **State v. Waadah**. Petition of appellant for further review overruled on January 14, 2004.

No. A-02-1376: **State v. Birdine**. Petition of appellant for further review overruled on December 10, 2003.

No. A-02-1378: **State v. Cunningham**. Petition of appellant for further review overruled on February 19, 2004.

No. A-02-1389: **State v. Cushing**. Petition of appellant for further review overruled on February 25, 2004.

No. A-02-1391: **Waite v. Hippe**. Petition of appellant for further review overruled on January 14, 2004.

No. S-02-1405: **Hosack v. Hosack**. Petition of appellant for further review sustained on December 30, 2003.

No. A-02-1441: **State v. Rogman**. Petition of appellant for further review overruled on March 10, 2004.

No. A-02-1442: **State v. Garcia**. Petition of appellant for further review overruled on December 17, 2003.

No. A-02-1448: **Castro v. IBP, inc**. Petition of appellee for further review dismissed on November 24, 2003.

No. S-02-1480: **State v. Vaught**, 12 Neb. App. 306 (2003). Petition of appellant for further review sustained on January 28, 2004.

No. S-02-1482: **State v. Smith**. Petition of appellant for further review sustained on January 14, 2004.

No. S-02-1503: **State v. Johnson**, 12 Neb. App. 247 (2003). Petition of appellant for further review sustained on December 10, 2003.

No. A-03-038: **Fields v. Vocelka**. Petition of appellant for further review overruled on December 10, 2003.

Nos. S-03-071 through S-03-074: **State v. Johnston**. Petitions of appellant for further review sustained on November 13, 2003.

No. A-03-146: **Bobyarchick v. Bobyarchick Maradie**. Petition of appellee for further review overruled on March 24, 2004.

No. A-03-149: **State v. Guia**. Petition of appellant for further review overruled on February 11, 2004.

No. A-03-170: **Kyriss v. Mroczek**. Petition of appellant for further review overruled on November 19, 2003.

No. A-03-198: **In re Interest of Brianna B. et al**. Petition of appellee Robert for further review overruled on January 14, 2004.

No. A-03-205: **State v. Velazquez**. Petition of appellant for further review overruled on November 26, 2003.

No. A-03-221: **In re Interest of Remey R. & Rmauni R**. Petition of appellant for further review overruled on January 14, 2004.

No. A-03-243: **State v. Burks**. Petition of appellant for further review overruled on April 21, 2004.

No. A-03-252: **State v. Burkhardt**. Petition of appellant for further review overruled on February 19, 2004.

Nos. A-03-277 through A-03-281: **State v. Burnett**. Petitions of appellant for further review overruled on December 10, 2003.

No. A-03-282: **State v. Tart**. Petition of appellant for further review overruled on April 21, 2004.

No. A-03-286: **State v. Larsen**. Petition of appellant for further review overruled on March 24, 2004.

No. A-03-292: **State v. Miller**. Petition of appellant for further review overruled on April 14, 2004.

No. A-03-359: **State v. Martin**. Petition of appellant for further review overruled on November 13, 2003.

No. A-03-360: **State v. Martin**. Petition of appellant for further review overruled on November 13, 2003.

No. A-03-396: **State v. Webb**. Petition of appellant for further review overruled on March 17, 2004.

No. A-03-402: **Bieck v. Good Samaritan Village of Hastings**. Petition of appellant for further review overruled on January 14, 2004.

No. A-03-412: **In re Interest of Hamilton**. Petition of appellant for further review overruled on February 25, 2004.

No. A-03-416: **Arias v. Board of Parole**. Petition of appellant for further review overruled on November 13, 2003.

Nos. A-03-439, A-03-468: **State v. Goings**. Petitions of appellant for further review overruled on December 17, 2003.

No. A-03-447: **Hurt v. Hurt**. Petition of appellant for further review overruled on November 26, 2003.

No. A-03-462: **State v. Maxwell**. Petition of appellant for further review overruled on November 13, 2003.

No. A-03-472: **Jelden v. Gardiner & Co**. Petition of appellant for further review overruled on February 11, 2004.

No. A-03-476: **State v. Patterson**. Petition of appellant for further review overruled on November 13, 2003.

No. A-03-485: **State v. Noyd**. Petition of appellant for further review overruled on April 14, 2004.

No. A-03-497: **State v. Lohman**. Petition of appellant for further review overruled on December 10, 2003.

No. A-03-497: **State v. Lohman**. Petition of appellant pro se for further review overruled on December 10, 2003.

No. A-03-507: **State v. Brown**. Petition of appellant for further review overruled on December 17, 2003.

No. A-03-545: **State v. Ackerman**. Petition of appellant for further review overruled on December 17, 2003.

No. A-03-546: **State v. Magee**. Petition of appellant for further review overruled on February 19, 2004.

No. S-03-571: **In re Adoption of Grace B**. Petition of appellant for further review sustained on December 17, 2003.

No. S-03-575: **State v. Richards**. Petition of appellant for further review sustained on January 28, 2004.

No. A-03-583: **State v. Moreno**. Petition of appellant for further review overruled on December 30, 2003.

No. A-03-589: **In re Interest of David T**. Petition of appellant for further review overruled on February 19, 2004.

No. A-03-600: **Willcock v. Willcock**, 12 Neb. App. 422 (2004). Petition of appellant for further review overruled on April 21, 2004.

No. A-03-607: **State v. Nelson**. Petition of appellant for further review overruled on February 19, 2004.

No. A-03-623: **Vang v. Vang**. Petition of appellant for further review overruled on March 24, 2004.

No. A-03-638: **State v. Delano**. Petition of appellant for further review overruled on November 19, 2003.

No. A-03-648: **Jacobson v. Patterson**. Petition of appellant for further review overruled on April 28, 2004.

No. A-03-704: **Falcone v. Venditte**. Petition of appellant for further review overruled on April 14, 2004.

No. A-03-736: **State v. Reiman**. Petition of appellant for further review overruled on January 14, 2004.

No. A-03-756: **State v. Martin**. Petition of appellant for further review overruled on November 13, 2003.

No. A-03-760: **State v. Moen**. Petition of appellant for further review overruled on December 30, 2003.

No. A-03-770: **Harper v. Department of Corr. Servs**. Petition of appellant for further review overruled on January 14, 2004.

No. A-03-792: **Wahrman v. Berry**. Petition of appellant for further review overruled on March 24, 2004.

No. A-03-842: **State v. Kierstead**. Petition of appellant for further review overruled on February 11, 2004.

No. A-03-844: **State v. Gibilisco**. Petition of appellant for further review overruled on November 19, 2003.

No. A-03-854: **State v. Doran**. Petition of appellant for further review overruled on April 21, 2004.

No. A-03-881: **Harris v. Omaha Hous. Auth**. Petition of appellant for further review overruled on December 30, 2003.

No. A-03-885: **State v. Christiansen**. Petition of appellant for further review overruled on February 19, 2004.

No. A-03-895: **Shepard v. Clarke**. Petition of appellant for further review overruled on April 21, 2004.

No. A-03-944: **In re Estate of Lane**. Petition of appellant for further review overruled on February 19, 2004.

No. A-03-951: **Gibbs v. Department of Corr. Servs**. Petition of appellant for further review overruled on December 5, 2003, as filed out of time.

No. A-03-959: **Cook v. Douglas Cty. Corr. Ctr**. Petition of appellant for further review overruled on April 14, 2004.

No. A-03-984: **State v. Silos**. Petition of appellant for further review overruled on February 11, 2004.

No. A-03-988: **State v. Barnell**. Petition of appellant for further review overruled on March 10, 2004.

No. A-03-998: **Johnson v. Department of Corr. Servs**. Petition of appellant for further review overruled on March 24, 2004.

No. A-03-1099: **In re Interest of K.L**. Petition of appellant for further review overruled on April 14, 2004.

No. A-03-1111: **In re Estate of Evers**. Petition of appellant for further review overruled on January 14, 2004.

No. A-03-1123: **Martin v. Board of Parole**. Petition of appellant for further review overruled on February 19, 2004.

No. A-03-1129: **State v. Robin**. Petition of appellant for further review overruled on April 14, 2004.

No. A-03-1179: **State ex rel. Stenberg v. Consumer's Choice Foods**. Petition of appellees for further review overruled on February 19, 2004.

No. A-03-1241: **Martin v. Department of Corr. Servs**. Petition of appellant for further review overruled on February 25, 2004.

No. A-03-1292: **State v. Costanzo**. Petition of appellant for further review overruled on March 24, 2004.

No. A-03-1297: **Allen v. Clarke**. Petition of appellant for further review overruled on April 21, 2004.

No. A-03-1385: **Martin v. Witthoff**. Petition of appellant for further review dismissed on March 24, 2004. See rule 2F(1).

No. A-03-1448: **In re Estate of Jefferson**. Petition of appellant for further review overruled on April 21, 2004.

No. A-03-1449: **In re Estate of Jefferson**. Petition of appellant for further review overruled on April 21, 2004.

No. A-04-121: **State v. Baker**. Petition of appellant for further review overruled on April 14, 2004.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JAYNE STEELE AND MARY STEELE, SUCCESSOR COPERSONAL REPRESENTATIVES OF THE ESTATE OF CHARLES E. STEELE II, DECEASED, APPELLANTS AND CROSS-APPELLEES, V. RITA C. SEDLACEK, PERSONAL REPRESENTATIVE OF THE ESTATE OF LISA M. SEDLACEK, DECEASED, APPELLEE AND CROSS-APPELLANT.

673 N.W.2d 1

Filed November 21, 2003. No. S-02-857.

1. **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.
2. **Negligence: Proof.** In a negligence action, a plaintiff must establish a duty of the defendant not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
3. **Juries: Damages.** A jury may award only those damages which are the probable, direct, and proximate consequences of the wrong complained of.
4. **Damages: Proof.** Damages for permanent injuries cannot be based upon mere speculation, probability, or uncertainty, but must be based upon competent evidence that permanent damages, clearly shown, are reasonably certain as a proximate result of the injury.
5. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
6. **Verdicts: Appeal and Error.** A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
7. **Verdicts: Juries.** A jury verdict will not be set aside unless clearly wrong.
8. **Photographs: Appeal and Error.** The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such a ruling.
9. **Trial: Evidence: Damages.** The fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise generally cannot be set up by the wrongdoer in mitigation of damages.
10. **Motions to Strike: Appeal and Error.** When the trial court grants a motion to strike testimony and the jury is admonished to disregard it, ordinarily, any error is thereby considered cured.

11. **Trial: Appeal and Error.** In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument.
12. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
13. **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 such discretion a factor in determining admissibility.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellants.

Michael F. Coyle and Russell A. Westerhold, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

This wrongful death action is before this court for a second time. In *Steele v. Sedlacek*, 261 Neb. 794, 626 N.W.2d 224 (2001), *modified* 262 Neb. 1, 626 N.W.2d 224, we reversed the decision of the Nebraska Court of Appeals, which had affirmed the trial court's denial of a motion for directed verdict. We remanded with directions to enter a directed verdict in favor of the estate of Charles E. Steele II on the issue of liability and to conduct a new trial on the issue of damages only. On remand, judgment was entered in favor of Charles' estate in the amount of $17,856.61.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Andersen v. A.M.W., Inc.*, 266 Neb. 238, 665 N.W.2d 1 (2003).

FACTS

Charles' estate filed a wrongful death action against the estate of Lisa M. Sedlacek after Charles and Lisa were killed in

September 1995 in a one-car accident near Rapid City, South Dakota. There were no eyewitnesses, but the physical evidence supported a finding that Lisa was driving at the time of the accident. The action was filed under South Dakota law in the district court for Douglas County, Nebraska. Charles' estate appealed following the jury's verdict for Lisa's estate, and the Court of Appeals affirmed. See *Steele v. Sedlacek*, No. A-99-760, 2000 WL 1207150 (Neb. App. Aug. 22, 2000) (not designated for permanent publication). This court's reversal was entered after we granted a petition for further review filed by Charles' estate.

On further review, we concluded that "reasonable minds could not differ and could draw but one conclusion—the cause of the accident was Lisa's failing to maintain a proper lookout, failing to maintain proper control of her vehicle, and driving at an excessive speed for the conditions then and there existing." *Steele*, 261 Neb. at 799, 626 N.W.2d at 228. We held that the trial court erred in failing to sustain the motion for directed verdict by Charles' estate on the issue of liability and that the Court of Appeals erred in affirming the decision of the trial court. We reversed the decision of the Court of Appeals and directed that court to remand the cause to the trial court with directions to enter a directed verdict in favor of Charles' estate on the issue of liability and conduct a new trial on the issue of damages only.

At the retrial, evidence was received concerning Charles' three surviving children: Charles Michael Matthew Steele, born October 1, 1992, to Charles and Jayne Steele (who were married from December 1991 to December 1994); Alisha K. Lavender, born April 3, 1992, whose mother is Renee L. Lavender (who was never married to Charles); and Jessica Jayne Schaecher, born June 23, 1990, whose mother is Kari Schaecher (who also was never married to Charles). Evidence was also presented concerning Charles' involvement with the children.

After Charles and Jayne Steele divorced, she moved to Massachusetts with their son. Charles had contact with the son by letter and telephone, but the son did not see Charles again before Charles' death. Charles had been ordered to pay $50 per month in child support, but Jayne Steele testified that he did not provide any child support.

Charles' paternity of Alisha Lavender was established after the State instituted a paternity action against him in 1992. The district court for Nance County, Nebraska, issued an order finding Charles to be Alisha Lavender's father in October 1994, and Charles was ordered to pay child support of $25 per month. Renee Lavender testified that Charles had no relationship with their daughter, other than one visit 2 weeks after she was born and a chance meeting in a mall. Renee Lavender stated that Charles gave her approximately $80 in cash, but he provided her no other monetary support for their daughter.

Kari Schaecher testified that Charles had no relationship with their daughter and that the only support he provided was to purchase a few items of clothing and some diapers. An order establishing Charles' paternity of Jessica Schaecher was entered in February 1998, following Charles' death.

The record indicates that although Charles was ordered to pay child support for two of the children in 1994, he had no taxable income during that year.

Charles' estate moved for directed verdict on the issue of causation of the damages sustained by his children. The motion was overruled, and the case was submitted to the jury. The jury returned a verdict for Charles' estate on the first cause of action, which sought damages for loss of support by Charles' children, in the amount of $11,734.91. The trial court entered judgment in that amount on the first cause of action. The court also entered judgment as a matter of law on the second cause of action, which sought funeral expenses, in the amount of $9,121.70, for a total judgment of $20,856.61.

Charles' estate filed motions for judgment notwithstanding the verdict, for new trial, and for additur. These motions were overruled. Lisa's estate filed a motion for setoff or credit, which the trial court granted pursuant to Neb. Rev. Stat. § 25-1222.01 (Reissue 1995), and the court deducted $3,000 from the judgment. A final judgment was entered in the amount of $17,856.61. Charles' estate appeals, and Lisa's estate cross-appeals.

ASSIGNMENTS OF ERROR

Restated, the assignments of error made by Charles' estate are as follows: (1) The trial court erred in submitting the issue of

causation to the jury, in giving the jury a verdict form allowing the jury to find in favor of Lisa's estate, and in failing to follow the law of the case on retrial; (2) the trial court erred in refusing to give jury instructions Nos. 2, 10, 12, and 13 proposed by Charles' estate; (3) the trial court erred in failing to grant motions for directed verdict made by Charles' estate, as well as its motions for judgment notwithstanding the verdict, for new trial, and for additur, and in failing to receive an affidavit in support of the posttrial motions; (4) the trial court erred in failing to sustain objections to and to order a new trial on the following grounds: (a) misconduct of Lisa's estate in presenting irrelevant and prejudicial evidence and improper argument; (b) receipt of a photograph of Lisa and Charles in an embrace; and (c) admission of irrelevant and prejudicial evidence, testimony, or argument regarding (i) Charles' lack of financial assets, as represented by an affidavit from an irrelevant proceeding; (ii) collateral sources of welfare payments for the benefit of the children in lieu of child support payments made; (iii) the filing of a paternity action after Charles' death; and (iv) the personal history of Lisa and her parents; and (5) allowing a $3,000 setoff or credit against the verdict in favor of Lisa's estate when it was never pled or set forth in the pretrial order as an issue at trial.

On cross-appeal, Lisa's estate asserts that the trial court abused its discretion in sustaining objections by Charles' estate to evidence of his incarceration and alleged alcoholism, which are probative and relevant to the issues in the case.

ANALYSIS

Proximate Cause

Charles' estate first argues that the trial court erred in submitting the issue of causation to the jury because this court remanded for a trial on the issue of damages only. Charles' estate also argues that the trial court erred in providing the jury with a verdict form allowing the jury to find in favor of Lisa's estate.

During opening statements at the second trial, counsel for Lisa's estate said that the issue in the lawsuit could be stated in two words: "[p]roximate cause." The trial court overruled Charles' estate's objection. At the conclusion of the opening statement by counsel for Lisa's estate, Charles' estate moved for a mistrial

because the court had allowed Lisa's estate to present a legal argument attempting to predetermine or relitigate proximate cause. The motion for mistrial was also overruled. The court stated: "This issue was taken up prior in a motion in limine and the Court has ruled that proximate cause of the negligence issue is not in this case. But the issue of cause and the damages are in this case so I'm going to overrule the motion."

Whether the trial court erred in failing to conduct the retrial as directed by this court is a question of law, and when reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. See *Andersen v. A.M.W., Inc.*, 266 Neb. 238, 665 N.W.2d 1 (2003).

Lisa's estate asserts that the issue of causation is implicit in determining damages because proximate cause is necessary to determine which, if any, of the damages claimed by Charles' estate were caused by the negligence of Lisa as previously determined by this court.

[2] We have often held that in a negligence action, a plaintiff must establish a duty of the defendant not to injure the plaintiff, a breach of that duty, proximate causation, and damages. See *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999).

Lisa's estate relies on this court's holding in *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996), in which we stated that a defendant is liable for all damages which result from his negligent acts. That case concerned whether the defendant could be held liable for damages resulting from aggravation of a preexisting condition. Lisa's estate also cites to *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 195, 639 N.W.2d 88, 92-93 (2002), a professional negligence action, in which the court stated:

> The principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he or she would have been had there been no injury or breach of duty, that is, to compensate for the injury actually sustained. . . . Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages.

(Citation omitted.)

[3,4] In earlier cases, this court stated that a jury may award only those damages which are "the probable, direct, and [proximate] consequences of the wrong complained of." (Syllabus of the court.) See *Sohl v. Sohl*, 114 Neb. 353, 207 N.W. 669 (1926). In *Schwarting v. Ogram*, 123 Neb. 76, 242 N.W. 273 (1932), the syllabus of the court stated: "Damages for permanent injuries cannot be based upon mere speculation, probability, or uncertainty, but must be based upon competent evidence that permanent damages, clearly shown, are reasonably certain as a *proximate result* of the injury." (Emphasis supplied.)

In a more recent case, this court reversed, and remanded "for retrial on the issue only of the amount of damages *proximately caused* by the defendants' negligence." (Emphasis supplied.) *Stanek v. Swierczek*, 209 Neb. 357, 358, 307 N.W.2d 807, 809 (1981). In another case, the judgment was reversed and the cause remanded "for a new trial with directions that the defendants, as a matter of law, were guilty of negligence *proximately causing* the accident, and that the sole issue for retrial is one of damages and injuries *proximately caused* by the accident." (Emphasis supplied.) *White v. Kluge*, 189 Neb. 742, 746, 204 N.W.2d 789, 793 (1973).

Here, the issue on retrial was the monetary loss incurred by Charles' estate resulting from the negligence of Lisa. The trial court instructed the jury that it had been determined as a matter of law that Lisa was negligent in the operation of her vehicle at the time of the accident and that her negligence was the proximate cause of the accident. The court informed the jury that the claim of Charles' estate was that his next of kin were damaged as a result of Lisa's negligence and that there were two separate causes of action seeking damages. The first cause of action claimed that Charles' three children sustained certain damages by way of loss of support, love, affection, care, comfort, and companionship. The second cause of action sought funeral expenses as damages. The court entered judgment as a matter of law with regard to the funeral expenses in the amount of $9,121.70. The jury was then instructed that as to the claim of Charles' estate on the first cause of action, the burden was upon the estate to prove by a preponderance of the evidence "1. That the September 25, 1995 collision was a proximate cause of some

damage to the Plaintiffs; and 2. The nature, extent, and amount of these damages."

Having been instructed that Lisa's negligence was the proximate cause of the accident, the jury was properly instructed that it must determine whether the accident was a proximate cause of any damage to Charles' estate. We find no merit to the claim of error on this issue by Charles' estate.

Jury Instructions

Charles' estate assigns as error the trial court's refusal to give its proposed jury instructions Nos. 2, 10, 12, and 13. The portion of instruction No. 2 at issue concerns the burden of proof. Charles' estate offered the following as its suggested instruction: "Before the Plaintiff can recover damages against the Defendant in this action, the burden is upon the Plaintiffs to prove by a preponderance of the evidence: 1. The nature, extent and amount of the damages sustained by the Plaintiff."

Instruction No. 2 as given by the trial court was similar to Charles' estate's proposed instruction No. 2, except that the instruction given added the requirement that Charles' estate had the burden to prove that "the September 25, 1995 collision was a proximate cause of some damage to the Plaintiffs." The trial court's instruction went on to state: "If the Plaintiffs have not met their burden of proof, then your verdict must be for the Defendant. On the other hand, if the Plaintiffs have met their burden of proof, then you must enter a verdict for the Plaintiffs."

[5] Instruction No. 10 proposed by Charles' estate described what the jury could consider in the way of pecuniary benefits in determining damages. Instruction No. 12 given by the trial court was similar to proposed instruction No. 10. Charles' estate did not object to instructions Nos. 2 and 12 given by the court. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Olson v. Sherrerd*, 266 Neb. 207, 663 N.W.2d 617 (2003). The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. *Id.* It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given. *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988). The

claims made by Charles' estate as to instructions Nos. 2 and 10 have no merit.

Charles' estate also complains of the trial court's refusal to give its proposed jury instructions Nos. 12 and 13, which addressed child support for children born out of wedlock and the Nebraska Child Support Guidelines. Proposed instruction No. 12 stated:

> With respect to any child born out of wedlock, an out-of-wedlock child has the statutory right to be supported to the same extent and in the same manner as a child born in lawful wedlock. The requirement of child support begins at the time of the birth of the child, whether the child is born in lawful wedlock or otherwise. The earning capacity of the noncustodial parent may be considered in setting the support obligation for any parent owing a duty of support for any child whether born in wedlock or out-of-wedlock.

Instruction No. 13 given by the trial court stated:

> Nebraska law provides in pertinent part as follows:
>
> **43-1402. Child support; liability of parents.** The father of a child whose paternity is established either by judicial proceedings or by acknowledgment as hereinafter provided shall be liable for its support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support.
>
> . . . .
>
> **43-1410. Child support; decree or approved settlement; effect after death of parent.** Any judicially approved settlement or order of support made by a court having jurisdiction in the premises shall be binding on the legal representatives of the father or mother in the event of his or her death, to the same extent as other contractual obligations and judicial judgments or decrees.

Charles' estate did not object to instruction No. 13 given by the trial court, and for the same reasons as stated above, we find no merit to the claim of Charles' estate as to his proposed instruction No. 12.

As to Charles' estate's proposed instruction No. 13, which contained sections of the Nebraska Child Support Guidelines, we conclude the trial court did not err in refusing to give this instruction. In instruction No. 12, the court set forth the elements of

pecuniary loss that the jury could consider in determining the amount of damages. This claim of error has no merit.

Motions for Directed Verdict, Judgment Notwithstanding Verdict, New Trial, and Additur

Charles' estate objects to the trial court's refusal to grant its motions for directed verdict and its posttrial motions, which sought to set aside the verdict as being inadequate. In its brief, Charles' estate argues these assigned errors collectively as a failure to set aside the verdict.

[6,7] A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Fales v. Norine*, 263 Neb. 932, 644 N.W.2d 513 (2002). A jury verdict will not be set aside unless clearly wrong. *Id.* On the record before us, we cannot say the verdict was clearly wrong.

Charles' estate also asserts that the trial court erred in failing to receive an affidavit which was offered in support of the motion for new trial. The affidavit was from counsel for Charles' estate, stating that he had spoken with one of the jurors, who advised him as to the method used by the jury to reach the verdict amount. Lisa's estate objected to receipt of the affidavit on grounds of foundation, hearsay, and relevancy. The court sustained the objection as to hearsay and relevancy, noting that the affidavit was offered to impeach a jury verdict.

The first part of the affidavit stated that some of the jurors were concerned because Lisa's parents might have to pay any amount awarded. During deliberations, the jury sent the following question to the trial court: "Will the settlement that is decided upon be taken solely from the estate of Lisa M. Sedlacek or can some other party be liable to be responsible for that settlement? [i.e.,] will it fall to the parent's [sic] estate?" The court responded: "The only issues you are to decide are set forth in the Instructions. Please re-read the Instructions and continue your deliberations." The second part of the affidavit stated that nothing had been awarded for the claim of Jessica Schaecher because she did not seek a paternity order until after Charles' death. The jury used the court-ordered payments of $50 per month for Charles Michael

Matthew Steele and the court-ordered payments of $25 per month for Alisha Lavender and applied a discount rate to reach a present value figure.

The use of juror affidavits is governed by Neb. Rev. Stat. § 27-606(2) (Reissue 1995), which states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

Charles' estate seeks to have this court find that the jury considered extraneous prejudicial information when, during deliberations, it asked whether Lisa's parents could be held responsible for the verdict. As noted above, the jury was directed to decide only the issues set forth in the instructions it had previously received.

The trial court did not abuse its discretion in refusing to receive the affidavit of counsel. No extraneous prejudicial information was brought to the jury's attention. The information contained in the affidavit was intended to address the jury's thought process in determining the verdict, and the attempt to set forth the jury's thought process in arriving at the verdict was properly refused. We find no error in the trial court's denial of the motions for directed verdict or the posttrial motions.

Admission of Evidence

Charles' estate also raises objections to the trial court's rulings on several evidentiary matters. First, it asserts that the court erred in failing to sustain objections to misconduct of Lisa's estate in presenting irrelevant and prejudicial evidence and improper argument, including the submission of a photograph of Charles and Lisa in an embrace. Charles' estate objected to the

photograph because it may have shown that Lisa was pregnant and it demonstrated the different ethnicity of the parties. Lisa's estate asserted that the photograph was "important to my client." The photograph was admitted.

[8] The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such a ruling. *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983). Other photographs of Charles and his children were offered by Charles' estate and admitted into evidence. The trial court did not abuse its discretion in admitting the photograph of Charles and Lisa.

Charles' estate also objects to the trial court's allowing evidence concerning his lack of financial assets, as demonstrated in an affidavit from an irrelevant proceeding. The court admitted, over objection, redacted versions of two financial affidavits signed by Charles in 1992 and 1993. The affidavits were apparently signed in connection with a criminal or paternity action. Charles' estate argues that the affidavits were intended to disparage Charles as a criminal with no assets.

As redacted and presented to the jury, the affidavits do not indicate that they arose from a criminal or paternity action. The admission of the affidavits was not an abuse of discretion.

Charles' estate also objects to the admission of testimony concerning collateral sources of welfare payments for the benefit of the children in lieu of child support payments made. Charles' estate argues that the questioning of Dan Redler, a legal program specialist for the Department of Health and Human Services child support enforcement division, was intended to demonstrate that Charles' children were " 'welfare children' " and "therefore less deserving of support through the verdict." See brief for appellant at 32.

Redler was presented as a witness for Charles' estate. On cross-examination, Lisa's estate asked whether, in a case where child support has been assigned to the state, the money goes to the state agency. Charles' estate objected, and the trial court overruled the objection after Lisa's estate indicated that it was following up on the information presented during direct examination as to the party who owns the child support claim.

[9] Charles' estate asserts that this questioning violates the collateral source rule, which provides: "[T]he fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise generally cannot be set up by the wrongdoer in mitigation of damages." See *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 847, 560 N.W.2d 451, 456 (1997).

During direct examination, Redler was asked whether a child support enforcement action belongs to the child, and Redler responded that "[t]he child support follows the child." An objection by Lisa's estate was overruled. The remainder of the direct examination included an explanation of various enforcement mechanisms used by the State. On cross-examination, Redler stated that he was not testifying about Charles and was not familiar with the facts of the case, but was providing an overview of remedies and vehicles used to collect child support.

[10] When Redler was asked about the assignment of rights for child support, he stated that as a general procedure, there can be an assignment of rights of support to the State if it has expended funds on behalf of a child through aid to dependent children or Medicaid. After Charles' estate objected and a sidebar conference was held, the trial court sustained a motion by Charles' estate to strike the last answer, and the jury was instructed to disregard it. Assuming for the sake of argument that the testimony was inadmissible, this court has held that when the trial court grants a motion to strike testimony and the jury is admonished to disregard it, ordinarily, any error is thereby considered cured. *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989). This alleged error has no merit.

Next, Charles' estate objects to the trial court's admission of evidence concerning the filing of a paternity action after Charles' death. Lisa's estate presented evidence by way of a deposition from Kari Schaecher, who testified that she gave birth to Jessica Schaecher on June 23, 1990, and that Charles was the father and was aware of the child. Kari Schaecher testified that Charles' paternity was established in February 1998 and that she began the paternity proceedings after Charles' death. Charles' estate offered the order establishing paternity, and it was received into evidence without objection.

[11] During closing argument, Lisa's estate suggested that it required speculation, conjecture, and guess to determine whether Kari Schaecher would have sought to establish Charles' paternity of her daughter at any time in the future and that any pecuniary loss by Jessica Schaecher was based on conjecture. Charles' estate did not object during the closing argument. In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument. *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). Any complaint about this issue has been waived.

The final complaint of Charles' estate concerning evidence relates to testimony provided by Lisa's mother, Rita C. Sedlacek. Rita Sedlacek testified that Lisa attended Catholic school in Omaha and, after high school graduation, worked for the Omaha Public Power District, where she met Charles, who worked in the cafeteria. Charles' estate requested and was granted a continuing objection to the testimony. It argues here that the testimony was irrelevant to the issue of damages to be awarded to Charles' next of kin. We conclude there was no prejudicial error in the admission of this evidence.

[12] In addition, Charles' estate complains because Rita Sedlacek was allowed to testify that she and her husband had been married 35 years and to testify concerning their employment. Charles' estate waived any complaint concerning this information by failing to object when the testimony was offered. Failure to make a timely objection waives the right to assert prejudicial error on appeal. *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002). There is no merit to the assigned errors concerning the admission of this evidence because Charles' estate waived them by failing to properly object at trial.

SETOFF AGAINST VERDICT

The final assignment of error by Charles' estate asserts that the trial court erred in allowing a $3,000 setoff or credit against the verdict in favor of Lisa's estate when it was never pled or set forth in the pretrial order as an issue at trial.

At a hearing following the verdict, Lisa's estate offered a copy of a check for $3,000 that had been sent to a funeral home

in Grand Island, Nebraska, and Lisa's estate requested a credit on the judgment in that amount. The check was paid by State Farm Mutual Automobile Insurance Company and indicated Lisa as the insured. Charles' estate objected to the exhibit on the basis of foundation and hearsay. The trial court sustained the objection and granted leave to submit further evidence. After receiving an affidavit in support of the exhibit, the court issued a written order in which it sustained the motion pursuant to § 25-1222.01 and deducted $3,000 from the judgment.

Section 25-1222.01 provides:

> No advance payments or partial payment of damages made by an insurance company or other person, firm, trust, or corporation as an accommodation to an injured person or on his behalf to others or to the heirs at law or dependents of a deceased person made under any liability insurance policy, or other voluntary payments made because of an injury, death claim, property loss, or potential claim against any insured or other person, firm, trust, or corporation thereunder shall be construed as an admission of liability by the insured or other person, firm, trust, or corporation, or the payer's recognition of such liability, with respect to such injured or deceased person or with respect to any other claim arising from the same accident or event. Any such payments shall constitute a credit and be deductible from any final settlement made or judgment rendered with respect to such injured or deceased person. In the event of a trial involving such a claim, the fact that such payments have been made shall not be admissible in evidence or brought to the attention of the jury, and the matter of any credit to be deducted from a judgment shall be determined by the court in a separate hearing or upon the stipulation of the parties.

Charles' estate argues that the intention of § 25-1222.01 is to prohibit the use of payments by an insurance company to demonstrate an admission of liability. However, Charles' estate also suggests that Lisa's estate did not meet the procedural requirements then in effect. See Neb. Rev. Stat. §§ 25-811 and 25-812 (Reissue 1995). (Now found at Neb. Ct. R. of Pldg. in Civ. Actions 8 and 13 (rev. 2003).) Section 25-811 stated that any counterclaim or

setoff shall be contained in the answer, and § 25-812 stated that the defendant may set forth in the answer as many grounds of counterclaim and setoff as he may have.

Section 25-1222.01 provides that payments by an insurance company "shall constitute a credit and be deductible from any" final judgment. The $3,000 amount was paid by Lisa's automobile insurance company to the funeral home for expenses related to Charles' funeral. Charles' estate sought damages for funeral expenses via its second cause of action, and the trial court was correct in granting a credit against that amount for the payment by the insurance company.

We find no merit to any of Charles' estate's assignments of error.

Cross-Appeal

On cross-appeal, Lisa's estate asserts that the trial court abused its discretion in sustaining Charles' estate's objections to evidence of his incarceration and alleged alcoholism, which are probative and relevant to the issues in the case. Lisa's estate argues that evidence of incarceration and alleged alcoholism is relevant to a consideration of the amount of support the children could have reasonably expected had Charles lived and to Charles' ability to earn wages.

[13] 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 such discretion a factor in determining admissibility. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

Lisa's estate offered several documents in its attempt to suggest that Charles had little earning capacity. The trial court received the exhibits for purposes of the offer of proof and objection only. First, Lisa's estate offered an affidavit from Jayne Steele that was filed in the York County District Court in December 1993 as part of the dissolution proceedings between Jayne and Charles. In the affidavit, Jayne Steele alleged that Charles had a drinking problem, had threatened bodily harm to her, and had been in jail for 6 of the previous 9 years.

During the trial, portions of a deposition from Jayne Steele were read. In it, Jayne Steele admitted that her statements in the affidavit were not true. Charles had not mentally abused her or threatened her bodily harm, had not abandoned her and their son, and had not refused to purchase diapers and other necessities. Jayne Steele admitted that Charles supported her when she was not working. She specifically admitted that the affidavit was " 'full of lies' " and was intended to help her gain custody of their son.

This affidavit was not relevant to the question of any support Charles could have provided to his children had he lived. It was originally offered as part of a dissolution proceeding, and Jayne Steele admitted that it contained false statements. The trial court did not abuse its discretion in refusing to receive it into evidence.

Lisa's estate also offered a copy of a judgment and sentence from the York County District Court for a drug conviction, along with a letter from the Nebraska Department of Correctional Services which stated that Charles was sentenced on March 22, 1994, to a term of 2 to 20 years' imprisonment for the drug conviction. He was paroled on March 25, 1995. Charles' estate points out that during his imprisonment, he was on work release and his wages were garnished for child support.

Whether Charles would have been incarcerated in the future and unable to provide support for his children is purely speculative. No abuse of discretion can be found in the trial court's refusal to receive these documents.

Finally, Lisa's estate offered an abstract of Charles' driving record from the Nebraska Department of Motor Vehicles. Charles' estate points out that Neb. Rev. Stat. § 60-504 (Reissue 1998) provides that driving abstracts "shall not be admissible as evidence in any action for damages or criminal proceedings arising out of a motor vehicle accident."

This action for damages does not arise specifically out of a motor vehicle accident caused by Charles, although Charles' death was a result of a motor vehicle accident. However, Lisa was driving at the time of the accident, and her liability had previously been determined. Charles' driving record has no relevance to his ability to earn wages to support his children. The trial court did not abuse its discretion in refusing to admit this document.

We find that the trial court did not abuse its discretion in refusing to allow the jury to hear the proposed evidence concerning Charles' alleged drinking habits and his jail record. The cross-appeal has no merit.

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the trial court.

AFFIRMED.

WILLIAM E. GAST, APPELLANT, V. PAUL F. PETERS AND GAST & PETERS, A NEBRASKA PARTNERSHIP, APPELLEES.

671 N.W.2d 758

Filed November 21, 2003. No. S-02-974.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Partnerships: Accounting: Appeal and Error.** An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in an appellate court de novo on the record.
3. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Partnerships.** Dissolution of a partnership is not synonymous with its termination. On dissolution, the partnership is not terminated but continues until the winding up of partnership affairs is completed.
5. ____. Because a partnership terminates only when the business of the partnership has been wound up, whatever rules apply with regard to distribution before the partnership is dissolved apply after it is dissolved but before it is terminated by the winding up of its affairs.
6. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
7. ____. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
8. **Partnerships: Accounting.** Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of

the partnership or from any use by him of its property. With respect to this fiduciary duty, partners must deal frankly and honestly with one another, and as trustees, they cannot derive a secret profit from partnership transactions unknown to the other.

9. **Partnerships.** Absent a contrary agreement, any income generated through the winding up of unfinished business of a partnership is allocated to the former partners according to their respective interests in the partnership.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

David E. Pavel, of David E. Pavel Law Offices, P.C., for appellant.

Monte Taylor and Paul F. Peters, of Taylor, Peters & Drews, for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This appeal arises from a dispute between two lawyers involving fees earned before the dissolution of their partnership but collected thereafter. Following a bench trial, the district court for Douglas County found that Paul F. Peters was justified in setting off $17,620.62 from fees due his former partner, William E. Gast, from a case which Peters had concluded because Gast had underpaid Peters by that same amount in distributing fees collected on another case which Gast had concluded. Upon consideration of Gast's appeal, we find no error and affirm.

BACKGROUND

The parties entered into a written partnership agreement effective January 1, 1990, in which they agreed to practice law under the firm name "Gast & Peters" (G&P). Under the terms of the agreement, the net profits and losses of the partnership were to be divided and borne equally between the partners.

In a November 10, 1992, agreement (merger agreement), Gast and Peters each indicated their acceptance of the outlined terms and conditions of a merger between G&P and the law firm of Schmid, Mooney & Frederick, P.C. (SM&F), effective January 1, 1993. Paragraph 4 of the merger agreement provided in relevant part:

> As of January 1, 1993, all contingent fee cases will be valued by G&P and SM&F, i.e., each pending case would be individually reviewed. Work completed and work to be performed would be apportioned on a percentage basis on each case. At the time of eventual payment of fees, the fees from each case would then be apportioned accordingly between G&P and SM&F, i.e., fees from a case 10% completed as of time of merger would be apportioned 10% to G&P and 90% to SM&F.

The merger agreement made specific reference to an attached letter dated October 23, 1992, signed by Peters on behalf of G&P and Keith I. Frederick on behalf of SM&F. This letter listed G&P's 14 largest pending contingency cases and assigned fee apportionment percentages to G&P and SM&F based on work which G&P had completed on each case as of the date of the letter. The letter provided that the proportions of the fees would become "vested" in G&P and SM&F, respectively, as of the January 1, 1993, merger date, subject to any adjustments required because of significant additional work accomplished prior to the merger.

From January 1, 1993, until February 28, 1996, both Gast and Peters were shareholders, directors, and employees of SM&F. Both parties left SM&F on approximately March 1, 1996, and thereafter have practiced law separately from each other. When Gast and Peters left SM&F, all but 2 of the 14 contingent fee cases referred to in the merger documents had been concluded. The two unresolved cases are referred to by the parties as the "*Yager*" and "*Stenson*" cases.

Gast originated the *Yager* case for G&P in 1990. When G&P merged with SM&F, G&P withdrew its representation of the client. Gast and attorney Terry Gutierrez continued working on the case as employees of SM&F. When Gast left SM&F, he took the *Yager* files with him, and he and his new firm, Gast, Ratz & Gutierrez, P.C. (GR&G), assumed responsibility for the case until its settlement in 1997. There is no record of the client's ever dismissing G&P or entering into a contingency fee agreement with SM&F or GR&G. As a result of the settlement, a total of $97,892.32 in attorney fees was received and deposited in the GR&G trust account. Pursuant to the merger agreement, the fees

from the *Yager* case were to be apportioned 60 percent to G&P and 40 percent to SM&F. Under this formula, G&P would have received $58,735.39. On February 7, 1998, after receipt of the *Yager* fee, Gast and other members of GR&G met with Peters and Frederick to discuss apportionment of the fee. Both prior to and during this meeting, Peters stated his position that G&P was entitled to 60 percent of the fee pursuant to the merger agreement. Gast and his GR&G colleagues took the position that the remaining 40 percent would be insufficient to compensate both SM&F and GR&G. No agreement was reached on this point, and Peters left the meeting. Subsequently, Gast and the members of GR&G decided to disburse 24 percent of the *Yager* fee in the amount of $23,494.16 to G&P, with a portion of the balance distributed to SM&F and the remainder retained by GR&G.

Peters originated the *Stenson* case for G&P. Peters retained the *Stenson* case files when he left SM&F, and both he and Gast were involved with the case until its conclusion by settlement in 1997. Pursuant to the merger agreement, fees from the *Stenson* case were to be apportioned 85 percent to G&P and 15 percent to SM&F. In January 1997, however, Peters entered into an agreement on behalf of G&P to modify the *Stenson* fee apportionment agreement due to the amount of work which he and Gast performed subsequent to their departure from SM&F. Under the modified agreement, G&P's percentage was increased from 85 percent to 88.75 percent and SM&F's share was reduced from 15 percent to 11.25 percent. Accordingly, G&P received 88.75 percent of the total attorney fees in the *Stenson* case, or $74,032.29. SM&F issued a check payable to G&P for this amount from its trust account and delivered it to Peters. Peters deposited the check into a newly created G&P account. In a letter dated September 11, 1998, Peters informed Gast of the deposit. In the same letter, Peters provided a detailed account of the manner in which he was disbursing the deposited funds. He informed Gast that he was disbursing 50 percent of the total proceeds, or $37,016.15, to himself in accordance with the G&P partnership agreement. Peters further disclosed that out of Gast's equal share, he was withholding the $17,620.62 in fees which he claimed to have been underpaid on the *Yager* settlement, thereby resulting in a net payment to Gast in the amount of $19,395.53.

Gast filed this action in which he sought a declaratory judgment that he was entitled to an additional $17,620.62 from the fee generated by the *Stenson* settlement. In his answer, Peters affirmatively alleged that the amount paid to Gast in the *Stenson* case constituted Gast's full 50-percent share minus a legal and proper setoff for Peters for the unpaid portion of Peters' claimed share of the *Yager* fees. Both Gast and Peters filed motions for summary judgment. Following two interlocutory orders which resulted in an entry of partial summary judgment for each party, the district court conducted a bench trial and thereafter concluded that Peters had properly set off the disputed $17,620.62, to which he was entitled. Gast filed this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Gast assigns, restated and consolidated, that the trial court erred in finding that Peters properly set off $17,620.62 from the *Stenson* settlement.

STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003); *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003); *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 639 N.W.2d 905 (2002).

[2] An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record. *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983).

[3] In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Lake Arrowhead, Inc. v. Jolliffe, supra.*

ANALYSIS

[4] As this is essentially an action for an accounting between partners of a partnership formed prior to January 1, 1998, the Uniform Partnership Act (UPA), Neb. Rev. Stat. §§ 67-301 to 67-346 (Reissue 1996), is applicable and determines the rights and duties of the parties. See § 67-318. It is undisputed that Gast and Peters were equal partners in G&P and that pursuant to their partnership agreement, each was entitled to one half of the partnership's profits. The merger between G&P and SM&F resulted in the dissolution of G&P. See § 67-329 (defining dissolution of partnership as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business"). Dissolution of a partnership, however, is not synonymous with its termination. "On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed." § 67-330. Accord *Essay v. Essay*, 175 Neb. 689, 123 N.W.2d 20 (1963). The collection and distribution of the contingent fees in the *Yager* and *Stenson* cases were part of the winding up of the affairs of G&P. Thus, while the merger of the two firms marked the end of the operations of G&P, it did not result in the complete winding up of its affairs.

[5] Because a partnership terminates only when the business of the partnership has been wound up, whatever rules apply with regard to distribution before the partnership is dissolved apply after it is dissolved but before it is terminated by the winding up of its affairs. *Smith v. Daub*, 219 Neb. 698, 365 N.W.2d 816 (1985). Here, it is undisputed that each party was entitled to 50 percent of the fees received by G&P. Indeed, Gast's entire claim is that he is entitled to a full 50 percent of the G&P fee in the *Stenson* case and that Peters improperly withheld $17,620.62 from that share. Likewise, Peters claims that he is entitled to 50 percent of G&P's fee in the *Yager* case. The dispute centers upon the amount of that fee, which Peters contends Gast understated by $35,241.23, thereby depriving Peters of $17,620.62, his 50-percent share of that amount.

At the time of the G&P merger with SM&F, it was agreed by all parties that G&P would receive 60 percent of the eventual fee collected in the *Yager* case based upon work which its lawyers

had completed prior to the merger. It is undisputed that Gast subsequently caused $23,494.16, representing approximately 24 percent of the *Yager* fee, to be disbursed to G&P, with the balance paid to SM&F and Gast's new firm, GR&G. In his operative amended petition and testimony at trial, Gast claimed that the reduction was justified because the percentage of each fee payable to G&P as set forth in the merger agreement was only applicable "in the event such cases were concluded during the merger." However, we find no language in the merger agreement which would support this position.

[6,7] When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 659 N.W.2d 823 (2003). A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include. *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994).

The letter attached to the merger agreement set forth G&P's 14 largest pending contingency cases and assigned the percentage of any eventual fees which would be allocated to G&P based upon the amount of work it had completed on each case prior to the merger, with the balance payable to SM&F. The letter specifically provided that the assigned percentages of the fees would become "vested" in G&P and SM&F, respectively, as of the January 1, 1993, merger date. The letter also provided for the contingency that "[s]ettlement agreements may be reached in some of the 14 cases prior to the effective date of the merger, and such cases would not become subject to fee-apportionment between G&P and SM&F." The agreement did not address the possibility of settlement agreements which might be reached *after* Gast and Peters had left SM&F. Rather, it unambiguously and unconditionally provided that as of the merger date, G&P had done 60 percent of the work necessary to conclude the *Yager* case, for which it would receive 60 percent of any eventual fee paid after the merger, and that SM&F would be entitled to the remaining 40 percent. We find Gast's claim that the agreement was in effect only for the duration of the merger to be without merit.

Gast argues in the alternative that the original agreement was replaced at the time of his departure from SM&F when he and Frederick came to an understanding that when each file was finished, they would sit down and discuss " 'what was fair between [Gast] after he left and [SM&F] before he left.' " Reply brief for appellant at 22. Gast argues that SM&F had the sole discretion to enter into an agreement regarding the *Yager* case and that "the only claim of the dissolved G&P to Yager case fees was derivative of SMF, which succeeded to G&P's former powers and privileges with respect to the case on account of the SMF/G&P Merger." *Id.* at 29. This argument is without merit.

[8,9] As noted above, although the merger brought about the dissolution of G&P, it did not wind up the partnership's affairs. The winding up could be completed only when G&P's share of the contingent fees pending at the time of merger was received and disbursed to the partners. During this winding up period, both Gast and Peters were bound by the statutory rule that

> [e]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

§ 67-321(1). With respect to this fiduciary duty, we have held that partners must deal frankly and honestly with one another and that as trustees, they cannot derive a secret profit from partnership transactions unknown to the other. *Bode v. Prettyman*, 149 Neb. 179, 30 N.W.2d 627 (1948). We held in *Schrempp and Salerno v. Gross*, 247 Neb. 685, 529 N.W.2d 764 (1995), that a lawyer who withdrew from a partnership in a manner which caused its dissolution had a continuing fiduciary duty that prohibited him from entering into contracts for personal gain in connection with unfinished business of the partnership. We further held that absent a contrary agreement, any income generated through the winding up of unfinished business of a partnership is allocated to the former partners according to their respective interests in the partnership.

Under these principles, Gast owed a fiduciary duty to Peters and G&P with respect to the 60-percent share of the *Yager* fee allocated to G&P in the merger documents. This duty precluded

him from entering into any agreement to decrease G&P's percentage without Peters' consent. By reducing G&P's share of the *Yager* fee from 60 percent to 24 percent so that his new firm could receive a portion of the fee, Gast violated the fiduciary duty which he owed to Peters in the winding up of G&P's affairs. As a consequence, Peters received $17,620.62 less than his entitlement from the *Yager* fee, and the district court therefore correctly determined that Peters was justified in setting off and deducting that amount from Gast's share of the *Stenson* fee.

For the sake of completeness, we note our disagreement with Gast's contention that the final judgment of the district court is inconsistent with its prior orders. In its first order, the district court denied Peters' motion for summary judgment and granted that of Gast, awarding Gast damages in the amount of $17,620.62. In its subsequent modification of that order, the district court awarded both parties "summary judgment on the issue of liability" and denied both parties' motions on the issue of damages. Taken together, we interpret these orders as an interlocutory determination that the parties were subject to the terms of their partnership agreement, and therefore each party was entitled to 50 percent of the fees received by G&P. That is entirely consistent with the final determination by the district court that G&P should have received its full 60-percent share of the fee paid in the *Yager* case, in accordance with the merger documents, and that Peters was entitled to receive 50 percent of that amount.

CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in determining that Peters was entitled to set off and retain $17,620.62 from Gast's share of the *Stenson* fee as compensation for the underpayment of Peters' rightful share of the *Yager* fee. We therefore affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. JOHNNY MEERS, APPELLANT AND CROSS-APPELLEE.

671 N.W.2d 234

Filed November 21, 2003. No. S-02-1099.

1. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Where a defendant is denied his or her right to appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995).
2. **Postconviction: Jurisdiction: Effectiveness of Counsel: Appeal and Error.** The power to grant a new direct appeal is implicit in Neb. Rev. Stat. § 29-3001 (Reissue 1995), and the district court has jurisdiction to exercise such a power where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings.
3. **Pretrial Procedure: Speedy Trial: Final Orders: Appeal and Error.** A pretrial ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is final and appealable. The failure to file a timely appeal from such an order forecloses appellate review of the defendant's claim of denial of the right to a speedy trial.
4. **Postconviction: Pretrial Procedure: Effectiveness of Counsel: Appeal and Error.** Where a postconviction claim of ineffective assistance of counsel is based upon acts or omissions occurring in the pretrial or trial stages of a criminal prosecution, a new direct appeal is not an appropriate postconviction remedy.

Appeal from the District Court for Adams County: TERRI HARDER, Judge. Reversed and remanded with directions.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

In this postconviction action, the district court for Adams County granted Johnny Meers a new direct appeal on the issue of whether the trial court erred in denying his pretrial motion for absolute discharge on speedy trial grounds. The district court denied Meers' claims for postconviction relief on other grounds. On appeal, Meers seeks to both prosecute the new direct appeal and obtain review of the denial of other postconviction relief. We

conclude that the district court erred in granting the new direct appeal and therefore reverse, and remand for further proceedings.

BACKGROUND

In 1998, Meers was convicted of one count of first degree sexual assault on a child under Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989), and one count of sexual assault of a child under Neb. Rev. Stat. § 28-320.01 (Reissue 1995). We affirmed the convictions and sentences on direct appeal. *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999). Meers subsequently brought an action for postconviction relief, asserting that his trial and appellate counsel was ineffective in (1) failing to perfect an appeal from a pretrial denial of his motion to discharge, (2) failing to file a motion to quash an amended information, and (3) allowing the trial to proceed without obtaining a waiver of the State's right to a jury trial. Following an evidentiary hearing at which trial counsel admitted that he erred in advising Meers as to the time for appealing the denial of the motion for discharge, the district court for Adams County held that trial counsel's performance was deficient in this respect. The court further held that under the reasoning in *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), prejudice was presumed. Accordingly, the court granted Meers postconviction relief in the form of a new direct appeal from the pretrial order denying his motion to discharge. It denied the further postconviction relief sought by Meers.

Within 30 days of the court's order in the postconviction action, Meers filed a notice of appeal, stating, "You are hereby notified that the Defendant intends to prosecute an appeal to the Court of Appeals. The Defendant was granted a new direct appeal pursuant to his petition for the [sic] post conviction relief by the District Court by a Journal Entry filed August 27, 2002." Meers' attached affidavit and application to proceed in forma pauperis recited, "The nature of the action is an appeal from a denial of post-conviction relief. Affiant believes that he is entitled to redress." In this appeal, Meers contends that the trial court erred in denying his pretrial motion for discharge and that the postconviction court erred in failing to find his trial counsel ineffective for failing to file a motion to quash the amended information. The State filed a cross-appeal raising certain procedural

issues, including the question of whether a new direct appeal is an appropriate postconviction remedy under the circumstances presented in this case. We granted the State's petition to bypass.

ASSIGNMENTS OF ERROR

Meers assigns that the trial court erred in denying his motion for discharge and that the postconviction court erred in denying his claim that trial counsel was ineffective for failing to file a motion to quash the amended information. On cross-appeal, the State assigns that the postconviction court (1) lacked jurisdiction to order a new direct appeal from a pretrial order denying the motion to discharge; (2) erred in applying the reasoning of *Trotter, supra*, to conclude that prejudice was presumed from trial counsel's failure to perfect the pretrial appeal; and (3) erred in addressing the remainder of Meers' postconviction claims after ordering a new direct appeal.

ANALYSIS

[1,2] Where a defendant is denied his or her right to appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995). *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). The power to grant a new direct appeal is implicit in § 29-3001, and the district court has jurisdiction to exercise such a power where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings. *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002); *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976). In *McCracken*, we specifically rejected the State's contention that the power conferred by the postconviction act is limited to either setting aside a criminal judgment because of a violation of the defendant's constitutional rights or denying postconviction relief entirely. We held that in addition to the district court's express statutory power to void the entire criminal proceedings, a district court had implicit authority to grant a new direct appeal "where

the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings." *McCracken*, 260 Neb. at 245, 615 N.W.2d at 914.

Subsequently, in *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), we held that if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant *after* a trial, conviction, and sentence, prejudice to the defendant will be presumed under the test articulated in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), and need not be proved under the two-pronged test for determining ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In reaching this conclusion, we relied on cases equating the failure to perfect a direct appeal following conviction with a complete denial of any assistance of counsel at a critical stage of the proceeding. See, e.g., *Castellanos v. U.S.*, 26 F.3d 717 (7th Cir. 1994) (approved in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

[3,4] Unlike *Trotter, supra*; *McCracken, supra*; and other cases in which we have recognized a new direct appeal as an appropriate form of postconviction relief, the alleged deficiency of defense counsel in this case occurred *before*, not after, the defendant was convicted. A pretrial ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is final and appealable. *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997). The failure to file a timely appeal from such an order forecloses appellate review of the defendant's claim of denial of the right to a speedy trial. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). Here, Meers contends that his trial counsel should have perfected an appeal from the order denying his motion for discharge and that such appeal would have averted his trial and conviction. We agree with the State's argument on cross-appeal that our holdings in *McCracken, supra*; *Trotter, supra*; and related cases cannot be logically extended to permit the postconviction remedy of a new direct appeal where the claim of ineffective assistance of counsel is based upon acts or omissions occurring in the pretrial or trial stages of a criminal prosecution.

We reach this conclusion for two reasons. First, the rationale for granting a new direct appeal as postconviction relief does not apply where the alleged deficiency in the performance of counsel occurs prior to conviction. When a postconviction claim of ineffective assistance of counsel is based solely upon counsel's failure to perfect an appeal from a conviction, a new direct appeal permits restoration of the convicted defendant's rights and status at the time of counsel's deficient performance by affording the full statutory time to perfect and prosecute a direct appeal while not disturbing the conviction, unless the appeal discloses reversible error. Here, restoring the status quo at the time of the alleged deficient performance would require setting aside the conviction, which is not authorized by § 29-3001 unless the defendant first demonstrates a violation of his or her constitutional rights at the conviction proceedings.

Second, unlike the defendants in *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), and other cases in which we have approved a new direct appeal as a form of postconviction relief, Meers has not been completely deprived of a direct appeal. The absence of a timely appeal from the pretrial order denying discharge on speedy trial grounds foreclosed appellate review on that single issue, albeit a potentially dispositive one, but it did not affect the right to seek appellate review of other issues. This is evident from the fact that Meers' counsel perfected a direct appeal from his convictions and sentences, and this court fully considered and rejected his claimed errors relating to venue, sufficiency of the amended information and trial evidence, and the sentences imposed. *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999). Meers' motion for postconviction relief cannot be fairly construed as alleging that he was completely deprived of the assistance of counsel at either the pretrial, trial, or appellate stages of his criminal prosecution. Rather, his claim is analogous to those postconviction cases in which a convicted defendant contends that trial counsel was deficient in failing to raise and preserve specific issues for appellate review. In such cases, we have required the defendant to prove both deficient performance and resulting prejudice under the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See, e.g., *State v. Davlin*, 265 Neb. 386, 658

N.W.2d 1 (2003) (holding error in not objecting to jury instruction so that issue would be preserved for appellate review not prejudicial under second prong of *Strickland*); *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002) (affirming denial of postconviction relief based in part upon determination that counsel's failure to properly raise and preserve certain issues not prejudicial to defendant); *State v. Tucker*, 257 Neb. 496, 598 N.W.2d 742 (1999) (affirming denial of postconviction relief based in part upon determination that even if counsel had preserved motion to suppress for appeal, there was no reasonable probability that evidence would have been suppressed and that therefore defendant was not prejudiced).

We conclude that Meers' claim can and should be fully adjudicated within this postconviction action utilizing the *Strickland* test for determining the effectiveness of counsel. Thus, the critical issue is whether a timely appeal from the pretrial order denying absolute discharge would have resulted in a reversal and prevented a subsequent trial and conviction. Only if that question is resolved in the affirmative could the failure to perfect the appeal be deemed prejudicial in the sense that it would have altered the result of the prosecution. See, *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003). If it is determined that failure to perfect the appeal constituted deficient performance which was prejudicial under *Strickland*, the appropriate postconviction relief would not be a new direct appeal, but, rather, an order vacating the convictions and discharging Meers from custody. See *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002). This determination should be made in the first instance by the district court.

We therefore conclude that the district court erred in awarding Meers a new direct appeal instead of adjudicating the merits of Meers' speedy trial claim in the context of a *Strickland* prejudice analysis. Because the district court has therefore not yet fully adjudicated Meers' postconviction claims, neither of his assignments of error is ripe for appellate review at this time, and we do not reach them. On remand, the district court is directed to resolve Meers' claim that his trial counsel was ineffective in failing to perfect an appeal from the order denying his motion for discharge, utilizing the *Strickland* test as set forth

above. That determination, together with disposition of any other postconviction issues deemed necessary by the district court, should be included in a final order awarding or denying postconviction relief.

REVERSED AND REMANDED WITH DIRECTIONS.

JACQAUS L. MARTIN, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLANTS AND CROSS-APPELLEES.

671 N.W.2d 613

Filed November 21, 2003. No. S-03-681.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Actions: Public Officers and Employees: Immunity.** An action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity.
4. ____: ____: ____. Suits which seek to compel an affirmative action on the part of state officials are barred by sovereign immunity.
5. **Res Judicata: Collateral Attack.** The rule against collateral attacks on prior judgments is based upon the doctrine of res judicata.
6. **Res Judicata.** Res judicata is an affirmative defense which must ordinarily be pleaded to be available.
7. **Administrative Law: Statutes.** The authority to delegate discretionary and quasi-judicial powers to administrative agency subordinates is implied where the powers bestowed upon an agency head are impossible of personal execution.

Appeal from the District Court for Johnson County: DANIEL BRYAN, JR., Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and Linda L. Willard for appellants.

JacQaus L. Martin, pro se.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

GERRARD, J.

BACKGROUND

The plaintiff, JacQaus L. Martin, was committed to the custody of the Department of Correctional Services (DCS) on May 30, 1990, and is incarcerated at the Tecumseh State Correctional Institution (TSCI). Martin has been found guilty of misconduct at various disciplinary hearings and, as a result, has forfeited 32 months 15 days of good time. Of that time, forfeiture of 19 months 15 days was not personally approved by the chief executive officer of the TSCI. None of the forfeiture was personally approved by the Director of Correctional Services (Director).

Neb. Rev. Stat. § 83-1,107 (Reissue 1999) provides, in relevant part:

> (2) The chief executive officer of a facility shall reduce the term of a committed offender by six months for each year of the offender's term and pro rata for any part thereof which is less than a year.
>
> The total reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted from the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.
>
> (3) While the offender is in the custody of the department, reductions of terms granted pursuant to subsection (2) of this section may be forfeited, withheld, and restored *by the chief executive officer of the facility with the approval of the director* after the offender has been consulted regarding the charges of misconduct.

(Emphasis supplied.) We note that some of the statutes and regulations relevant to this appeal have been amended during Martin's incarceration. The parties have not presented any argument regarding these amendments, and we have determined that these changes do not affect our analysis of the instant appeal. Therefore, we will cite to the current statutory language for the sake of simplicity and convenience. See *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*, 259 Neb. 24, 607 N.W.2d 857 (2000).

On December 27, 2002, Martin filed a "42 U.S.C.A. § 1983 Civil Complaint, Petition For Declaratory, Injunctive & Other Equitable Relief/Damages" against the DCS, Director Harold W. Clarke, and various wardens and former wardens of the TSCI and Nebraska State Penitentiary, purportedly in both their official capacities and their individual capacities. The petition, liberally construed, alleges that the defendants violated several of Martin's constitutional rights by failing to perform their duty to personally review disciplinary actions under § 83-1,107. Martin sought declaratory and injunctive relief restoring his forfeited good time. Martin also sought injunctive relief "ordering Plaintiff [sic] immediate release from custody, and freedom, along with bus ticket to any destination chosen." Finally, Martin sought, as relevant to this appeal, money damages totaling $25,000,000 as compensation for violations of his constitutional rights.

In an order dated March 3, 2003, the district court struck Martin's 42 U.S.C. § 1983 (2000) claims from his petition. The basis for striking the 42 U.S.C. § 1983 claims was, apparently, that the action was brought against the State and state officials acting in their official capacities, and was barred by sovereign immunity. See, e.g., *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999) (neither State nor its officials acting in their official capacities are "persons" under 42 U.S.C. § 1983).

In an order dated June 5, 2003, the district court concluded that Martin's good time had been improperly forfeited and should be restored to Martin. The court concluded, in relevant part, that

> while Neb. Rev. Stat. § 83-173 allows the [D]irector to delegate *appropriate powers* and *duties* to department heads, it is not an appropriate power to delegate the forfeiture, withholding, and restoration of good time to the Chief Executive Officers of the facilities, in contravention of Neb. Rev. Stat. § 83-1,107.

(Emphasis in original.) The court ordered that 32 months 15 days of Martin's good time be restored. The State timely appealed, Martin cross-appealed, and we moved the case to our docket pursuant to our authority to regulate the caseloads of the

appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The State's amended brief assigns that the district court erred in finding that the Director could not delegate the authority to approve forfeiture of good time given to the Director in § 83-1,107(3). As developed by the arguments in the State's amended brief, (1) the State claims that the district court lacked jurisdiction over Martin's petition because (a) the State has sovereign immunity from declaratory judgments and Martin's petition fails to state a cause of action against the defendants in their individual capacities and (b) Martin is collaterally attacking his disciplinary action, and (2) the State claims that the Director's approval of forfeiture of good time is delegable.

On cross-appeal, Martin assigns that

> the lower courts errored [sic] by not grantting [sic] the Plaintiff the monetary relief that he seeks, sought in the original petition,for [sic] the damages that the 5th, and 8th Amendments violations [sic] of his U.S., and State Of Nebraska Constitutional Rights, pursuant to Neb. Rev. Stat. [§] 25-1146, for the overtime served.

STANDARD OF REVIEW

[1] This appeal presents questions of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. See *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003).

ANALYSIS

JURISDICTION

[2-4] We first consider the State's jurisdictional argument. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). The State argues that Martin's petition for declaratory judgment is barred by sovereign immunity. An action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity.

State ex rel. Steinke v. Lautenbaugh, 263 Neb. 652, 642 N.W.2d 132 (2002). However, suits which seek to compel an affirmative action on the part of state officials are barred by sovereign immunity. *Id.*

The facts of this case closely resemble those presented in *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997), *disapproved, Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999), in which an inmate brought a declaratory judgment action to determine whether DCS officials properly revoked his good time credit and to compel restitution of his good time credit. This court held that the inmate's action against the defendants was barred by sovereign immunity because he was seeking to compel an affirmative action on the part of the officials. See *id.* This court stated that the inmate's good time credit had already been taken away from him and that the inmate sought to compel immediate restitution of his good time credit. See *id.* The relief sought was affirmative and within the scope of sovereign immunity. See *id.* Therefore, the district court lacked subject matter jurisdiction. See *id.*

However, we overruled *Perryman* in *Johnson, supra.* In *Johnson*, an inmate brought a declaratory judgment action against officials of the DCS seeking declaratory relief regarding his rights under parole eligibility statutes and seeking restoration of his parole eligibility. We read the petition "as seeking a determination of whether defendants invalidly determined that he was not eligible for parole on the parole eligibility date he claims he was originally given." *Id.* at 320, 603 N.W.2d at 376. We held that the inmate sought to restrain the defendants from performing an invalid act, and we disapproved *Perryman, supra*, to the extent that it characterized such relief as affirmative. See *Johnson, supra.*

Relying in part upon *Johnson*, we also rejected the State's claim of sovereign immunity in *Lautenbaugh, supra.* In *Lautenbaugh*, the relators, a political candidate and an individual voter, brought an action against a county election commissioner seeking a writ of mandamus compelling the commissioner to restore the original district number to the adjusted territory of a school board election subdistrict. We concluded that the action was not, in reality, an action brought against the State or one of its

political subdivisions, because the action did not seek affirmative relief. See *id.* We noted that the basis for the relators' claims was that the election commissioner exceeded his statutory authority to adjust subdistrict boundaries, and the relators sought relief from what they alleged to be an invalid act or an abuse of authority by the election commissioner. See *id.* We stated that "[i]n this situation, the relief requested is affirmative only to the extent that it requests [the election commissioner's] actions be nullified if determined to be invalid." *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 662, 642 N.W.2d 132, 140 (2002). Because the mandamus was brought only to remedy alleged unlawful acts of the official, the court did not lack subject matter jurisdiction due to sovereign immunity. See *id.*

Based on our recent decisions in *Johnson* and *Lautenbaugh*, we conclude that the district court did not lack jurisdiction in the present case. The basis for Martin's claim is that the defendants exceeded their statutory authority in forfeiting Martin's good time credits, and his petition essentially seeks a declaration that the defendants have executed that forfeiture invalidly. Compare, *Lautenbaugh, supra*; *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999). The relief requested (at least, after dismissal of the 42 U.S.C. § 1983 claims) was affirmative only to the extent it requested that the defendants' actions be nullified if determined to be invalid. Compare *Lautenbaugh, supra*. Consequently, we conclude that the State's sovereign immunity argument is without merit, and the district court did not lack subject matter jurisdiction over Martin's petition.

[5] The State also argues, in what it claims is a jurisdictional defect, that the district court erred by permitting Martin to use a declaratory judgment action to collaterally attack disciplinary determinations that should have been directly appealed under the Administrative Procedure Act. See, e.g., *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991); *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985); *Dailey v. Nebraska Dept. of Corr. Servs.*, 6 Neb. App. 919, 578 N.W.2d 869 (1998). However, the rule against collateral attacks on prior judgments is based upon the doctrine of res judicata. See *Kirkland v. Abramson*, 248 Neb. 675, 538 N.W.2d 752 (1995)

(final judgment on merits of claim before administrative agency is res judicata and may not be relitigated). Cf. *Moore, supra.*

[6] Res judicata is an affirmative defense which must ordinarily be pleaded to be available. *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982). The State's answer to Martin's operative amended petition does not plead res judicata as a defense, nor does the record contain any indication that res judicata was raised as an issue by any filing in the district court. Compare *id.* While we may invoke the doctrine on our own motion, see *Abramson, supra*, we decline to do so in this case, and we do not consider the State's argument that Martin's petition is a collateral attack on a prior judgment.

DELEGATION OF AUTHORITY

We next turn to the State's argument that the district court erred in concluding that § 83-1,107 requires the Director to personally approve forfeitures of good time and that this authority is nondelegable. We confronted a similar issue in *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986). In *Fulmer*, the plaintiff's motor vehicle operator's license was revoked by the Department of Motor Vehicles (DMV) after he was arrested for driving while intoxicated but refused to consent to a body fluid test. The statute then in effect, Neb. Rev. Stat. § 39-669.16 (Reissue 1984), provided in relevant part that

> [u]pon receipt of the officer's report of such refusal, the Director of Motor Vehicles shall notify such person of a date for hearing before him or her as to the reasonableness of the refusal to submit to the test. . . . After granting the person an opportunity to be heard on such issue, if it is not shown to the director that such refusal to submit to such chemical test was reasonable, the director shall summarily revoke the motor vehicle operator's license or nonresident operating privilege of such person for a period of one year from the date of such order. For the purpose of such hearing, the director may appoint an examiner who shall have such power to preside at such hearing, to administer oaths, examine witnesses and take testimony, and thereafter report the same to the director.

In *Fulmer, supra*, a hearing was held before a hearing officer, as provided by statute, and the hearing officer delivered a synopsis of the testimony to the deputy director of the DMV. The decision to revoke the plaintiff's license was made by the deputy director. See *id.* The plaintiff appealed the revocation to this court, arguing that the director of the DMV had illegally delegated her authority to determine whether the plaintiff's license should be revoked. See *id.*

[7] We rejected the plaintiff's argument. We cited Neb. Rev. Stat. § 60-1503 (Reissue 1984), which provided that "[t]he Director of Motor Vehicles shall have authority to employ such personnel, including legal, and technical advisors as may be necessary to carry out the duties of his [or her] office." We noted the testimony of the director of the DMV that the DMV reviewed, at that time, up to 1,600 implied consent cases a year, making it impossible for her to personally review every case. See *Fulmer, supra*. We held that "[t]he authority to delegate discretionary and quasi-judicial powers to agency subordinates is implied where the powers bestowed upon an agency head 'are impossible of personal execution.' " *Id.* at 585, 379 N.W.2d at 739, quoting 2 Am. Jur. 2d *Administrative Law* § 223 (1962). We concluded that

> "[t]he law does not preclude practicable administrative procedure in obtaining the aid of assistants in the department, apparently to any extent *so long as the agency does not abdicate its power and responsibility and preserves for itself the right to make the final decision.*" The authority of the director to delegate her implied consent revocation duties is fairly implied by § 60-1503. We conclude that the appellee director did not unlawfully delegate her responsibilities under § 39-669.16.

(Emphasis supplied.) *Fulmer v. Jensen*, 221 Neb. 582, 585, 379 N.W.2d 736, 739 (1986), quoting 2 Am. Jur. 2d, *supra*, § 224. Accord *Koepp v. Jensen*, 230 Neb. 489, 432 N.W.2d 237 (1988).

The statutory provisions relevant to the instant case set forth the authority of the Director to delegate his duties even more explicitly than the statute upon which we relied in *Fulmer, supra*. Like the statute at issue in *Fulmer*, § 83-1,107 explicitly assigns the duty of reviewing forfeiture of good time to the Director. However, Neb. Rev. Stat. § 83-173(4) and (5) (Reissue

1999) specifically provides that the Director of the DCS shall "[a]ppoint and remove the chief executive officer of each [correctional] facility and *delegate appropriate powers and duties to him or her*" and "[a]ppoint and remove employees of the department and *delegate appropriate powers and duties to them*." (Emphasis supplied.) Neb. Rev. Stat. § 83-177 (Reissue 1999) further provides, in relevant part, that

> [d]eputy or associate wardens or assistant superintendents in each facility shall advise and be responsible to the chief executive officer of the facility and *shall have such powers and duties as the chief executive officer delegates to them* in accordance with law or pursuant to the directions of the director.

(Emphasis supplied.) That authority has been exercised, as relevant to this appeal, by 68 Neb. Admin. Code, ch. 6, § 007 (2000), which provides that "[t]he disciplinary committees of each facility shall conduct hearings, render decisions, and impose appropriate penalties for violations of the Code of Offenses, with the review and approval of the Chief Executive Officer or designee." See, also, 68 Neb. Admin. Code, ch. 6, § 008 (2000) (committees may impose loss of good time).

The record also contains an affidavit, admitted without objection, in which the Director averred that, pursuant to § 007, he had delegated his duty to approve the forfeiture, withholding, and restoration of good time to the chief executive officers of DCS facilities. The Director averred that the DCS "held approximately 16,765 disciplinary hearings during 2002[,] any one of which could have resulted in loss of good time[,] and nearly 1700 of which during that time period did result in loss of good time." The Director explained that his position involved a large number of responsibilities and that it was "physically impossible for [him] to review each and every loss of good time by inmates and to perform the other duties of [his] office without delegating duties."

Based on the record before us and the relevant statutes, we conclude that the Director, and the chief executive officers of the TSCI, acted within their authority in delegating to subordinate officials the duty to approve the forfeiture of good time. It is only possible for an agency head to delegate duties that have

been conferred upon the delegator in the first instance. While § 83-1,107 provides that good time may be "forfeited . . . by the chief executive officer of the facility with the approval of the director," we do not read § 83-1,107 as excepting the duty to approve the forfeiture of good time from their authority to delegate duties, derived from the general principles of administrative law we explained in *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986), and expressly set forth in §§ 83-173 and 83-177. In other words, the Department, by setting up a practical system of determining the forfeiture (or nonforfeiture) of good time with due process fully preserved, has in no way abdicated its power and responsibility, and in fact " 'preserve[d] for itself the right to make the final decision.' " See *Fulmer*, 221 Neb. at 585, 379 N.W.2d at 739. Consequently, we conclude that the State's assignment of error has merit, and the judgment of the district court must be reversed.

Martin argues, on cross-appeal, that he was entitled to a number of additional remedies that the district court failed to award, including monetary damages. However, as best we can determine, all of Martin's arguments are premised on the underlying statutory argument that we rejected above. Therefore, based on our analysis of the State's assignment of error, we also conclude that Martin's cross-appeal is without merit.

CONCLUSION

The district court erred in concluding that the Director's duty to approve the forfeiture of good time was nondelegable. The judgment of the district court is reversed, and the cause is remanded with directions to dismiss Martin's petition in its entirety.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., not participating.

STEPHAN, J., dissenting.

Neb. Rev. Stat. § 83-1,107(3) (Reissue 1999) authorizes certain actions to be taken with respect to an offender's "good time" if the offender is guilty of misconduct while in the custody of the Department of Correctional Services. The statute provides that good time may be "forfeited, withheld, and restored *by the chief executive officer of the facility with the approval of the director* after the offender has been consulted regarding the charges of

misconduct." (Emphasis supplied.) From the plain language of the statute, I understand this is to be a two-step procedure, with each step occurring at a different level of the administrative structure. The initial decision to take away an offender's good time is to be made at the facility level by the chief executive of the facility. That decision must then be approved at the departmental level by the Director of Correctional Services (Director).

I agree with the general principle that under *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986), and applicable statutory authority, certain administrative powers may be lawfully delegated to subordinates. I do not question the delegation of the chief executive officer's responsibility under § 83-1,107 to the disciplinary committee at the facility under 68 Neb. Admin. Code, ch. 6, §§ 005, 007, and 008 (2000). That delegation involves the first step of the good time forfeiture process, i.e., the initial determination that good time should be forfeited. In my view, as long as this determination is made at the facility level, it does not matter whether it is made personally by the chief executive officer or by the disciplinary committee of that facility pursuant to a delegation of authority.

However, the second step of the process is problematic in this case. Under § 83-1,107(3), the Director must approve a forfeiture of good time that has been determined at the facility level. I agree that the Director could not be expected to review each case personally and that thus delegation *to someone* is permissible under *Fulmer*. Moreover, as the majority correctly notes, the Director has specific authority to delegate statutory responsibility to subordinates. But such authority is not carte blanche. Under Neb. Rev. Stat. § 83-173(4) (Reissue 1999), the Director may delegate "appropriate powers and duties" to the chief executive officer of each facility. A separate subsection of that statute, § 83-173(5), authorizes the Director to delegate "appropriate powers and duties" to "employees of the department." The fact that the statute makes a distinction between delegation of authority to chief executive officers of correctional facilities and delegation to other department employees indicates that some powers and duties of the director may be appropriately delegated to a chief executive officer under § 83-173(4), while others may not and

must be delegated, if at all, to some other departmental employee pursuant to § 83-173(5).

I agree with the district court that the Director's power to approve a forfeiture of good time is not an appropriate power for delegation to the chief executive officer of the facility where the prisoner is in custody. Such a delegation would alter the statutory scheme of determination of forfeiture at the facility level subject to approval at the departmental level by placing the entire process at the facility level. In effect, the chief executive officer would be given authority to approve his or her own actions. An administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002); *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997). It logically follows that administrative officers may not delegate their statutory powers and duties to subordinates in such a manner as to modify a specific statutory procedure.

In my opinion, the judgment of the district court is correct and should be affirmed. I therefore respectfully dissent.

CONNOLLY, J., joins in this dissent.

TYLESHA L. MASON AND FERNANDEZ MASON, BY AND THROUGH LISA CANNON, AS THEIR NEXT FRIEND, ET AL., APPELLEES, V. STATE OF NEBRASKA ET AL., APPELLANTS.

672 N.W.2d 28

Filed December 5, 2003. No. S-01-1265.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Statutes: Legislature: Intent.** When a statute is ambiguous and must be construed, the principal objective is to determine and give effect to the legislative intent of the enactment.
3. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.

4. **Statutes: Legislature: Intent.** In construing an ambiguous statute, a court may examine the legislative history of the act in question to assist in ascertaining the intent of the Legislature.
5. **Constitutional Law: Equal Protection.** The Equal Protection Clause of the U.S. Constitution does not forbid classifications; it simply keeps governmental decision-makers from treating differently persons who are in all relevant respects alike.
6. **Equal Protection: Statutes.** If no suspect classification or fundamental right is implicated by an equal protection challenge, a legislative enactment will be viewed as a valid exercise of state power if it is rationally related to a legitimate governmental purpose.
7. **Constitutional Law: Equal Protection.** The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives.
8. **Statutes: Public Health and Welfare: Contracts: Words and Phrases.** "Participation in the program," within the meaning of Neb. Rev. Stat. § 68-1724(2)(b) (Reissue 1996), refers to participation in a self-sufficiency contract as described in Neb. Rev. Stat. § 68-1719 (Reissue 1996), and the family cap established by § 68-1724(2)(b) does not apply to families who are not participating in a self-sufficiency contract.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Don Stenberg, Attorney General, Royce N. Harper, and Michael J. Rumbaugh, Special Assistant Attorney General, for appellants.

Rebecca L. Gould and D. Milo Mumgaard, of Nebraska Appleseed Center for Law in the Public Interest Welfare Due Process Project, Martha F. Davis and Geoffrey A. Boehm, of NOW Legal Defense and Education Fund, Sue Ellen Wall, and Susan A. Koenig for appellees.

Lenora M. Lapidus, Emily J. Martin, and Amy A. Miller, for amici curiae American Civil Liberties Union Foundation Women's Rights Project and American Civil Liberties Union Foundation of Nebraska.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Nebraska's Welfare Reform Act (Act), Neb. Rev. Stat. § 68-1708 et seq. (Reissue 1996 & Cum. Supp. 2002), generally requires that while receiving cash assistance benefits, recipient

families in which at least one adult has the capacity to work must participate in a "self-sufficiency contract," which sets forth certain approved work-related activities in which recipients must engage. See *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002). When no adult in the family has the capacity to work, however, no self-sufficiency contract is required. See 468 Neb. Admin. Code, ch. 2, § 020.01(3)(b) (2002).

The Act also contains a "family cap," which generally operates to prevent cash assistance benefits from increasing because a child is born into a recipient family more than 10 months after the family accepts cash assistance. See § 68-1724(2)(b); 468 Neb. Admin. Code, ch. 2, § 007.01 (2001). The issue presented in this appeal is whether the Legislature intended the family cap to apply when there is no adult in the family with the capacity to work.

BACKGROUND

The underlying facts of this case are essentially undisputed. The plaintiffs are children from families that are headed by single mothers and have received cash assistance payments from the aid to dependent children (ADC) program. See Neb. Rev. Stat. § 43-501 et seq. (Reissue 1998 & Cum. Supp. 2002). See, generally, *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968); *Knowlton v. Harvey*, 249 Neb. 693, 545 N.W.2d 434 (1996) (describing ADC). The defendants are the State of Nebraska, the Department of Health and Human Services, and the department's director (collectively the Department). None of the families participate in a self-sufficiency contract, and the Department does not dispute that each plaintiff's mother is disabled and has no capacity to work within the meaning of the Act. The plaintiffs were each born more than 10 months after their mothers began receiving ADC benefits. Each family was informed by the Department that, due to the family cap, the family's cash assistance payments would not be increased because of the additional child.

The plaintiffs filed a class action in the district court, seeking injunctive and declaratory relief based on their claim that the family cap does not apply to families without a self-sufficiency contract. (The Department's appeal presents no argument with respect to class certification or the plaintiffs' choice to collaterally

attack the Department's denial of increased ADC benefits.) The court determined that the family cap did not apply to families without a self-sufficiency contract and enjoined the Department from enforcing the family cap under those circumstances. The Department appeals.

ASSIGNMENTS OF ERROR

The Department assigns, as consolidated and restated, that the court erred in (1) holding that the family cap does not apply to the plaintiffs' class and (2) not finding that the plaintiffs' interpretation of the family cap would result in unconstitutional discrimination.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

ANALYSIS

Before addressing the precise issue of statutory interpretation that is presented by this appeal, it is necessary to examine, in more detail, the statutory framework of the Act. The intent of the Act was, in part, to reform the welfare system to remove disincentives to employment, promote economic self-sufficiency, and provide individuals and families with the support needed to move from public assistance to economic self-sufficiency. See, § 68-1709; *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002). The Act was intended to change public assistance from entitlements to temporary, "contract-based" support, accomplished through individualized assessments of the personal and economic resources of the applicant and the use of individualized self-sufficiency contracts. See, § 68-1709; *Kosmicki, supra*. To that end, the Act limits most recipients of public assistance to no more than 2 years of cash assistance and generally requires that while receiving cash assistance benefits, recipients engage in certain approved work-related activities. See *Kosmicki, supra*. These work-related activities are provided through the "Employment First" program. See 468 Neb. Admin. Code, ch. 2, § 020 (2002).

When an individual or family applies for public assistance benefits, a comprehensive assessment of the applicant's personal and financial assets is conducted by the Department. Based on the results of the assessment, the applicant and Department case manager may develop a self-sufficiency contract detailing the responsibilities, roles, and expectations of the applicant family, the case manager, and other service providers. See, §§ 68-1719 and 68-1720; *Kosmicki, supra.* Cash assistance is then provided only while recipients are actively engaged in the specific Employment First activities outlined in the self-sufficiency contract. See, § 68-1723; *Kosmicki, supra.*

However, those who are found to be incapacitated, and unable to engage in employment or training, are not required to participate in the self-sufficiency contract. See § 020.01(3)(b). Instead, these individuals and families are placed in the "non-time limited benefit group." See *id.* Non-time-limited assistance is intended for families for whom full self-sufficiency is not possible, because of the mental, emotional, or physical conditions of the adult members included in the family unit. See 468 Neb. Admin. Code, ch. 2, § 020.09A (2002). Families on non-time-limited assistance are, as the term suggests, not subject to the time limits of the Act. *Id.* Each plaintiff's family has been placed, due to disability, in the non-time-limited benefit group.

The Act provides that for families receiving cash assistance benefits, the "payment standard shall be based upon family size." § 68-1724(2)(b). The family cap provision specifically states, as relevant, that "[a]ny child born into the recipient family after the initial ten months of participation in the program shall not increase the cash assistance payment . . . ." *Id.* The Department has interpreted the phrase "participation in the program" to refer to the receipt of cash assistance benefits such as ADC. Thus, the Department has promulgated regulations which apply the family cap to families who receive benefits pursuant to a non-time-limited agreement. See § 007.01. Pursuant to § 007.01, the Department refused to provide additional benefits to the plaintiffs' families when their births increased the size of their families.

The plaintiffs argue, on the other hand, that the phrase "participation in the program" refers not to the receipt of benefits, but to a self-sufficiency contract. Thus, the plaintiffs contend that the

family cap created by § 68-1724(2)(b) does not apply to families in the non-time-limited benefit group and that the Department exceeded its statutory authority when it adopted regulations that prevented the plaintiffs' cash assistance benefits from increasing when their families grew. The parties' disagreement over the meaning of § 68-1724(2)(b) is the issue now before this court. The Department argues that the district court erred in rejecting the Department's interpretation of the statute.

[2] It is not clear, from the language of the Act, in which "program" a recipient must be participating for the family cap to apply pursuant to § 68-1724(2)(b). The language of the family cap can be read to refer to the ADC program, but can also be read to refer to a self-sufficiency contract. Consequently, we look to the purposes of the Act and ADC benefits and the legislative history of the Act in order to ascertain the Legislature's intent. When a statute is ambiguous and must be construed, the principal objective is to determine and give effect to the legislative intent of the enactment. *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). For the reasons that follow, we conclude that the Legislature intended the family cap to apply only to families participating in the Employment First program under a self-sufficiency contract and that the Department's assignments of error to the contrary are without merit.

As previously noted, the Legislature declared that the intent of the Act was, in part, to reform the welfare system to remove disincentives to work, promote economic self-sufficiency, and provide individuals and families the support needed to move from public assistance to economic self-sufficiency. See § 68-1709. However, § 68-1709 also expresses the Legislature's intent to "provid[e] continuing assistance and support . . . for individuals and families with physical, mental, or intellectual limitations preventing total economic self-sufficiency." Furthermore, protection of dependent children is the paramount goal of ADC. *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). We have stated that the ADC program aims, among other things, "to encourage the care of dependent children in their own homes by parents who experience a substantial reduction in their ability to care for or support their dependent children." *Knowlton v. Harvey*, 249 Neb. 693, 703, 545 N.W.2d 434, 441 (1996).

The Department's interpretation of the family cap does not serve to advance any of these expressed purposes. To the extent that the family cap serves to promote a transition from public assistance to economic self-sufficiency, there is little to be gained in applying the family cap to families who receive non-time-limited assistance because full self-sufficiency is unrealistic. Furthermore, the Department's interpretation of the family cap does not advance the Legislature's intent to provide continuing assistance and support for individuals and families with disabilities, and undermines the goal of the ADC program to protect dependent children.

[3] In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). The expressed purposes of the Act and ADC benefits are inconsistent with the Department's interpretation of § 68-1724(2)(b).

[4] Furthermore, the legislative history of the Act does not support the Department's interpretation of § 68-1724(2)(b). In construing an ambiguous statute, a court may examine the legislative history of the act in question to assist in ascertaining the intent of the Legislature. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002). The primary purpose of the Act is to require adults "*who are able to work* . . . to participate in one or more ways, such as education, job seeking skills training, work experience, job search or employment." (Emphasis supplied.) Introducer's Statement of Intent, L.B. 1224, Committee on Health and Human Services, 93d Leg., 1st Sess. (Feb. 10, 1994). As explained by then Governor E. Benjamin Nelson, testifying in support of L.B. 1224:

> The goal of LB 1224 is to move recipients who are able to work from welfare to productive work so that they are able to support their families and themselves as well. These initiatives will not excuse government from the responsibility of assisting people who truly depend on public assistance for their ongoing day-to-day survival. . . . In short, we want

> to reshape Nebraska's public policy to keep people out of the welfare system by focusing on job training and decent jobs, jobs that will enable people to support their families, to help all who are able to move quickly beyond welfare to the job market and a decent job. For those who are unable to leave public assistance, we want to support them also in keeping their human dignity.

Committee on Health and Human Services Hearing, 93d Leg., 1st Sess. 5 (Feb. 10, 1994). "[T]hose folks who are unable to work will be taken care of in the manner as they have in the past and we will work to support them." *Id.* at 7.

Similarly, Mary Dean Harvey, director of the then Department of Social Services, testified that "[o]nly those persons who are recipients of Aid to Dependent Children who are *able to work* will be included in this first cut of the project." (Emphasis supplied.) *Id.* at 39. Harvey testified, regarding the family cap, that "[c]hildren born to a family after the initial ten months of program participation will not increase the cash participation" because "[t]he cash assistance payment standard will be based on the family size *at the time of the contract.*" (Emphasis supplied.) *Id.* at 42. Harvey's testimony that the 10-month period would commence "at the time of the contract" suggests that the "program" at issue is based on participation in a self-sufficiency contract.

Furthermore, the family cap was extensively discussed during the floor debate on L.B. 1224, and an amendment to the bill was offered that would have removed the family cap. In speaking against that amendment, Senators Don Wesely and Jessie Rasmussen each explained that the family cap was premised on the existence and obligations of a self-sufficiency contract. As Senator Wesely explained:

> The idea is you come into ADC, you sign the self-sufficiency contract, that's a contract between the state and the family . . . . Part of the contract is envisioned to say this amount of children that now are in the family will be covered and have this assistance. . . . But if, ten months after that contract, you bear a child, what we're saying is we signed a contract, we had an understanding of what the conditions were and a decision was made to have another child . . . there will not be the additional [cash assistance].

Floor Debate, 93d Leg., 1st Sess. 11940 (Mar. 29, 1994). Accord Floor Debate, L.B. 455, 94th Leg., 1st Sess. 7966-67 (May 23, 1995). See, also, Floor Debate, L.B. 1224, 93d Leg., 1st Sess. 11951 (Mar. 29, 1994) (remarks of Senator Rasmussen); Floor Debate, L.B. 455, 94th Leg., 1st Sess. 5014 (Apr. 20, 1995) (remarks of Senator Connie Day).

Read as a whole, the legislative history indicates that the Legislature intended the family cap to apply to individuals and families participating in the Employment First program pursuant to a self-sufficiency contract. Discussion of the family cap was focused on the need to promote self-sufficiency, and to the extent that individuals and families unable to achieve self-sufficiency were discussed, it was indicated that their support would not be substantially affected by the Act. There is, at the very least, no evidence to support applying the family cap to families in the non-time-limited benefit group, and in the absence of that clearly expressed intent, we must construe § 68-1724(2)(b) to effectuate the beneficent purposes of the Act and the ADC program. Cf., *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995) (Employment Security Law liberally construed to accomplish its beneficent purposes); *Belitz v. City of Omaha*, 172 Neb. 36, 108 N.W.2d 421 (1961) (pension laws, as statutes of beneficial character, should be liberally construed in favor of those intended to be benefited).

The Department argues that the district court's interpretation of the family cap could hurt some ADC recipients. The Department contends that some families receive child support on behalf of newly born children and that those families would be required to turn that child support over to the Department if the families received ADC cash assistance for the same children. The Department's argument fails for two reasons. First, while some families receive child support and might lose money as a result of accepting ADC benefits, many other families are unable to collect child support, and would benefit from additional ADC cash assistance. In other words, no matter how the cap is applied, some families will benefit, while others may be disadvantaged. The Department's argument provides no basis for preferring one interpretation over the other.

More significant, however, is that the objective of statutory interpretation is to determine and give effect to the intent of the Legislature. See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). The purpose of the family cap is obviously not to protect families' abilities to retain child support payments. Because the Department's observations regarding child support do not illuminate legislative intent, they are irrelevant to our interpretation of the family cap.

Finally, the Department argues that the district court's interpretation of § 68-1724(2)(b) would render the family cap unconstitutional. The Department notes, correctly, that when a challenged statute is susceptible to more than one reasonable construction, a court uses the construction that will achieve the purposes of the statute and preserve the statute's validity. *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997). The Department contends that we should adopt its interpretation of the family cap in order to prevent the family cap from violating the Equal Protection Clause of the U.S. Constitution.

The Department's argument is that the equal protection rights of those able to work would be violated if the family cap was applied to individuals and families with the capacity to work, but not to individuals and families without the capacity to work. The Department asserts that the family cap must "uniformly be applied to all participants in the ADC program." Brief for appellant at 21.

This argument is without merit, for which the Department should be thankful. The Department may be overlooking the implications of its advocacy in this particular appeal. The Department's equal protection analysis could, if adopted, result in the invalidation of the entire Act. After all, the Act is premised on the distinction between families participating in self-sufficiency contracts and those receiving non-time-limited benefits. Logically, the "uniform" treatment urged by the Department would mean uniform application not only of the family cap, but *all* the requirements of the Act—including, for example, time-limited benefits, work-related activities, and self-sufficiency contracts.

[5-7] The Department's argument fails, however, because there is a rational basis for treating the plaintiffs differently from others who are subject to the family cap. The Equal Protection Clause of the U.S. Constitution does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). Since no suspect classification or fundamental right is implicated in this case, the Act will be viewed as a valid exercise of state power if it is rationally related to a legitimate governmental purpose. See *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998). The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

As previously noted, families are placed in the non-time-limited benefit group when full self-sufficiency for the family is not possible. See § 020.09A. The legitimate objectives of the Act are to provide individuals and families the support needed to move from public assistance to economic self-sufficiency, while also providing continuing assistance to those for whom full self-sufficiency is not possible. See § 68-1709. Enforcing the family cap on those who are working toward self-sufficiency, but not on those who are incapable of full self-sufficiency, is rationally related to those objectives. Thus, the Equal Protection Clause is satisfied, and the Department's assignment of error is without merit.

[8] For the foregoing reasons, we hold that "participation in the program," within the meaning of § 68-1724(2)(b), refers to participation in a self-sufficiency contract as described in § 68-1719 and that the family cap established by § 68-1724(2)(b) does not apply to families who are not participating in a self-sufficiency contract. The decision of the district court to this effect was correct and is affirmed.

CONCLUSION

We conclude, based on our review of the statutes and legislative history, that the family cap established by § 68-1724(2)(b)

was not intended to apply to families in which there is no adult with the capacity to work. Absent a clearly expressed legislative intent to apply the family cap to such families, we must construe the Act in the manner which best achieves its beneficent purposes. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF STEVEN K., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. STEVEN K., APPELLANT.
IN RE INTEREST OF CASSANDRA M.,
A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
CASSANDRA M., APPELLANT.

671 N.W.2d 777

Filed December 5, 2003. Nos. S-02-941, S-02-942.

Petitions for further review from the Nebraska Court of Appeals, HANNON and MOORE, Judges, and BUCKLEY, District Judge, Retired, on appeal thereto from the Separate Juvenile Court of Douglas County, ELIZABETH G. CRNKOVICH, Judge. Appeal in No. S-02-941 dismissed. Judgment of Court of Appeals in No. S-02-942 affirmed.

Thomas C. Riley, Douglas County Public Defender, and John J. Jedlicka for appellant Steven K.

Thomas C. Riley, Douglas County Public Defender, and Katie M. Anderson for appellant Cassandra M.

James S. Jansen, Douglas County Attorney, Jennifer L.K. Stevens, Nicole Brundo Goaley, and Matthew R. Kahler for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

HENDRY, C.J.

In these appeals, the Douglas County Separate Juvenile Court denied a juvenile's motion to terminate the court's jurisdiction

and a juvenile's petition to dismiss after each juvenile married. The Nebraska Court of Appeals reversed after determining that marriage terminates the minority of a juvenile and, therefore, ends the jurisdiction of the juvenile court. See *In re Interest of Steven K.*, 11 Neb. App. 828, 661 N.W.2d 320 (2003). We granted the State's petition for further review. We dismiss one of the appeals, and in the other, we affirm the judgment of the Court of Appeals.

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). 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. *Id.*

A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Id.* A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Id.* Thus, this court must first determine whether Steven K.'s appeal is moot.

In case No. S-02-941, the record before us indicates that Steven was born on July 12, 1984, and has since attained the age of 19 years. As a result, regardless of marital status, the jurisdiction of the juvenile court as to Steven has terminated pursuant to Neb. Rev. Stat. §§ 43-245 and 43-247 (Cum. Supp. 2002). As such, we determine the legal issue presented in this appeal is moot and further determine that said issue does not qualify for review under the public interest exception to the mootness doctrine.

In view of the conclusion that this case presents no justiciable issue, the appeal is dismissed.

In case No. S-02-942, having reviewed the briefs and record, and having heard oral arguments, we conclude on further review that the decision of the Court of Appeals concerning Cassandra M. in *In re Interest of Steven K., supra*, is correct and accordingly affirm the decision of the Court of Appeals.

APPEAL IN NO. S-02-941 DISMISSED.
JUDGMENT IN NO. S-02-942 AFFIRMED.

McCORMACK, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. STUART B. MILLS, RESPONDENT.

671 N.W.2d 765

Filed December 5, 2003. No. S-02-1085.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the court may, at its discretion, adopt the findings of the referee as final and conclusive.
4. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
5. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
6. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events and throughout the proceeding.
7. ____. Pursuant to Neb. Ct. R. of Discipline 4 (rev. 2001), the Nebraska Supreme Court may consider any of the following as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
8. ____. The propriety of a disciplinary sanction must be considered with reference to the sanctions imposed by the Nebraska Supreme Court in prior cases presenting similar circumstances.
9. ____. Before imposing a disciplinary sanction, the Nebraska Supreme Court must also consider any mitigating factors present.
10. ____. In an attorney discipline proceeding, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation.
11. ____. An attorney's cooperation during the disciplinary proceedings is considered as a factor in mitigation.
12. ____. An attorney's admission of responsibility for his or her actions reflects positively upon his or her attitude and character and is to be considered in determining the appropriate discipline.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Robert F. Bartle, of Bartle & Geier Law Firm, for respondent.

HENDRY, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

The office of the Counsel for Discipline of the Nebraska Supreme Court filed amended formal charges against respondent, Stuart B. Mills. After a formal hearing, the referee concluded that Mills had violated the Code of Professional Responsibility and recommended that Mills be suspended from the practice of law for a period of 5 months. Both the Counsel for Discipline and Mills filed exceptions to the referee's recommended sanction.

FACTUAL BACKGROUND

Mills was admitted to the practice of law in the State of Nebraska on January 22, 1973. The charges in this case arise from Mills' representation of Cheryl Borgelt, personal representative of the estate of David Borgelt. David died intestate in Cuming County, Nebraska, on July 28, 1998, and was survived by his wife, Cheryl, five adult children, and several grandchildren. Following David's death, Cheryl retained Mills to assist her in the estate proceedings. Mills testified that the Borgelt estate was the largest he had ever handled.

Due to David's intestacy, as well as the size of the estate, consideration was given as to the best method to minimize or defer estate taxes. The method chosen was renunciation, wherein the Borgelts' adult children would renounce any claim they had to the Borgelt estate so that the property could pass directly to Cheryl. It was further determined that when necessary, the Borgelts' adult children would renounce on behalf of their minor children. Mills testified that he had never handled an estate in which a renunciation or disclaimer was used. Although Mills states that he "did not necessarily agree that the renunciation process would necessarily be in the best interest of the client,"

brief for respondent at 3, Mills ultimately advised Cheryl to proceed with renunciation.

Prior to retaining Mills, the record discloses that Cheryl met with another attorney regarding the feasibility of a renunciation plan. That attorney informed Cheryl that the Borgelts' children could not unilaterally renounce on behalf of their minor children. The record further shows that Mills was aware of that attorney's opinion at the time he undertook his representation of Cheryl and the estate.

Before recommending that the adult children renounce not only their interests in the estate but also that of their minor children, Mills contacted an attorney employed in the estate tax division of the Internal Revenue Service (IRS) with whom Mills had "developed a working relationship, long-standing in nature." Brief for respondent at 3. Mills' purpose in contacting the attorney was to ascertain whether renunciation would be permissible in the circumstances of the Borgelt estate. The attorney told Mills that he believed renunciation would be permissible. This discussion was not confirmed in writing, and Mills did no further research on the issue. Mills acknowledged in his testimony before the referee that he should not have relied on the attorney's belief. It was later determined that under the circumstances presented, the Borgelts' adult children could not renounce their respective minor children's interest without court approval.

The renunciations prepared by Mills required that the signatures of those executing the renunciations be notarized. Since several of the Borgelt children lived outside the Cuming County area, their renunciations were sent by mail. Mills requested those children living outside the area to sign and return the renunciations to him, at which time he would notarize the signatures. Upon receipt, Mills notarized the renunciations despite the fact that he had not witnessed the children's signing the documents.

In addition to notarizing the documents in this manner, Mills directed his secretary to alter the dates on which the Borgelt children had actually signed the renunciations so that they were uniformly dated March 25, 1999, which the secretary accomplished by using "white out." Mills also notarized several warranty deeds signed by the Borgelt children, again without witnessing their signatures. To those deeds, Mills affixed a date of

April 8, 1999, although that was not the date on which the deeds were signed.

Mills believed all of these steps were required to be completed within 9 months of David's death. The record indicates, however, that both the renunciations and the deeds were actually circulating amongst the Borgelt family in May 1999, which was beyond the 9-month postdeath time limitation of April 28, 1999.

At the hearing before the referee, Mills testified that he mistakenly believed it was sufficient that the renunciations simply be signed within 9 months of David's death, and that filing within that time period was not required. See, generally, Neb. Rev. Stat. § 30-2352(b) (Reissue 1995). Federal estate tax return form 706 (Form 706) was completed and filed on March 25, 1999. The renunciations were filed with the county court for Cuming County on June 30, 1999, and the deeds were filed with the register of deeds of Cuming County on that same date.

In reviewing copies of the renunciations, Michele Moser, the IRS attorney assigned to examine the tax return, "noted that the renunciations were not timely filed." In addition, Moser believed there were indications suggesting the renunciations were not properly dated. Moser then traveled to Cuming County to examine the original renunciations. Upon examination, Moser observed that most of the renunciations contained two dates, a typewritten date over the "white out" and a handwritten date under the "white out."

When Moser contacted Mills concerning these discrepancies, Mills was not truthful about the date the renunciations were signed or in whose presence the renunciations were acknowledged. Mills also told Moser he did not know why "white out" had been used on the renunciations, claiming it must have been done by his secretary for appearance purposes. Mills further told Moser that the renunciations were received by the personal representative prior to March 25, 1999, the date Form 706 was filed.

After Mills had been contacted by Moser, Mills wrote a letter to Cheryl dated June 2, 2000, which stated in part, "I left a message on your answering machine this morning. It is critical that in the event [Moser] calls any of your children that they tell her they were in Wisner on March 25, 1999 and signed the renunciation (disclaimer) in my presence."

Eventually, Mills admitted his wrongdoing and a new attorney was retained by Cheryl to represent the Borgelt estate. The record indicates that during the IRS investigation of the circumstances surrounding the filing of Form 706, neither Cheryl nor her children provided any false or inaccurate information to the IRS and, further, that no family member was the focus of any criminal investigation. The record further indicates that Cheryl and the estate suffered a financial loss due to Mills' actions. Also, at the time of Mills' hearing, the potential existed for additional IRS penalties resulting from these events.

Amended formal charges were filed against Mills in this court, alleging he violated the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (3) Engage in illegal conduct involving moral turpitude.
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
>
> . . . .
>
> DR 6-101 Failing to Act Competently.
>
> (A) A lawyer shall not:
>
> (1) Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.
>
> (2) Handle a legal matter without preparation adequate in the circumstances.
>
> (3) Neglect a legal matter entrusted to him or her.
>
> . . . .
>
> DR 7-102 Representing a Client Within the Bounds of the Law.
>
> (A) In his or her representation of a client, a lawyer shall not:
>
> . . . .

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

(7) Counsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

It was further alleged that Mills' conduct violated Neb. Rev. Stat. § 76-218 (Reissue 1996) (violation of notary's duty).

REFEREE'S FINDINGS

A referee was appointed to conduct a hearing in this matter. In a report filed February 21, 2003, the referee found there was clear and convincing evidence that Mills had violated Canon 1, DR 1-102(A)(1) and (3) through (6); Canon 6, DR 6-101(A)(1) and (2); and Canon 7, DR 7-102(A)(4) through (8); as well as § 76-218. The referee found there was not clear and convincing evidence as to any violation of DR 6-101(A)(3). The referee recommended a suspension of 5 months, noting that

> [t]he nature of the offense is extremely serious; the need for deterring others is evident; the maintenance of the Bar's reputation and protection of the public militates in favor of some substantial punishment; the attitude of the Respondent was cooperative and remorseful and is taken into account; and, finally, the behavior of the Respondent does bring into question his fitness to continue to practice law.

ASSIGNMENTS OF ERROR

The Counsel for Discipline filed an exception to the referee's recommended sanction as being too lenient. Mills filed cross-exceptions to (1) the referee's finding that "the behavior of the Respondent does bring into question his fitness to continue to practice law" and (2) the referee's recommended sanction, arguing that the record supported a sanction of a suspension of no greater than 60 days.

STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a

conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003). Disciplinary charges against an attorney must be established by clear and convincing evidence. *Id.*

ANALYSIS

[3] We read Mills' exception to the referee's finding that "the behavior of Respondent does bring into question his fitness to continue to practice law" as relating only to the referee's recommended sanction. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the court may, at its discretion, adopt the findings of the referee as final and conclusive. *Achola, supra.* Because neither party has filed exceptions to the referee's findings of fact, we consider them final and conclusive pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2001). We therefore adopt the referee's findings of fact and conclude that clear and convincing evidence establishes that Mills violated DR 1-102(A)(1) and (3) through (6); DR 6-101(A)(1) and (2); DR 7-102(A)(4) through (8); and § 76-218. Thus, we determine that the only issue remaining for this court's consideration is the appropriate sanction.

[4-6] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *Achola, supra.* Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *Id.* For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events and throughout the proceeding. *Id.*

Mills' conduct as counsel for the personal representative of this estate is troubling. Such conduct consisted of (1) handling a legal matter which he knew or should have known he was not

competent to handle without associating with an attorney who was competent; (2) handling a legal matter without adequate preparation; (3) notarizing certain renunciations and deeds without witnessing the signatures of those signing the respective documents; (4) directing his secretary to alter the dates the renunciations were actually signed and to affix a uniform date of March 25, 1999; (5) affixing a uniform date of April 8, 1999, to some of the deeds, which did not conform to the actual dates on which the deeds were signed; (6) causing to be filed in both the county court for Cuming County and the register of deeds for Cuming County documents known to be false; (7) falsely informing the IRS, through Moser, that (a) the renunciations were signed in Mills' presence on March 25, 1999, (b) he did not recall why "white out" was used other than perhaps by his secretary for appearance purposes, and (c) the renunciations were received by the personal representative prior to March 25, 1999; and (8) filing Form 706 based on information Mills knew to be false.

As troubling as this conduct is, the most egregious aspect is what followed. In a letter to Cheryl dated June 2, 2000, Mills elicits the aid of Cheryl and her children in perpetuating his deception, telling Cheryl, "[i]t is critical that in the event [Moser] calls any of your children that they tell her they were in Wisner on March 25, 1999 and signed the renunciation (disclaimer) in my presence."

[7,8] Pursuant to Neb. Ct. R. of Discipline 4 (rev. 2001), this court may consider any of the following as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003). We therefore turn our attention to the determination of an appropriate sanction, recognizing that the propriety of a sanction must be considered with reference to the sanctions this court has imposed in prior cases presenting similar facts. See *State ex rel. NBSA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

The only Nebraska case cited by the Counsel for Discipline involving the misrepresentation of an acknowledgment is *State ex rel. Nebraska State Bar Assn. v. Butterfield*, 169 Neb. 119, 98

N.W.2d 714 (1959). In that case, Elven Butterfield represented his clients in a real estate transaction. The referee found that during a subsequent proceeding to set aside a deed involved in that transaction, Butterfield falsely testified that one of the signatures on the deed was not acknowledged before him. The referee further found that although the acknowledgment had occurred on or before June 7, 1956, Butterfield postdated the acknowledgment to January 2, 1957. The referee concluded that Butterfield had improperly postdated the deed and the acknowledgment and had given false testimony to a court of law. We suspended Butterfield for 6 months.

In *State ex rel. NSBA v. Scott*, 252 Neb. 698, 564 N.W.2d 588 (1997), this court was faced with an attorney who had lied to both the Department of Veterans Affairs and the Workers' Compensation Court during the course of representing his client. We stated that "[a]lthough we encourage all attorneys to zealously represent their clients, such advice cannot be construed to permit attorneys to deceive a court of law or other interested entities," *id.* at 704, 564 N.W.2d at 592, and suspended the attorney for 1 year.

The present case, however, involves conduct beyond falsifying renunciations and deeds and providing false information to a county court, the register of deeds, and the IRS. It includes an element not found in *Butterfield* or *Scott*; that element is Mills' attempt to elicit the aid of Cheryl, his client, and her children in his deception. Our review of Nebraska cases has found no similar factual circumstance, and the parties cite us to none. We therefore look to other jurisdictions presenting similar facts for additional guidance. See *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001) (looking to other jurisdictions for guidance in determining appropriate disciplinary sanction).

In re Corizzi, 803 A.2d 438 (D.C. 2002), involved an attorney who represented two clients in separate personal injury cases. Both clients had been treated by a chiropractor suggested by Anthony Corizzi. Corizzi counseled his clients to commit perjury during their depositions with respect to how each had been referred to the chiropractor, as Corizzi was attempting to conceal the fact that he and the chiropractor had a referral relationship. In furtherance of Corizzi's suggestion, both clients lied in their

depositions "to the virtual destruction of their causes." *Id.* at 439. In addition, Corizzi failed to advise one of his clients of a settlement offer, and made false statements to the "Bar Counsel" denying he had counseled his clients to lie. The Court of Appeals for the District of Columbia concluded that Corizzi's actions violated ethical rules equivalent to DR 1-102(A)(4) and DR 7-102(A)(7). Being "particularly influenced by the violations . . . which establish that [Corizzi] instructed two of his clients to lie in their depositions," 803 A.2d at 442, the court, noting the lack of mitigating factors, disbarred Corizzi, stating:

> While engaged in the practice of law, he blatantly solicited outright perjury by two of his clients on separate occasions to conceal his reciprocal relationship with the chiropractor. The predictable consequences of his action were the virtual destruction of his clients' cases and their exposure to possible criminal prosecution, clients to whom he owed the highest duty of fidelity.

Id. at 442-43.

Matter of Friedman, 196 A.D.2d 280, 609 N.Y.S.2d 578 (1994), involved an attorney who engaged in multiple acts of serious misconduct. Relevant to our inquiry was an incident whereby Theodore Friedman had a private investigator approach a witness in a negligence suit he was litigating. The witness later informed the opposing attorney that Friedman's private investigator had tried to bribe him. Apparently unaware that the opposing side knew of the bribe, Friedman and the private investigator met with the witness and asked the witness to testify falsely about various matters, including whether the witness had been offered or paid any money, and whether the witness had ever met Friedman. The court, concluding that Friedman's actions with respect to this incident were in violation of DR 7-102(A)(4), (6), and (8), disbarred Friedman, noting that "[a]ny one of [his] many serious violations would be ground for removal of the respondent from the roll of attorneys." *Matter of Friedman*, 196 A.D.2d at 295, 609 N.Y.S.2d at 586.

Matter of Geron, 486 N.E.2d 514 (Ind. 1985), presented a factual situation in which respondent Terry Geron was representing a client on a contempt citation. Geron told his client to wait in the stairwell while he went into the courtroom to check

the nature of the hearing. Five minutes later, Geron returned to his client and told him to leave the courthouse and go to " 'The Village Pub.' " *Id.* at 515. The client did so, and Geron reentered the courtroom, informing the court that his client had yet to arrive. Geron then made a few telephone calls and informed the court that his client was on the way. However, the client never arrived and the hearing proceeded in the client's absence. During the hearing, witnesses testified that they had seen Geron and his client arrive at the courthouse together. In response, Geron falsely testified that he had not entered the courthouse with his client. Geron later informed his client of the nature of Geron's testimony, and threatened the client with bodily harm should the client fail to testify as Geron advised. The Indiana Supreme Court found that Geron had violated DR 1-102(A)(1) and (3) through (6) and DR 7-102(A)(3) through (7). The court, in suspending Geron for 2 years, stated:

> The bizarre behavior surrounding this incident calls into question Respondent's professional competence and ethics. He jeopardized his client's interest and the integrity of the court in order to camouflage his errors. The extent of his willingness to do so demonstrates a serious lack of understanding of the professional obligations of a lawyer. It is difficult, if not impossible, to discern the motivating factors behind conduct of this nature, but it is certain that this Court cannot allow its reoccurrence.

Matter of Geron, 486 N.E.2d at 516.

Finally, in *In the Matter of Gross*, 435 Mass. 445, 759 N.E.2d 288 (2001), respondent Frank Gross was retained to represent a client charged with operating a motor vehicle while under the influence of alcohol and leaving the scene of an accident. Although at the time of her arrest the client acknowledged that she was the operator of the vehicle, Gross decided to employ both an alibi defense and a defense based upon mistaken identification. In furtherance of these defenses, and in response to the court's calling the case for trial, Gross had the alibi witness approach as if she were the defendant. This was all done in an attempt to confuse the victim, who was present, and hopefully prompt a misidentification at trial. Gross' attempt at confusing the victim was discovered.

Though initially denying his actions, Gross eventually acknowledged that the alibi witness, and not his client, had come forward when the case was called for trial. However, Gross insisted that the mixup was due to " 'some confusion.' " *Id.* at 447, 759 N.E.2d at 290. Gross later contacted his client and the alibi witness, informing them that both would be questioned about the incident, and advising them to tell the judge that they, too, had been " 'confused.' " *Id.* The Supreme Judicial Court of Massachusetts concluded that Gross had violated DR 1-102(A)(4) through (6); DR 6-101(A)(2) and (3); DR 7-101(A)(1) and (3); DR 7-102(A)(3), (5), and (7); DR 7-102(B)(1) and (2); and DR 7-104(A)(2). Noting a prior disciplinary violation involving deceit, the court suspended Gross for 18 months, stating:

> A knowing misrepresentation to a court is itself a serious violation, and that serious violation was then compounded by other aggravating factors. The respondent's orchestration of the impersonation scheme before the court was a form of misrepresentation amounting to criminal contempt and obstruction of justice. . . . When the ruse was uncovered, the respondent sought to evade responsibility, and asked his client and another witness to make further misrepresentations to the court to assist him in covering up his own wrongdoing. Ensnaring them in the scheme led to the issuance of a default warrant against his client, a capias for the arrest of the witness, and potential criminal charges against the witness.

In the Matter of Gross, 435 Mass. at 452-53, 759 N.E.2d at 293-94.

[9] Before imposing a disciplinary sanction, we must also consider any mitigating factors present. *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001). Mills argues that several mitigating factors exist. To begin with, Mills argues that Cheryl and her family were not the complainants in this case.

Although it is true that Mills' actions were brought to the attention of the Counsel for Discipline by the attorney retained to replace Mills, that attorney testified at Mills' hearing:

> [Counsel for relator:] I just want to focus here for a moment. Why did you file the grievance as opposed to [Cheryl], the client of Stuart Mills, filing the grievance?

> A. If I had not, I believe the client would have because of the anger or distress they felt. And in discussing it, they preferred that I file it. Also, because of the things that came to my attention in the course of working with the [IRS] to resolve things, I became concerned that it also was my obligation [under the Code] to file something.

Our de novo review of the record simply shows that Cheryl preferred that her new attorney file the complaint. Even though Cheryl and her family were not the "complainants," we conclude that under these circumstances, the identity of the party actually filing the complaint is not a mitigating factor.

Next, Mills argues that he has suffered financial consequences as a result of this action. Specifically, Mills argues that he has "incurred defense costs relating to the IRS investigation" and that he has lost present and future clients as a result of his actions. Brief for respondent at 11. Mills also argues that he "will suffer the shame of the proceeding represented here." *Id.* However, these are merely consequences of Mills' own inappropriate conduct and offer nothing in the way of explaining the underlying reason for such conduct. Under these circumstances, they are not mitigating factors.

Finally, Mills contends he was suffering from "the mitigating factors of [a] difficult personal situation at home, as well as [a] difficult office situation." Brief for respondent at 10. In support of this argument, Mills cites *State ex rel. Counsel for Dis. v. Koenig*, 264 Neb. 474, 647 N.W.2d 653 (2002), and *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

Mills first compares his situation to *Koenig*, stating that "[t]he stressful personal crisis and psychological issues confronting . . . Mills presents a case similar to the court's recognition of such circumstances in [*Koenig*]." Brief for respondent at 10. However, *Koenig* is inapplicable, as in that case, this court makes no mention of a "stressful personal crisis and psychological issues."

Thompson, however, does consider "psychological issues." In *Thompson*, this court gave mitigating weight to Thompson's diagnosed depression. In Mills' case, however, the referee specifically determined:

> I am not prepared to give great weight to the personal problems (i.e., loss of a long-time secretary, deterioration in

> his marriage relationship) which . . . Mills claimed clouded his judgment. It should be noted that during a critical period of time involved here - January 1, 1999 to August 1, 1999 - . . . Mills did not see fit to seek out professional medical treatment.
>
> The type of personal problem being endured by . . . Mills in this case is not, in my view, the kind of matter which this Court has felt worthy of mitigation.

(Citation omitted.)

Our de novo review of the record supports the referee's determination. Unlike *Thompson*, this record contains no diagnosis of depression. The diagnosis is that of "adjustment disorder of adult life with mixed emotional features." Mills' "treatment" for this specific diagnosis consisted principally of one office "interview" on December 10, 1999, and two telephone "visits" with a clinical psychologist on December 13 and 21. With regard to the December 21 visit, the psychologist's records state that "[Mills] thinks that he can handle the problems with the help of his friends, so he decided to call back if the problems again become overwhelming." There is no evidence of any further treatment or evaluation by this psychologist.

Although we acknowledge Mills' additional testimony that approximately 1 year after this initial treatment, he received "counseling of a similar nature" from another counselor, the medical evidence in this record does not approach that in *Thompson*, nor does it contain any evidence that Mills' diagnosis was a direct and substantial contributing factor to his misconduct or that treatment will substantially reduce the risk of further misconduct. See *Thompson, supra*. We determine that based upon this record, Mills' adjustment disorder is not a mitigating factor.

[10-12] In an attorney discipline proceeding, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). An attorney's cooperation during the process is yet another factor to be considered in mitigation. *Id.* Finally, the attorney's admission of responsibility for his or her actions reflects positively upon his attitude and character and is to be considered in determining the appropriate discipline. *Id.*

It is clear from the record that Mills' behavior surrounding his handling of the Borgelt estate was an isolated incident in what has otherwise been an exemplary legal career. The record indicates that Mills is involved in his community and has countless letters of support from judges, lawyers, and laypersons. In addition, Mills has never been disciplined in the 30 years he has been authorized to practice law in Nebraska.

Although Mills initially lied to the IRS during its investigation, he did eventually cooperate and has fully cooperated with the Counsel for Discipline's investigation into this matter. Furthermore, Mills has admitted his wrongdoing and has admitted that he engaged in conduct which violates the Code of Professional Responsibility.

Mills' actions, particularly with respect to eliciting the aid of Cheryl and her children in perpetuating his deception to the IRS, are egregious. Nevertheless, this case is unlike *In re Corizzi*, 803 A.2d 438 (D.C. 2002), in which the attorney made false statements to "Bar Counsel" denying that he had advised his clients to lie and where the court specifically noted the lack of any mitigating factors, and *Matter of Friedman*, 196 A.D.2d 280, 295, 609 N.Y.S.2d 578, 586 (1994), which involved "many serious violations" and where the only mitigating evidence consisted of character witnesses. In this case, sufficient evidence in the form of Mills' cooperation, the absence of any prior discipline, and an otherwise exemplary 30 years of practice, exists to mitigate against the disbarment imposed in *In re Corizzi* and *Matter of Friedman*. Upon our de novo review of the record, this court determines that Mills should be suspended from the practice of law for a period of 2 years.

CONCLUSION

The Counsel for Discipline's exception with respect to the referee's recommended sanction is upheld. Mills' exceptions with regard to the recommended sanction are overruled. Mills is hereby suspended from the practice of law for a period of 2 years, effective immediately. Mills is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Mills is directed to pay costs and expenses in accordance with

Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF SUSPENSION.

GERRARD, J., not participating.

JOSEPH PONSEIGO AND MARGARET PONSEIGO, APPELLANTS, V. MARY W. ET AL., APPELLEES.

672 N.W.2d 36

Filed December 5, 2003. No. S-03-118.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
2. **Statutes.** To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
3. **Juvenile Courts: Courts: Jurisdiction: Visitation.** When a juvenile court has obtained exclusive jurisdiction over a minor under Neb. Rev. Stat. § 43-247 (Reissue 1998), the district court lacks jurisdiction to hear an action seeking grandparent visitation.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

James Walter Crampton for appellants.

Jon C. Bruning, Attorney General, Royce N. Harper, and Lee C. Brawner, Special Assistant Attorney General, for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

CONNOLLY, J.

This appeal presents the question whether a district court has jurisdiction to grant grandparent visitation under Neb. Rev. Stat. §§ 43-1802 and 43-1803 (Reissue 1998) when a juvenile court has previously assumed jurisdiction under Neb. Rev. Stat. § 43-247(3) (Reissue 1998). Joseph Ponseigo and Margaret Ponseigo appeal the district court's order vacating a decree that awarded them grandparent visitation. The district court determined that because the child was under the jurisdiction of the

juvenile court, it lacked jurisdiction to enter the decree. We affirm, because under § 43-247, the juvenile court has exclusive jurisdiction over the child.

BACKGROUND

The Ponseigos, as maternal grandparents, filed a petition in the district court seeking visitation with their grandchild who was under the custody of the Nebraska Department of Health and Human Services (DHHS) and in foster care with the paternal grandparents. The Ponseigos alleged that the parents of the child were divorced, that the Ponseigos had visitation through an order of the juvenile court, and that they anticipated adoption or guardianship by the paternal grandparents. DHHS did not file a response, and the Ponseigos filed a motion for a default judgment. DHHS then filed an answer alleging in part that the juvenile court had jurisdiction over this case.

On February 25, 2002, the district court granted the Ponseigos visitation rights that would survive relinquishment of parental rights or termination of the jurisdiction of the juvenile court. On April 18, DHHS moved to vacate the decree, alleging that the court failed to hold an evidentiary hearing, the visitation was excessive, and the paternal grandparents were necessary parties. On June 13, the court made a docket entry sustaining the motion. The docket entry was not file stamped.

The Ponseigos filed an appeal, which was dismissed by the Nebraska Court of Appeals for lack of jurisdiction on August 23, 2002. On January 14, 2003, the district court entered a file-stamped order sustaining the motion to vacate and finding that it lacked jurisdiction to enter the decree. The Ponseigos appeal.

ASSIGNMENTS OF ERROR

The Ponseigos assign that the district court erred in determining that it lacked jurisdiction and in vacating the decree.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Davis v. Settle*, 266 Neb. 232, 665 N.W.2d 6 (2003).

ANALYSIS

Relying on §§ 43-1802 and 43-1803, the Ponseigos contend that the district court has jurisdiction even though the child is under the jurisdiction of the juvenile court. DHHS argues, however, that the juvenile court has exclusive jurisdiction under § 43-247(3).

Section 43-1802(b) allows a grandparent to seek visitation with his or her minor grandchild when "[t]he marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered." Section 43-1803(1) provides in part:

> If the marriage of the parents of a minor child has been dissolved or a petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered, a grandparent seeking visitation shall file a petition for such visitation in the district court in the county in which the dissolution was had or the proceedings are taking place.

Although § 43-1803 requires a petition seeking grandparent visitation to be filed in the district court, § 43-247 provides:

> The juvenile court shall have exclusive original jurisdiction as to any juvenile defined in subdivision . . . (3) of this section, and as to the parties and proceedings provided in subdivisions (5), (6), and (8) of this section. . . .
>
> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> . . . .
>
> (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; 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; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or

> limb or injurious to the health or morals of such juvenile, (b) who, by reason of being wayward or habitually disobedient, is uncontrolled by his or her parent, guardian, or custodian; who deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others; or who is habitually truant from home or school, or (c) who is mentally ill and dangerous as defined in section 83-1009.

Under § 43-247, the juvenile court also has exclusive jurisdiction over (1) the parent, guardian, or custodian who has custody of any juvenile; (2) proceedings for termination of parental rights under the juvenile code; and (3) any juvenile who has been voluntarily relinquished to DHHS or a child placement agency. § 43-247(5), (6), and (8).

We have never addressed whether a district court has jurisdiction over a petition for grandparent visitation when the child is under the exclusive jurisdiction of the juvenile court. We have held, however, that a county court may not acquire jurisdiction over a guardianship appointment under the probate code when the court, sitting as a juvenile court, has previously adjudicated a minor under § 43-247(3). *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000). See *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001).

In *In re Guardianship of Rebecca B. et al., supra*, children were adjudicated under § 43-247(3). Later, the county court held a guardianship proceeding and appointed the grandparents as coguardians for the children. On appeal, the mother of the children contended that the county court lacked jurisdiction over the guardianship proceeding because the juvenile court had jurisdiction under § 43-247. We agreed, noting that the juvenile court had exclusive jurisdiction under § 43-247. We further agreed with cases from the Court of Appeals which expressed concern that if the county court had jurisdiction to appoint a guardian, it would be possible for separate entities to be appointed guardian in each court. If the same entity were appointed in each court, the guardianship would still be subject to supervision by two separate courts. Finally, we noted that the court must apply different standards for guardianship under the juvenile code and the probate code. We concluded that because the juvenile court had

jurisdiction over the children, the county court lacked jurisdiction to hear the guardianship proceeding.

[2] In *In re Interest of Sabrina K.*, we held a county court's jurisdiction over a previously established guardianship must yield to the juvenile court's exclusive jurisdiction if the juvenile court determines there is a sufficient factual basis for an adjudication under § 43-247(3). We recognized that " '[t]o the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.' " *In re Interest of Sabrina K.*, 262 Neb. at 876, 635 N.W.2d at 732. We then determined that under the juvenile code, exclusive jurisdiction is specific to the circumstances for adjudication listed in § 43-247(3), whereas the county court has jurisdiction over guardianships generally. Thus, we concluded that the county court's jurisdiction must yield to the jurisdiction of the juvenile court.

Here, § 43-247 specifically places exclusive jurisdiction in the juvenile court when the child has been adjudicated under § 43-247(3) or when the child has been voluntarily relinquished under § 43-247(8). The grandparent visitation statute, however, generally places jurisdiction in the district court. Thus, the more general statutory provision must yield to the specific. Further, the concerns we noted in *In re Guardianship of Rebecca B. et al., supra*, regarding concurrent jurisdiction in guardianship proceedings also apply to grandparent visitation. The Ponseigos successfully intervened in the juvenile court action and were granted visitation by the juvenile court. If they are able to concurrently pursue visitation in the district court, the possibility exists for conflicting orders.

The Ponseigos distinguish their situation from cases involving guardianship, arguing that if they cannot file in district court, they will be unable to obtain visitation that will survive a termination of parental rights. They argue that jurisdiction for grandparent visitation must be placed in the district court. We disagree. Nothing in §§ 43-1802 or 43-1803 shows an intention of the Legislature to allow a district court to grant grandparent visitation when the juvenile court has exclusive jurisdiction over a child under § 43-247. Instead, the legislative history indicates the opposite. The legislative history makes clear that the Legislature intended to pass a narrow statute that provided limited visitation

rights. In particular, it did not intend the grandparent visitation act to apply to situations involving the termination of parental rights or after adoption. Rather, the Legislature was interested in allowing visitation in circumstances such as divorce or death when one parent had custody of the children. Thus, by allowing exclusive jurisdiction to remain in the juvenile court for children adjudicated under § 43-247, a situation is avoided in which visitation could be granted by the district court in cases beyond what the Legislature intended.

[3] We hold that when a juvenile court has obtained exclusive jurisdiction over a minor under § 43-247, the district court lacks jurisdiction to hear an action seeking grandparent visitation. Thus, the district court correctly vacated its decree because it lacked jurisdiction. The Ponseigos next argue that the district court improperly vacated the decree after the court term ended. Because we find that the district court lacked jurisdiction to enter the decree, the decree is void, and we need not discuss this argument. See, generally, *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992). The Ponseigos cannot confer jurisdiction on the district court through an argument that the order was improperly vacated out of term.

CONCLUSION

We conclude that the district court lacked subject matter jurisdiction to enter a decree granting grandparent visitation when the child was under the exclusive jurisdiction of the juvenile court under § 43-247. The court properly vacated the decree. We affirm.

AFFIRMED.

McCORMACK, J., not participating.

IN RE INTEREST OF TAMANTHA S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF JUVENILE SERVICES, APPELLANT.

672 N.W.2d 24

Filed December 5, 2003. No. S-03-256.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes.** It is the role of the court, to the extent possible, to give effect to the entire language of a statute, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.
3. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
4. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
5. ____. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, or unambiguous out of a statute.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Affirmed.

John M. Baker, Special Assistant Attorney General, for appellant.

James S. Jansen, Douglas County Attorney, Paul J. Sullivan, Matthew R. Kahler, and Kelli Wiehl, Senior Certified Law Student, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

On November 26, 2002, Tamantha S. was adjudicated by the separate juvenile court of Douglas County as being within the scope of Neb. Rev. Stat. § 43-247 (Cum. Supp. 2002) and placed

in the custody of the Department of Health and Human Services, Office of Juvenile Services (OJS). Following a February 4, 2003, dispositional hearing, on February 5, the juvenile court ordered, inter alia, that Tamantha be "placed under the Conditions of Liberty contract (incorporated herein as if set forth in full) for a **period of one year** unless sooner extended or revoked for cause by the court." OJS appeals from the juvenile court's dispositional order and claims that the juvenile court did not have authority to order a "Conditions of Liberty" contract for a prescribed period of time. Finding no error in the juvenile court's order of February 5, we affirm.

STATEMENT OF FACTS

On or about October 4, 2001, Tamantha was expelled from a middle school in Omaha after she assaulted a security guard at the school. As a result of the assault, on June 7, 2002, a petition was filed in the separate juvenile court of Douglas County alleging that Tamantha came within the provisions of § 43-247(1), in that she had violated a state law or municipal ordinance. Tamantha was arraigned on November 25. At the November 25 hearing, she admitted the allegations in the petition. The juvenile court held a dispositional hearing on February 4, 2003, at which time the court determined that Tamantha's best interests were served by placing her in the custody of OJS and by allowing her inhome placement. In its February 5 order, the court further ordered that Tamantha comply with the terms of the Conditions of Liberty contract "for a **period of one year** unless sooner extended or revoked for cause by the court." OJS appeals from the juvenile court's dispositional order.

ASSIGNMENT OF ERROR

OJS claims the juvenile court erred by ordering Tamantha to remain in OJS' custody under a Conditions of Liberty contract for a prescribed period of time.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Estate of Breslow*, 266 Neb. 953, 670 N.W.2d 797 (2003).

ANALYSIS

Initially, we note that the record does not contain a copy of the Conditions of Liberty contract. Based upon the parties' briefs and oral argument, we understand that the contract was an agreement between Tamantha and OJS and that it did not include a term limiting its duration. We further note that both parties understand that the juvenile court's dispositional order placed a 1-year time limit on the contract. For purposes of this opinion, we accept the parties' description of the contract and their construction of the juvenile court's order.

OJS claims on appeal that the juvenile court's order improperly deprives OJS of the power to discharge the juvenile from OJS. At issue in this appeal is OJS' assertion that the Legislature, in drafting Neb. Rev. Stat. § 43-408 (Cum. Supp. 2002), intended to give OJS the sole responsibility and the sole authority over the discharge of juveniles committed to OJS. Presently, § 43-408 provides, in relevant part, as follows:

> (2) The committing court . . . shall continue to maintain jurisdiction over any juvenile committed to the Office of Juvenile Services until such time that the juvenile is discharged from the Office of Juvenile Services. The court shall conduct review hearings every six months, or at the request of the juvenile, for any juvenile committed to the Office of Juvenile Services who is placed outside his or her home, except for a juvenile residing at a youth rehabilitation and treatment center. The court shall determine whether an out-of-home placement made by the Office of Juvenile Services is in the best interests of the juvenile, with due consideration being given by the court to public safety. If the court determines that the out-of-home placement is not in the best interests of the juvenile, the court may order other treatment services for the juvenile.
>
> (3) After the initial level of treatment is ordered by the committing court, the Office of Juvenile Services shall provide treatment services which conform to the court's level of treatment determination. Within thirty days after making an actual placement, the Office of Juvenile Services shall provide the committing court with written notification of where the juvenile has been placed. At least once every six

> months thereafter, until the juvenile is discharged from the care and custody of the Office of Juvenile Services, the office shall provide the committing court with written notification of the juvenile's actual placement and the level of treatment that the juvenile is receiving.

On appeal, OJS asserts that a "plain reading of Neb.Rev.Stat. § 43-408" grants OJS and not the juvenile court the authority to discharge a juvenile from the care and custody of OJS. Brief for appellant at 9. OJS claims that when the juvenile court imposed the 1-year time limit on the Conditions of Liberty contract, the juvenile court "impermissibly intrude[d] upon the legislative grant of authority to [OJS by] dictating to OJS how and when to discharge a committed youth from OJS." *Id.* at 6.

In support of its argument, OJS relies on *In re Interest of David C.*, 6 Neb. App. 198, 572 N.W.2d 392 (1997). In *In re Interest of David C.*, the Nebraska Court of Appeals ruled, inter alia, under the facts of that case, that the juvenile court retained jurisdiction of the juvenile after his placement at the Youth Rehabilitation and Treatment Center in Kearney, Nebraska, but that the juvenile court had exceeded its statutory authority "when it attempted to control OJS' management of [the adjudicated child]." *Id.* at 215, 572 N.W.2d at 402. In particular, the Court of Appeals concluded that the juvenile court's order, which required OJS to submit placement plans to the court, to report any change in the juvenile's placement to the court, and to notify the court prior to the juvenile's release, exceeded the powers of the juvenile court. Although OJS urges us to rely on *In re Interest of David C.*, we note that subsequent to the filing of *In re Interest of David C.*, the Nebraska Legislature amended the juvenile code and that those amendments are controlling. See, e.g., § 43-408. Thus, although we are informed by *In re Interest of David C.*, we decline OJS' invitation to rely entirely on *In re Interest of David C.* in resolving this appeal. See *River City Life Ctr. v. Douglas Cty. Bd. of Equal.*, 265 Neb. 723, 658 N.W.2d 717 (2003) (stating that when Legislature enacts law affecting area which is already subject of other statutes, it is presumed that it acted with full knowledge of preexisting legislation and of appellate court decisions construing and applying that legislation).

[2-5] In reaching our decision, we refer to § 43-408, and we are guided by fundamental rules of statutory interpretation. We have previously stated that it is the role of the court, to the extent possible, to give effect to the entire language of a statute, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible. *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003); *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999). In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Gilroy, supra*; *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002). A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Galaxy Telecom v. J.P. Theisen & Sons*, 265 Neb. 270, 656 N.W.2d 444 (2003). Further, a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, or unambiguous out of a statute. *Wilder v. Grant Cty. Sch. Dist. No. 0001*, 265 Neb. 742, 658 N.W.2d 923 (2003).

In accordance with these precepts, it is clear under the language of § 43-408 that the committing court maintains jurisdiction over a juvenile committed to OJS, conducts review hearings every 6 months, and is to receive written notification of the placement and treatment status of juveniles committed to OJS at least every 6 months. See § 43-408(2) and (3). Thus, although the statute speaks of committed juveniles' being "discharged from [OJS]," § 43-408(2), the statute does not explicitly say that OJS discharges the juveniles, and, on the contrary, the Legislature has explicitly mandated that the committing court "continue[s] to maintain jurisdiction" over a juvenile committed to OJS. *Id.* Therefore, while OJS may make an initial determination with regard to the advisability of the discharge of a juvenile committed to OJS, the committing court, as a result of its statutorily imposed continuing jurisdiction, must approve the discharge of the juvenile.

Giving effect to the language of § 43-408, we determine that there is no merit to OJS' assertion that the juvenile court erred by ordering Tamantha to remain in OJS' custody under a Conditions of Liberty contract for a prescribed period of time. The juvenile court's imposition of a 1-year time limit on the Conditions of Liberty contract was merely an exercise of the court's responsibility to review the placement and treatment of committed juveniles. Indeed, if the juvenile court were not permitted to conduct this type of periodic review, its statutorily mandated continuing jurisdiction would be rendered meaningless. See *Wilder, supra*. The court's order does not usurp OJS' authority to assess the advisability of the discharge of a juvenile committed to it. See § 43-408(2). The challenged order merely provides a time limit for the Conditions of Liberty contract but does not provide that Tamantha would be discharged at the end of the 1-year time period.

CONCLUSION

We conclude that the juvenile court's imposition of a 1-year time limit on the Conditions of Liberty contract was not improper. Accordingly, there is no merit to OJS' assignment of error, and we affirm the February 5, 2003, order of the juvenile court.

AFFIRMED.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JAMIE EARL MOWELL, APPELLANT.

672 N.W.2d 389

Filed December 12, 2003. No. S-03-009.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant.
3. ____: ____: ____. 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.

4. **Rules of Evidence: Appeal and Error.** 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 such discretion a factor in determining admissibility. Where 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.
5. **Criminal Law: Convictions: Evidence: Appeal and Error.** 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.
6. **Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
7. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.
8. **Trial: Jury Instructions.** The purpose of the instruction conference is to give the trial court an opportunity to correct any errors made by it.
9. **Jury Instructions: Appeal and Error.** A party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions.
10. ____: ____. The failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.
11. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial.
12. **Appeal and Error: Words and Phrases.** Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
13. **Criminal Law: Self-Defense: Legislature: Intent.** Neb. Rev. Stat. § 28-1407 (Reissue 1995) reflects the Nebraska Legislature's policy that certain circumstances legally excuse conduct that would otherwise be criminal.
14. **Self-Defense.** The choice of evils defense requires that a defendant (1) acts to avoid a greater harm; (2) reasonably believes that the particular action is necessary to avoid a specific and immediate harm; and (3) reasonably believes that the selected action is the least harmful alternative to avoid the harm, either actual or reasonably believed by the defendant to be certain to occur.
15. **Criminal Law: Self-Defense.** Generalized and nonimmediate fears are inadequate grounds upon which to justify a violation of law.
16. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Rev. Stat. § 27-401 (Reissue 1995) and prejudice under Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
17. **Trial: Evidence.** While most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party, only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.

18. **Trial: Joinder: Appeal and Error.** Severance is not a matter of right, and a ruling of the trial court with regard thereto will not be disturbed on appeal absent a showing of prejudice to the defendant.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Sean J. Brennan for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Jamie Earl Mowell was found guilty by a jury of second degree murder, use of a deadly weapon to commit a felony, and being a felon in possession of a firearm, in association with the shooting death of Jeremy Cade. After a motion for new trial was overruled, the district court sentenced Mowell to a term of imprisonment and Mowell appealed. This appeal involves Mowell's challenges to a number of the court's procedural and evidentiary rulings, as well as his challenges to the instructions given to the jury and the sufficiency of the evidence that led to his second degree murder conviction.

FACTUAL AND PROCEDURAL BACKGROUND

The evidence at trial revealed that in February 2002, Cade and Calvin Secrest were both residing at the Salvation Army's residential treatment facility in Lincoln, Nebraska. They became close friends and eventually left the treatment facility together. After leaving the treatment facility, Cade and Secrest began to spend a significant amount of time with Mowell. Cade's relationship with Mowell was often rocky and violent and essentially revolved around drug sales and drug use.

In the early afternoon of March 18, 2002, Cade and Secrest went to Mowell's apartment in search of methamphetamines (meth). They were driven to the apartment by Cade's girl friend, Angela Kosmicki. Upon arrival, Cade and Secrest went into Mowell's apartment, while Kosmicki stayed in the car. Secrest

testified that Mowell welcomed them into the apartment, but Mowell testified that he had told Cade not to come to his apartment, and only let Cade and Secrest in because he believed the knock at the door was from someone else.

In any event, Cade and Secrest entered the apartment, and shortly thereafter, Secrest asked Kosmicki to join them inside. According to Secrest, Mowell stated that he was "really high" and asked Kosmicki to take Secrest to a grocery store to purchase a bag of syringes so they would be able to inject meth. At the time he left, Secrest stated that Cade and Mowell were getting along fine. Kosmicki, however, testified that Cade repeatedly requested meth from Mowell and that Mowell told Cade no, and to "back off" because he was too high.

Mowell testified that he wanted Cade and Secrest to leave his apartment, and repeatedly asked them to do so. According to Mowell, Cade refused and made repeated demands for meth. Mowell testified that after Secrest and Kosmicki left, Cade continued to demand meth, and an argument ensued because Mowell refused to provide Cade with meth. During this argument, Mowell claims that Cade repeatedly threatened him and stated that he was going to kill him. Mowell testified that he became scared and eventually gave Cade his remaining batch of meth. Moreover, Mowell stated that he offered to give Cade his compact disc player, personal digital assistant, and a scale for weighing meth. Cade, however, was not satisfied and, according to Mowell, continued to demand more meth, saying "this ain't over." At this time, two or three additional unidentified people entered Mowell's apartment.

According to Secrest, when he and Kosmicki returned, Cade was sitting across a small table from Mowell. Thereafter, Mowell began to break up "rocks" of meth. The recent entrants into the apartment then asked Mowell for syringes and went into Mowell's bathroom to use drugs.

At this point, the testimony of various witnesses differs in several respects. Secrest testified that while breaking up the rocks of meth, Mowell pulled out his gun, pointed it at Cade for a few seconds, and then shot him. Secrest testified that prior to the shooting, he did not hear any verbal exchange or argument between Cade and Mowell, nor was anyone standing or being loud.

Moreover, Secrest stated that just prior to the shooting, Cade was looking at the floor with his hands on his lap and that Cade only looked up after the gun was pointed at him. Secrest also testified that Cade made no movements toward Mowell while the gun was pointed at him. During cross-examination, however, Secrest admitted that Mowell and Cade were talking immediately prior to the shooting and that Secrest had previously told the police that he heard Cade threaten to kill Mowell just prior to the shooting.

Kosmicki testified that prior to the shooting, Cade was complaining about the amount of meth Mowell gave him. Kosmicki also testified that Cade, while looking down at the drugs, stated that if the amount of drugs Mowell had given him was not enough, then he would kill Mowell. At that point, according to Kosmicki, Mowell pointed his gun at Cade. Kosmicki then told Cade not to worry because Mowell "is just fucking with you." A few seconds later, Kosmicki testified, the gun went off.

Mowell also testified that Cade continued to demand more meth and that he became angrier and more vocal with each demand. Mowell stated that the dispute culminated when Cade told him that "if this is not enough, I am going to kill you." Mowell testified that in response to this threat, he grabbed his gun, pointed it at Cade, and told him to leave. Mowell stated that Cade told him to go ahead and shoot and then made another threat on his life. According to Mowell, Kosmicki then said something which diverted his attention from Cade. Mowell testified that when he turned his attention back to Cade, Cade was moving toward him and reaching for the gun. Mowell stated that he pulled the trigger once, but only to stop Cade.

According to Secrest, after the shot was fired, Cade got up as if to beat up Mowell. Kosmicki also testified that Cade, after getting shot, moved toward Mowell as if he wanted to "kick [Mowell's] ass." Seeing Cade move toward him aggressively, Mowell ran out of the apartment. Kosmicki, Crystal Walsh (Mowell's girl friend who was in the bedroom throughout the incident), and the persons in the bathroom then left the apartment. According to Secrest, shortly after leaving, Mowell returned to the apartment and grabbed his backpack. Mowell testified that he returned to the apartment to call his mother, but only managed to grab his backpack before leaving the apartment.

Once downstairs, Walsh, Secrest, and Mowell jumped inside Kosmicki's car. Kosmicki then drove approximately one block to a nearby service station. After parking, Kosmicki told Mowell and Walsh to get out of the car. Secrest went to the pay telephone and dialed the 911 emergency dispatch service, while Mowell and Walsh proceeded up the alley behind the service station. Kosmicki drove Secrest back to the apartment so he could wave down the police and ambulance. Thereafter, Kosmicki returned to her home.

Mowell and Walsh eventually traveled to Sioux City, Iowa. Eleven days later—March 19, 2002—they were arrested by the Sioux City Police Department while coming out of a motel room in Sioux City. At the time of the arrest, Mowell had a black and yellow backpack in his possession.

Cade was pronounced dead on March 18, 2002, at 3:52 p.m. Along with the fatal gunshot wound to the chest, Cade suffered an injury to his right thumb. Expert testimony established that a bullet struck Cade's thumb before going through his sternum, pericardial sac, aorta, and right lung. The bullet eventually lodged in one of his ribs. The distance between the gun and Cade's shirt was approximately 3 to 5 feet when the gun was fired, and Cade's thumb was between 12 and 18 inches from the gun when it was hit by the bullet.

On May 22, 2002, Mowell was arraigned on information and charged with first degree murder (count I), use of a deadly weapon to commit a felony (count II), and being a felon in possession of a firearm (count III). Prior to trial, Mowell filed a motion to sever, requesting that the court try count III separately from counts I and II. A hearing on the motion was held September 5, and the court denied the motion on September 6.

The trial commenced on October 1, 2002. At trial, Mowell objected to the receipt of a number of exhibits, including exhibits 93 through 96 and 100. These exhibits were a few of the writings and drawings that were found in the notebooks inside of Mowell's backpack the day of his arrest. Mowell argued the exhibits were irrelevant, cumulative, and unfairly prejudicial. The trial court overruled Mowell's objections and admitted the exhibits into evidence.

After the State rested, Mowell moved to dismiss the charges. That motion was overruled. At the close of all the evidence, Mowell renewed his motion to dismiss, but the motion was overruled.

A formal jury instruction conference was held on October 10, 2002. The trial court's proposed jury instructions were discussed, and Mowell objected to instruction No. 4. Mowell's primary objection was in regard to the step instruction. Under the step instruction, the jury was instructed to separately consider the crimes of first degree murder, second degree murder, and manslaughter. The instruction stated that the crimes were to be considered in descending order, and only if the jury found the State had failed to prove first degree murder could the jury consider second degree murder, and so on. Essentially, Mowell argued that the jury should have been able to consider the three choices—first degree murder, second degree murder, and manslaughter—in any order. The trial court overruled Mowell's objection.

Mowell also tendered his own instructions. Relevant here, Mowell requested a choice of evils instruction, arguing that a felon should maintain the right of self-defense, including the right to possess a firearm. The court refused to give Mowell's proposed instruction.

On October 11, 2002, Mowell was found guilty by jury verdict of second degree murder, use of a deadly weapon to commit a felony, and being a felon in possession of a firearm. Mowell was sentenced to a term of (1) from 40 years' to life imprisonment for second degree murder; (2) from 10 to 20 years' imprisonment for use of a deadly weapon to commit a felony, to be served consecutively to the second degree murder sentence; and (3) from 5 to 10 years' imprisonment for being a felon in possession of a firearm, to be served concurrently with the sentence for count II.

Thereafter, Mowell filed a timely motion for a new trial. Mowell made three arguments: (1) The court should have instructed the jury on the legal definition and meaning of " 'sudden quarrel' " and " 'provocation,' " (2) the prosecuting attorney made improper comments during closing arguments, and (3) the court should not have admitted certain exhibits taken from

Mowell's backpack into evidence. The district court overruled this motion, and Mowell timely filed his notice of appeal.

ASSIGNMENTS OF ERROR

Mowell assigns, restated, that the trial court erred by (1) failing to instruct the jury on the meaning and legal definition of provocation and sudden quarrel, (2) denying his motion for a new trial, (3) refusing to give his proposed jury instruction No. 4, (4) overruling his objections to exhibits 93 through 96 and 100, (5) denying his motion to sever count III, and (6) accepting the jury's verdicts in that there was insufficient evidence to prove beyond a reasonable doubt that he intentionally killed another person and that he was not acting in self-defense.

STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002).

[2] In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

[3] 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. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003).

[4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where 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. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

[5] 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. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

ANALYSIS

PROVOCATION AND SUDDEN QUARREL

Mowell argues the trial court erred by failing to define the term "sudden quarrel," which he contends prevented the jury from adequately considering an essential issue presented by the evidence. Jury instruction No. 4, the step instruction, provided the analytical framework for the jury to decide counts I, II, and III, including the elements of the charged crimes. With respect to count I, the jury was instructed that it could return one of four possible verdicts: (1) guilty of murder in the first degree, (2) guilty of murder in the second degree, (3) guilty of manslaughter, or (4) not guilty. Relevant here, the pertinent portions of instruction No. 4 gave the following charge:

> The material elements that the [S]tate must prove . . . in order to convict the Defendant of [second degree] murder . . . are:
>
> 1. That the Defendant caused the death of Jeremy Cade; and
>
> 2. That the Defendant did so intentionally but without premeditation; and . . .
>
> . . . .
>
> 4[.] That he did not do so in self defense.
>
> . . . .
>
> The material elements that the [S]tate must prove . . . in order to convict the Defendant of manslaughter are:
>
> 1. That the Defendant killed Jeremy Cade; and
>
> 2. That the Defendant did so without malice, either upon a sudden quarrel, or unintentionally while in the commission of an unlawful act; and . . .
>
> . . . .
>
> 4. That he did not do so in self defense.

According to Mowell, trial courts should be required to define the term "sudden quarrel" because it is not only an essential element of manslaughter, but understanding the term "sudden

quarrel" is an essential component of allowing the jury to effectively consider whether Mowell had the requisite intent to commit murder. More specifically, Mowell argues that a proper understanding of the term sudden quarrel at an early stage of the step instruction would have led the jury to find a sudden quarrel erupted between Mowell and Cade prior to the shooting. In turn, this could have negated Mowell's intent to kill Cade and caused the jury to find Mowell guilty of manslaughter instead of murder.

[6] Whether jury instructions given by a trial court are correct is a question of law. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002). Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial to or otherwise adversely affected a substantial right of the appellant. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995).

We first note that Mowell's assignment of error is not appropriate for appellate review because he failed to object to the portion of the jury instruction he now criticizes. At the instruction conference, Mowell objected to certain aspects of instruction No. 4, but he did not specifically object to the trial court's failure to define "sudden quarrel," or to its absence in instruction No. 7, which provided definitions to the terms used throughout the instructions.

[7-10] Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice. *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002). The purpose of the instruction conference is to give the trial court an opportunity to correct any errors made by it. *Id.* Consequently, a party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions. *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999). Stated otherwise, and relevant here:

> " '[I]t is the duty of the trial court, without any request to do so, to instruct the jury on the issues presented by the pleadings and supported by the evidence. . . .

> " 'In applying that principle we have established that the failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.' "

State v. Myers, 258 Neb. 300, 314, 603 N.W.2d 378, 390 (1999) (quoting *Ellis v. Guy Advg. v. Cohen*, 219 Neb. 340, 363 N.W.2d 180 (1985)). Accord *McCauley v. Briggs*, 218 Neb. 403, 355 N.W.2d 508 (1984). Thus, in order to preserve the alleged error, Mowell was required to specifically object to that error. See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002) (objection, based on specific ground and properly overruled, does not preserve appellate review on any other ground).

[11,12] However, as noted, an appellate court always reserves the right to note plain error which was not complained of at trial. *Id.* We have defined plain error as "error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process." *State v. Greer*, 257 Neb. 208, 215, 596 N.W.2d 296, 302 (1999). Here, there was no miscarriage of justice because the jury found Mowell guilty of second degree murder under a properly administered step instruction.

Under the step instruction, the jury was instructed to separately consider, in the following order, the crimes of first degree murder, second degree murder, and manslaughter. The jury was adequately instructed on the element of intent with respect to the crime of second degree murder such that any alleged failure to further define the term "sudden quarrel" at an earlier stage of the step instruction would not constitute plain error under these circumstances. We have repeatedly approved of step instructions that require consideration of the most serious crime charged before the consideration of lesser-included offenses. See, generally, *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002); *Myers, supra*; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998); *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995). The jury was so charged under a properly administered step instruction in the instant case, and we refuse to invoke the

plain error doctrine to give Mowell's first assignment of error any further consideration.

Likewise, Mowell's second assignment of error with respect to the denial of his motion for new trial, which is predicated on the court's failure to define the term "sudden quarrel," is without merit.

Choice of Evils Defense

Mowell was found guilty of being a felon in possession of a firearm in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1995). According to Mowell, the evidence at trial established that Cade had placed him in fear of his life, and under Neb. Rev. Stat. § 28-1407 (Reissue 1995), the jury should have been presented with a choice of evils instruction, whereby they could have found his possession of a firearm necessary, i.e., lawful, under the circumstances. In other words, Mowell argues that § 28-1206 is subject to the choice of evils defense found in § 28-1407.

[13,14] In delineating the scope and applicability of § 28-1407, we have stated the statute reflects the Nebraska Legislature's policy that certain circumstances legally excuse conduct that would otherwise be criminal. *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992). The defense requires that a defendant (1) acts to avoid a greater harm; (2) reasonably believes that the particular action is necessary to avoid a specific and immediate harm; and (3) reasonably believes that the selected action is the least harmful alternative to avoid the harm, either actual or reasonably believed by the defendant to be certain to occur. *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999); *Cozzens, supra.*

Mowell presented such an instruction to the trial court. However, believing *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), *disapproved on other grounds, State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991), was controlling, the trial court refused to give Mowell's proposed instruction. 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. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003).

Assuming for argument's sake that Mowell's tendered instruction is a correct statement of the law, we must determine whether a choice of evils defense is applicable to a violation of § 28-1206. Nebraska law explicitly and unequivocally prohibits a felon from being in possession of a firearm. See § 28-1206. Noting that no exceptions appear on the face of the statute, we have held that a felon who possesses a firearm for allegedly self-defense purposes is guilty of violating § 28-1206. *Harrington, supra.*

In *Harrington*, the defendant was convicted of being a felon in possession of a firearm in violation of § 28-1206(1). At trial, the defendant testified that he carried a firearm because a gang had repeatedly threatened his life. Based on this evidence, the defendant requested that the trial court instruct the jury that the State must prove his possession of the firearm was not for the purpose of security or defense. The court refused to issue the instruction, and we affirmed on appeal. We stated:

> [Section] 28-1206(1) makes it a crime for a convicted felon to possess a firearm. There is no exception for a convicted felon who believes he may need a firearm for self-defense, and the defendant violated that statute by being in possession of a firearm. His possession of the firearm for allegedly self-defense purposes did not excuse or justify his violation of the statute. Since the statute creates no right for a felon to possess a firearm for self-defense, it was unnecessary to instruct the jury as requested by the defendant.

Harrington, 236 Neb. at 502, 461 N.W.2d at 754.

We are faced with a slightly different issue in this case because the defendant's proposed instruction in *Harrington* was not based on a choice of evils defense under § 28-1407. Furthermore, as Mowell notes, some courts have crafted exceptions to their felony possession statutes which allow for variations on the choice of evils defense in *very* limited circumstances. See, generally, *U.S. v. Paolello*, 951 F.2d 537 (3d Cir. 1991) (recognizing defense where, during bar altercation, defendant knocked gun from attacker's hand to prevent him from shooting defendant's stepson and then picked up gun from floor to prevent attacker from retrieving it); *United States v. Panter*, 688 F.2d 268 (5th Cir. 1982) (recognizing defense where defendant, pinned to floor after being stabbed in abdomen, reached under bar for club and instead retrieved pistol);

Vasquez v. State, 830 S.W.2d 948 (Tex. Crim. App. 1992) (recognizing defense where defendant presented evidence that he grabbed firearm from kidnappers in attempt to free himself).

[15] Without ruling on a limited availability of a choice of evils-type justification defense to the charge of being a felon in possession of a firearm, we conclude that under the facts of this case, Mowell was not entitled to such an instruction. When examining justification or choice of evils defenses, this court has repeatedly stated that the action taken must be "necessary to avoid a specific and immediately imminent harm." *State v. Cozzens*, 241 Neb. 565, 571, 490 N.W.2d 184, 189 (1992). Stated otherwise, generalized and nonimmediate fears are inadequate grounds upon which to justify a violation of law. See *State v. Graham*, 201 Neb. 659, 271 N.W.2d 456 (1978). See, also, *Cozzens, supra.*

A review of the evidence shows that although Cade and Mowell had a rocky and violent relationship, Mowell was not facing immediate harm when he first obtained the firearm, nor later when he obtained the firearm again, shortly before Cade's death. Mowell stated he originally obtained the firearm a few weeks prior to Cade's death. He stated he obtained the firearm because Cade told him that "someone" inside of the gang was going to die. However, this statement was so vague that it could not have triggered more than a generalized fear for his safety. Moreover, a few days after obtaining the firearm, Mowell testified that he pointed the firearm at Cade because Cade was demanding meth. The same night, however, Mowell returned the firearm to his friend.

Mowell was in possession of the firearm again, 2 days prior to Cade's death. Mowell testified that he reobtained the firearm because Cade believed that Mowell had cheated him in a drug transaction. Mowell testified that his fear was based on Cade's statement that "it's not over" prior to his leaving Mowell's apartment the night of the drug transaction. However, Cade made no specific and immediate threat to Mowell, and the vague statement, "it's not over," is insufficient to establish more than a generalized and nonimmediate fear of harm. The true nature of Mowell's possession of the firearm is aptly demonstrated by examining the day of Cade's death. Mowell testified that on the afternoon of March 18, 2002, he was sitting with the firearm by

his side even though he did not think Cade was coming to the apartment. Such circumstances, both leading up to and on March 18, conclusively demonstrate that Mowell's possession of the firearm was without justification under the law.

Furthermore, even if Mowell felt threatened and harassed by Cade to a point where he feared for his safety, Mowell had ample opportunity to go to the police, request a restraining order, or stop associating with Cade. See *Graham, supra* (time to explore other viable alternatives is relevant factor in analyzing justification defense). See, also, *U.S. v. Bell*, 214 F.3d 1299 (11th Cir. 2000); *U.S. v. Rice*, 214 F.3d 1295 (11th Cir. 2000); *U.S. v. Lomax*, 87 F.3d 959 (8th Cir. 1996). There is simply no evidence that shows Mowell was facing a specific and immediate threat when he obtained the firearm; thus, even if we assume that § 28-1206 could modify § 28-1407 under certain limited circumstances, the trial court did not err by refusing to give the instruction in the instant case.

Lastly, Mowell argues that the denial of his proposed jury instruction was unconstitutional because it deprived him of his right to defend himself under Neb. Const. art. I, § 1. This argument is without merit. Mowell cannot predicate constitutional error on the failure to give an instruction on a factually inapplicable defense. Moreover, to the extent Mowell argues that the right to bear arms trumps § 28-1206, we have previously found § 28-1206 to be a reasonable, and constitutional, restriction on the right to bear arms. See, *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), *disapproved on other grounds, State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991); *State v. Comeau*, 233 Neb. 907, 448 N.W.2d 595 (1989).

EXHIBITS 93 THROUGH 96 AND 100

Mowell also argues that the trial court erred by admitting exhibits 93 through 96 and 100. These exhibits are some of the writings found in Mowell's backpack at the time of his arrest. Generally speaking, they can be read as admissions by Mowell that he killed Cade and that he had no remorse for doing so.

As an initial matter, the State argues that Mowell's objections to these exhibits were not sufficiently specific to preserve these claims for appellate review. At the time the exhibits were offered,

Mowell's counsel interposed objections "on the basis of the objections that I made previously" and "for the reasons previously stated."

The governing statutory provision states, in relevant part:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, *stating the specific ground of objection, if a specific ground was not apparent from the context* . . . .

(Emphasis supplied.) Neb. Rev. Stat. § 27-103 (Reissue 1995).

A review of the record makes it clear that defense counsel was simply referencing and renewing the more specific objections he had made at a previous hearing where the trial court denied its objections to the exhibits. Moreover, after the court made its ruling at the hearing, counsel for the defense and the trial court had the following colloquy:

> [Defense counsel]: When we get started, my understanding [is that the prosecutor] wants to offer all of [the exhibits] and have me object and have you rule on the objection. Is it necessary to restate all of the foundation for the objection?
>
> THE COURT: I think if you want to make a record, I think we could state on the record at this point that the objections you have, have already been expressed and so that the Court of Appeals or Supreme Court, should they ever look at it, don't deprive you of your opportunity to raise that issue. I think that is good enough and not have you go through all of that and have to do it here at side-bar. I wouldn't let you do it in the presence of the jury.
>
> [Defense counsel]: Right. I am concerned about appellate decisions that said, even though you made an objection, you don't make it at the time that it's being offered.
>
> THE COURT: I think you can make it at the time it's being offered, but you don't have to repeat your reasons for it. I think that preserves it. You can simply, for the record, object even though we all know that we have had this discussion.

> [Defense counsel]: For the reasons previously stated, I object to these exhibits.
>
> THE COURT: And then you probably ought to — I suppose I will know as we go along which ones are which so I get the right numbers.

Thereafter, the court brought the jury back into the courtroom, and the State called a Lincoln police officer to the stand. During the direct examination of the police officer, the State offered exhibits 93 through 96 and 100. As noted above, the defense made general objections and the trial court admitted the exhibits into evidence over those objections. Because the prior hearing should have made the specific ground of the objections apparent to both the State and the trial court, the State's argument is without merit. See, § 27-103(1)(a); *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988) (noting objection must be sufficiently specific to enlighten trial court and enable it to pass upon it).

[16] Mowell argues that the exhibits were irrelevant, cumulative, and unfairly prejudicial, and should not have been admitted into evidence at trial. 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 such discretion a factor in determining admissibility. Where 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. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Rev. Stat. § 27-401 (Reissue 1995) and prejudice under Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. See, *McPherson, supra*; *Cook, supra*; *State v. Dixon*, 240 Neb. 454, 482 N.W.2d 573 (1992).

A review of the exhibits shows that they were neither irrelevant nor unduly prejudicial. "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." § 27-401. These exhibits were relevant to facts at issue in the case. First,

Mowell is simply wrong to suggest that the only issue to be decided in the case was whether Cade's death was a result of a sudden quarrel. At the time the exhibits were offered and received, the State was still attempting to prove the elements of murder. In other words, they were attempting to show that Mowell killed Cade and that he did so intentionally, deliberately, and not in the course of self-defense. Admissions by Mowell that he killed Cade are relevant to these issues. Moreover, the exhibits are relevant to establish Mowell's motive at the time of the killing. Finally, the exhibits have some relevance for what they did not include; namely, they contained no indication that Mowell killed Cade in self-defense.

[17] However, even 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." § 27-403. Essentially, Mowell argues that the exhibits were prejudicial because they contain callous language about a tragic event and highlight his lack of remorse over killing Cade. However, the key inquiry is not whether the exhibits were prejudicial, but whether they were unduly prejudicial. For "[w]hile most, if not all, evidence offered by a party is 'calculated to be prejudicial to the opposing party,' only evidence tending to suggest a decision on an improper basis is 'unfairly prejudicial.'" *State v. Perrigo*, 244 Neb. 990, 997, 510 N.W.2d 304, 309 (1994). See, also, *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000) (unfair prejudice means undue tendency to suggest decision on improper basis).

Our review of the exhibits leads us to conclude that they were highly relevant to a number of issues and that they were not, as Mowell contends, overly suggestive of the idea that Mowell was guilty because he was a bad person, nor did they constitute a needless presentation of cumulative evidence. The trial court did not abuse its discretion by admitting these exhibits into evidence.

Motion to Sever

Prior to trial, the defense filed a motion to sever the charge of felon in possession of a firearm from the other counts. The defense argued that joinder would unfairly prejudice Mowell

because the charge illustrated Mowell's prior felony convictions to the jury. The trial court denied the motion, stating, "I am satisfied that whatever prejudice may arise from trying all three counts together can be cured by a jury instruction limiting the purpose for which the Defendant's prior felony may be considered." The trial court, however, gave no such instruction to the jury.

Mowell asserts that the trial court abused its discretion by denying his motion to sever. More specifically, Mowell argues that he was prejudiced by the court's ruling because it allowed the prosecution to create the impression that Mowell was a bad man and, therefore, guilty of murder. Moreover, Mowell argues that the court's failure to properly instruct the jury exacerbated the prejudice.

The authority to join offenses is found in Neb. Rev. Stat. § 29-2002 (Reissue 1995). It provides:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .
>
> (3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses in an indictment, information, or complaint or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

[18] We have held that severance is not a matter of right, and a ruling of the trial court with regard thereto will not be disturbed on appeal absent a showing of prejudice to the defendant. *State v. Evans*, 235 Neb. 575, 456 N.W.2d 739 (1990); *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976), *disapproved on other grounds, State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990). When determining if the offenses were properly joined, this court has undertaken a two-stage analysis.

First, we must determine how the offenses are related. If the offenses occurred as part of the "same act or transaction," they are properly joinable under § 29-2002. See, *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991); *Evans, supra*. Here, because the murder charged in count I was committed with the firearm that was the subject of counts II and III, the events clearly arose out of the same act or transaction. See *Evans, supra*, citing *State v. Fournier*, 554 A.2d 1184 (Me. 1989).

Second, we must determine if joinder was prejudicial to the defendant. See, *Illig, supra*; *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989). Here, joinder was not prejudicial to Mowell because the evidence relating to each offense would have been admissible in a trial of each offense separately. See, *Illig, supra*; *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). Simply put, Mowell chose to testify at his trial; therefore, even if count III had been severed, evidence of his prior felony convictions would have been properly admitted to potentially impeach his testimony.

Furthermore, the trial court's failure to instruct the jury on the appropriate use of Mowell's felony record does not merit reversal. Rather, the failure to give such a limiting instruction is simply another factor to consider when determining prejudice. As noted above, prejudice is absent from the record, thus any error committed by the trial court in this regard is harmless.

Sufficiency of Evidence

Lastly, Mowell argues that the trial court improperly concluded that the jury's verdicts were supported by sufficient evidence to prove beyond a reasonable doubt that (1) he formed the requisite intent to kill Cade and (2) he was not acting in self-defense.

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. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). Viewing the evidence, as summarized above, in a light most favorable to the prosecution, we conclude that there was

ample evidence to sustain the conviction of Mowell for second degree murder.

CONCLUSION

For the foregoing reasons, we affirm Mowell's convictions for second degree murder, use of a deadly weapon to commit a felony, and being a felon in possession of a firearm.

AFFIRMED.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
CLYDE W. BRONSON, SR., APPELLANT.

672 N.W.2d 244

Filed December 12, 2003. Nos. S-03-040, S-03-483.

1. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
2. **Actions: Statutes.** Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes and have also been described as every special statutory remedy which is not in itself an action.
3. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
4. **Motions to Vacate: Appeal and Error.** The denial of a motion to vacate and set aside the judgment under Neb. Rev. Stat. § 29-4123(2) (Cum. Supp. 2002) affects a substantial right in a special proceeding and is therefore an appealable order under Neb. Rev. Stat. § 25-1902 (Reissue 1995).
5. **Motions to Vacate: DNA Testing.** A court may properly grant a motion to vacate and set aside the judgment under Neb. Rev. Stat. § 29-4123(2) (Cum. Supp. 2002) when (1) the DNA testing results exonerate or exculpate the person and (2) the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value.
6. **Motions to Vacate: Motions for New Trial: DNA Testing: Appeal and Error.** The appeal of a ruling denying a motion to vacate and set aside the judgment under Neb. Rev. Stat. § 29-4123(2) (Cum. Supp. 2002) of the DNA Testing Act does not deprive a trial court of jurisdiction to consider a motion for new trial filed under Neb. Rev. Stat. § 29-2101(6) (Cum. Supp. 2002) based on newly discovered evidence obtained under the DNA Testing Act.

7. **Motions for New Trial: DNA Testing: Appeal and Error.** A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
8. **Motions for New Trial: DNA Testing.** To warrant a new trial, the trial court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.

Appeals from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

I. NATURE OF CASE

Clyde W. Bronson, Sr., was convicted in 1992 of first degree murder and use of a weapon to commit a felony. The convictions and sentences were affirmed on direct appeal to this court. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). On May 8, 2002, the district court for Douglas County granted Bronson's motion to subject evidence in his case to DNA testing pursuant to Nebraska's DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Cum. Supp. 2002). After the DNA testing was completed, Bronson filed a "Motion for Hearing and to Vacate Convictions" based on the results. The motion was denied, and the appeal of that denial is case No. S-03-040. Bronson subsequently moved for a new trial based on the DNA testing results. The motion was denied, and the appeal of the denial of the motion for new trial is case No. S-03-483. Cases Nos. S-03-040 and S-03-483 have been consolidated on appeal. For the reasons explained below, we affirm the order of the district court in each case.

II. STATEMENT OF FACTS

On January 14, 1992, Bronson was found guilty of first degree murder and use of a weapon to commit a felony. Bronson

was sentenced to life imprisonment for the murder conviction and to a consecutive term of 20 years for the weapons conviction. In affirming the convictions and sentences, we set forth the facts of the case in *Bronson* as follows:

> Barbara Smith was found dead by her husband the morning of June 28, 1991. The cause of death was determined to be multiple stab wounds to the chest and blunt injuries to the face and head. No evidence indicated forcible entry. As the Omaha Police Division crime lab searched the scene for fingerprints and other physical evidence, other officers contacted persons in the area regarding any information they may have had about the murder. Bronson, who lived two homes away from the victim, was questioned as he was returning from work. He indicated that he had last been to the Smith residence on June 27 to borrow $5 from Ken Smith, the victim's husband. On June 29 the police requested that appellant, as well as all other individuals known to have been in the Smith residence recently, go over to another neighbor's residence to be fingerprinted. One of Bronson's latent palm prints was found on the refrigerator and one of his patent fingerprints was observed in apparent blood on exhibit 9, a glass vase at the crime scene. Dr. Reena Roy, a forensic serologist, testified that a presumptive test for blood on the vase was positive. Linda Brokofsky, a fingerprint examiner for the Nebraska State Patrol, stated that she found a fingerprint in blood on the vase. Patricia Osier, a senior crime lab technician with the Omaha Police Division examined the vase and found a fingerprint in what appeared to be blood.
>
> On Monday, July 1, Police Officer Bill Jadlowski and Detective Wilson went to Bronson's home to ask him to accompany them to police headquarters for further interview. The officers arrived at the house and at about the same time Bronson was walking up the sidewalk. According to Jadlowski, the officers asked Bronson if they could step inside his residence and, once inside, explained to Bronson that they would like to "talk to him at Central Police Headquarters." Bronson was then taken to the police station. According to the officer, Bronson was not threatened,

> coerced, or promised anything, was not told he was under arrest, was not handcuffed, and rode in the back seat of the unmarked police car with the two officers in the front. Bronson, according to Jadlowski, was calm and cooperative.
>
> Prior to having his *Miranda* rights explained to him, Bronson relayed the same story as to when he had last been in the Smith residence, and admitted that he was a recreational user of crack cocaine. When the police questioned him about several cuts on his hands, he explained that he had received a cut on his finger at work, and the other cuts on his hands were as a result of cleaning a crack-pipe with a wire coat hanger. At this point, the officers left the interrogation room for a short period, obtained a search warrant, returned to the interrogation room, and read Bronson his Miranda rights. Because Bronson indicated he wanted to see his attorney, the interrogation ceased. The officers returned Bronson to his home and proceeded with the execution of the warrant to search the Bronson residence. Sometime later Bronson was allowed to leave his home.
>
> On Wednesday Bronson learned that a warrant for his arrest for first degree murder had been issued, and by arrangements made with the police by his lawyer, Bronson turned himself in on Friday morning.
>
> At trial, Bronson supplemented his original statement, saying that while he had been in the house to borrow money, he also had visited the deceased, Barbara Smith, in her home earlier that week for the purpose of carrying on a romantic affair with her.

242 Neb. at 934-36, 496 N.W.2d at 887-88.

On March 25, 2002, Bronson filed an amended motion for DNA testing under § 29-4120 of the DNA Testing Act. The evidence that he sought to have tested included the vase found at the crime scene which exhibited Bronson's fingerprint in what appeared to be blood, a bloodstained doorknob and various other items of evidence from the victim's home, and a laundry detergent bottle and various other bloodstained items that were seized from Bronson's home. On May 9, the court granted Bronson's motion for DNA testing of the evidence identified by Bronson in his amended motion.

The University of Nebraska Medical Center's human DNA identification laboratory issued a report on July 29, 2002, regarding the results of DNA testing of the evidence in Bronson's case. With regard to the vase found in the victim's home, the report stated that the substance on the vase generated partial DNA profiles and that results concerning contributors to the partial profiles were inconclusive. With regard to the doorknob in the victim's home, the report stated that swabs from the doorknob generated a partial DNA profile consistent with a mixture of Bronson's blood and the victim's blood. Finally, with regard to the laundry detergent bottle found in Bronson's home, the report stated a swab from the bottle generated a DNA profile consistent with Bronson's blood.

On December 4, 2002, pursuant to § 29-4123(2), Bronson moved the district court for an order vacating and setting aside the judgment on the basis of the DNA testing results. In the motion, Bronson asserted that the DNA testing failed to establish that the fingerprint on the vase was made in the blood of either Bronson or the victim or even that the substance was human blood. Bronson also asserted that the DNA testing which established that the doorknob from the victim's home contained DNA consistent with a mixture of Bronson's blood and the victim's blood supported his story that he had been at the victim's home twice in the days preceding the victim's death. Finally, Bronson asserted that the DNA testing established that the blood on the items seized from his home was his blood and not that of the victim. Given the results of the DNA testing, Bronson claimed that the judgment should be vacated and set aside.

After a hearing on December 12, 2002, the court found that the DNA testing results did not exonerate or exculpate Bronson. The court therefore denied Bronson's motion for an order vacating and setting aside the judgment. On January 3, 2003, Bronson filed a notice of appeal regarding the court's order. The appeal of the December 12 order denying Bronson's motion to vacate and set aside the judgment is case No. S-03-040.

On March 11, 2003, pursuant to Neb. Rev. Stat. § 29-2101(6) (Cum. Supp. 2002), Bronson filed a motion for new trial based on newly discovered exculpatory DNA evidence. Bronson made the same allegations regarding the significance of the results of the

DNA testing that he had made in his motion under § 29-4123(2). Bronson claimed that the DNA test results warranted a new trial. After determining that Bronson's motion for new trial was filed within the time period contemplated under Neb. Rev. Stat. § 29-2103 (Cum. Supp. 2002) and that it had jurisdiction to consider the motion, the district court denied Bronson's motion for new trial in an order dated April 21, 2003. On April 24, Bronson filed a notice of appeal of the denial of his motion for new trial. The appeal of the April 21 order denying Bronson's motion for new trial is case No. S-03-483. We granted Bronson's motion to consolidate the two appeals for briefing and oral argument.

III. ASSIGNMENTS OF ERROR

Bronson asserts that the district court erred in (1) failing to vacate and set aside the judgment pursuant to § 29-4123(2) in case No. S-03-040 and (2) failing to grant a new trial based on newly discovered DNA evidence pursuant to § 29-2101(6) in case No. S-03-483.

IV. ANALYSIS

1. S-03-040: Motion to Vacate and Set Aside Judgment Under § 29-4123(2)

(a) Appealability of Denial of Motion to Vacate and Set Aside Judgment Under § 29-4123(2)

The State claims that the denial of a motion to vacate and set aside the judgment made pursuant to § 29-4123(2) is not an appealable, final order and that therefore this court does not have jurisdiction to consider Bronson's appeal in case No. S-03-040. We reject the State's argument.

Section 29-4123 provides:

> (1) The results of the final DNA or other forensic testing ordered under subsection (5) of section 29-4120 shall be disclosed to the county attorney, to the person filing the motion, and to the person's attorney.
>
> (2) Upon receipt of the results of such testing, any party may request a hearing before the court when such results exonerate or exculpate the person. Following such hearing, the court may, on its own motion or upon the motion of any party, vacate and set aside the judgment and release the

> person from custody based upon final testing results exonerating or exculpating the person.
>
> (3) If the court does not grant the relief contained in subsection (2) of this section, any party may file a motion for a new trial under sections 29-2101 to 29-2103.

The district court denied Bronson's motion under § 29-4123(2) on December 12, 2002, and on January 3, 2003, Bronson appealed the denial of his § 29-4123(2) motion.

[1] The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Lauck*, 261 Neb. 145, 621 N.W.2d 515 (2001).

[2] In *State v. Silvers*, 255 Neb. 702, 708-09, 587 N.W.2d 325, 331 (1998), we stated that "[s]pecial proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes" and that "[s]pecial proceedings have also been described as 'every special statutory remedy which is not in itself an action.' " Thus, for example, in *Silvers*, we identified postconviction proceedings as "special proceedings" within the context of § 25-1902. Applying the foregoing definition of special proceeding to the instant case, we conclude that a hearing under § 29-4123(2) is a "special proceeding" within the meaning of the final order statutes.

[3] Because the proceeding at issue was a special proceeding, the denial of Bronson's motion under § 29-4123(2) is an appealable order if it affects a substantial right. A substantial right is an essential legal right, not a mere technical right. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999).

[4] The State argues that the denial of a motion under § 29-4123(2) does not affect a substantial right because the defendant can be afforded relief by filing a motion for new trial and the defendant should be required to await a ruling on a motion for new trial before being allowed to appeal the denial of a motion made under § 29-4123(2). In this regard, we note that in *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997), we held

that the denial of a motion to discharge based on speedy trial grounds affected a substantial right and was an appealable order. Similarly, in *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990), we held that the denial of a plea in bar raising a nonfrivolous double jeopardy claim was a final, appealable order because it affected a substantial right in a special proceeding. In both *Gibbs* and *Milenkovich*, we noted that the rights of the accused would be significantly undermined if appellate review were postponed. In the present case, despite the option to move for a new trial based on DNA testing evidence as identified in § 29-4123(3), we determine that a substantial right is nevertheless affected because, where relief is indicated but not afforded, a defendant has lost the right to be immediately released from custody without being exposed to further delay, expense, and the risk inherent in a new trial. In sum, Bronson's rights conferred by § 29-4123(2) would be significantly undermined if appellate review were postponed. See, *Gibbs, supra*; *Milenkovich, supra*. We therefore conclude that the denial of a motion to vacate and set aside the judgment under § 29-4123(2) affects a substantial right in a special proceeding and is therefore an appealable order under § 25-1902.

(b) Required Proof Under § 29-4123(2)

We have not previously reviewed a district court's ruling on a motion to vacate and set aside the judgment under § 29-4123(2) based on DNA testing evidence. We therefore take this opportunity to address the proof required to succeed on such a motion.

[5] A motion to vacate and set aside the judgment pursuant to § 29-4123(2) is similar to a motion to dismiss in a criminal case. With respect to motions to dismiss, we have stated:

> 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. Bao, 263 Neb. 439, 448, 640 N.W.2d 405, 413 (2002). Because of the similarity to a motion to dismiss, we determine that a standard comparable to that which is applied to a motion to dismiss in a criminal case should apply with respect to a motion

under § 29-4123(2). We hold that a court may properly grant a motion to vacate and set aside the judgment under § 29-4123(2) when (1) the DNA testing results exonerate or exculpate the person and (2) the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value.

2. S-03-483: Motion for New Trial Under § 29-2101(6)

(a) District Court's Jurisdiction to Consider Motion for New Trial Under § 29-2101(6)

As an adjunct to its assertion in case No. S-03-040 that the denial of Bronson's motion under § 29-4123(2) was not an appealable order, the State argues in case No. S-03-483 that if it is concluded that the order denying the motion to vacate and set aside the judgment is appealable, then Bronson's appeal of that order deprived the district court of jurisdiction to consider the motion for new trial under § 29-2101(6) while the first appeal was pending. We reject the State's argument and conclude that the district court had jurisdiction to consider the motion for new trial under § 29-2101(6) during the pendency of the appeal of the denial of the motion to vacate and set aside the judgment under § 29-4123(2).

Section 29-2101 provides that "[a] new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: . . . (6) newly discovered exculpatory DNA or similar forensic testing evidence obtained under the DNA Testing Act . . . ."

Although the evidence supporting a motion for new trial pursuant to § 29-2101(6) is obtained under the DNA Testing Act, the motion for new trial under § 29-2101(6) is not part of the DNA Testing Act. A motion for new trial under § 29-2101(6) based on newly discovered evidence is akin to a motion for new trial based on newly discovered evidence under § 29-2101(5). We have long held that the appeal of a conviction in the appellate court and the consideration of a motion for new trial on the

ground of newly discovered evidence filed in a trial court may be separately conducted in both courts at the same time. *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958). We stated in *Smith* that "the two proceedings . . . should be conducted separately and independently of each other, and that such independent conduct by the [trial] court could not be regarded [by the Legislature or the courts] as an invasion of the jurisdiction of the [appellate court]." 167 Neb. at 494, 93 N.W.2d at 500.

[6] In the same respect, we note that § 29-4123(3) provides that "[i]f the court does not grant the relief contained in subsection (2) of this section, any party may file a motion for new trial under sections 29-2101 to 29-2103." The legislative direction that the filing of a motion for new trial be made "under sections 29-2101 to 29-2103" indicates that the motion for new trial is a separate and independent proceeding from the proceedings under the DNA Testing Act. We therefore conclude that the appeal of a ruling denying a motion to vacate and set aside the judgment under § 29-4123(2) of the DNA Testing Act does not deprive a trial court of jurisdiction to consider a motion for new trial filed under § 29-2101(6) based on newly discovered evidence obtained under the DNA Testing Act.

(b) Required Proof Under § 29-2101(6)
and Appellate Review

We have not previously reviewed a district court's ruling on a motion for new trial under § 29-2101(6) based on evidence obtained pursuant to the DNA Testing Act. We therefore take this opportunity to address the proof required to succeed on such a motion and the standard of review an appellate court should apply to the trial court's ruling on a motion for new trial under § 29-2101(6).

[7] With respect to the trial court's consideration of a motion for new trial based on newly discovered evidence, we have stated in a similar context under § 29-2101(5) that where a motion for new trial is based on newly discovered evidence, such " ' "evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result." . . .' " *State v. Boppre*, 243 Neb. 908, 924, 503 N.W.2d 526, 536 (1993). We have further stated that "[a]

motion for new trial based on newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed." *State v. Bjorklund*, 258 Neb. 432, 496, 604 N.W.2d 169, 220 (2000). We determine that the standards just quoted are applicable to motions for new trial pursuant to § 29-2101(6) based on newly discovered evidence obtained under the DNA Testing Act.

Bronson urges that because § 29-2101(6) refers to exculpatory evidence obtained "under the DNA Testing Act," the definition of "exculpatory evidence" provided in the DNA Testing Act sets the exclusive standard by which a trial court must decide a motion for new trial under § 29-2101(6). In this regard, we note that the DNA Testing Act defines "exculpatory evidence" as "evidence which is favorable to the person in custody and material to the issue of guilt of the person in custody." § 29-4119. Bronson argues that a trial court should grant a new trial based on newly discovered evidence obtained under the DNA Testing Act if such evidence is merely "favorable to the person in custody and material to the issue of guilt of the person in custody." Brief for appellant at 5.

[8] A review of §§ 29-2101(6) and 29-4123(3) taken together shows that although § 29-4123(3) refers to the new trial statutes and § 29-2101(6) refers to "exculpatory evidence" under the DNA Testing Act, such reference in § 29-2101(6) is for the purpose of defining the proper basis for bringing a motion explicitly under § 29-2101(6). Thus, although "exculpatory evidence" may support filing a motion for new trial under § 29-2101(6), the existence of such evidence does not invariably warrant the granting of a new trial. A motion for new trial under § 29-2101(6), properly brought within the timeframe allowed under § 29-2103(5), must be based on "exculpatory . . . evidence obtained under the DNA Testing Act." Where the trial court determines that the evidence meets the definition of "exculpatory evidence" under § 29-4119, thus justifying the filing of a motion for new trial, the trial court must then proceed to consider whether the newly discovered evidence warrants a new trial. We conclude that to warrant a new trial, the trial court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act must

be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.

3. Analysis of Merits in Cases Nos. S-03-040 and S-03-483

In the district court and on appeal, Bronson claimed certain DNA-tested evidence exonerated or exculpated him. Bronson relied on the results of three main pieces of DNA-tested evidence. Those items as described by Bronson are (1) the DNA tests on the substance on the vase which Bronson asserts was not proved to be human blood, (2) the DNA material on the doorknob of the victim's house which Bronson states was proved to be his, and (3) the DNA material on items found in Bronson's home which Bronson states was not proved to belong to the victim.

With respect to the vase, the DNA testing did not establish that the substance was not human blood. Furthermore, the DNA-tested evidence is not inconsistent with the evidence presented at trial which indicated that the substance likely was blood. In sum, the import of the evidence remains that Bronson's fingerprint was on the vase regardless of whether the substance making the fingerprint was the victim's blood or some other substance. The evidence of Bronson's fingerprint on the vase is not inconsistent with guilt.

With respect to the doorknob, Bronson argues that evidence that his blood was on the doorknob at the victim's home supports his story that he was at the house in the days prior to the murder. Contrary to Bronson's argument, the DNA testing results do not establish when the DNA evidence was left and it could rationally be inferred that the blood was left on the doorknob at the time of the killing rather than days earlier as Bronson asserts. Thus, the fact that Bronson was in the house at an earlier date does not disprove that he was also at the house at the time of the murder. Bronson's blood on the doorknob is not inconsistent with guilt.

With respect to the blood found on items in Bronson's home, Bronson notes that the DNA testing established that the blood on these items did not belong to the victim. In response, the State points out that while testing of some of the blood indicates that it was Bronson's rather than that of the victim, testing of

other stains was inconclusive. Had Bronson cut himself during the murder, the fact that the blood on the items in Bronson's home was his rather than the victim's blood is not inconsistent with guilt.

In sum, the DNA testing results do not warrant the relief Bronson seeks. The evidence obtained under the DNA Testing Act is not of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result. We therefore conclude that the district court did not abuse its discretion by denying Bronson's motion for new trial under § 29-2101(6), and we affirm the court's ruling in case No. S-03-483.

Because we determine that the evidence obtained under the DNA Testing Act does not warrant a new trial, a fortiori, the same evidence does not warrant vacating and setting aside the judgment. When the DNA testing results are considered in association with the evidence presented in connection with the case which resulted in the underlying judgment, we cannot say there was a complete failure of evidence to establish an essential element of the crime charged or that the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. We therefore conclude that the district court did not err in denying Bronson's motion to vacate and set aside the judgment under § 29-4123(2), and we affirm the court's ruling in case No. S-03-040.

V. CONCLUSION

We conclude that the order denying Bronson's motion to vacate and set aside the judgment under § 29-4123(2) is an appealable order and that during the pendency of the appeal of that order, the district court had jurisdiction to consider Bronson's motion for new trial under § 29-2101(6). We further conclude that the district court did not err in denying both motions. We therefore affirm the rulings in both cases Nos. S-03-040 and S-03-483.

AFFIRMED.

McCORMACK, J., not participating.

DENISE DEBOSE AND JAMES MCCULLOUGH, APPELLANTS, V. STATE OF NEBRASKA, APPELLEE.

672 N.W.2d 426

Filed December 19, 2003. No. S-01-1188.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Final Orders: Motions for New Trial: Time: Notice: Appeal and Error.** In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial.
3. **Motions for New Trial: Pleadings: Judgments: Time: Notice: Appeal and Error.** The running of the time for filing a notice of appeal may be terminated by the filing of certain motions, including a motion for new trial under Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2002), a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), or a motion to set aside a verdict or judgment under Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2002).
4. **Pleadings: Judgments.** A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title.
5. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), and must seek substantive alteration of the judgment.
6. **Pleadings: Judgments.** A motion which merely seeks to correct clerical errors or one seeking relief that is wholly collateral to the judgment is not a motion to alter or amend a judgment.
7. **Supreme Court: Courts: Appeal and Error.** Upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, this court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and INBODY, Judges, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Thom K. Cope for appellants.

Don Stenberg, Attorney General, Vicki L. Boone-Lawson, and, on brief, Melanie J. Whittamore-Mantzios for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Denise DeBose and James McCullough (collectively the appellants) filed this employment discrimination action against the State of Nebraska. The district court for Lancaster County determined that the action was not filed within the applicable statute of limitations and dismissed the action. On appeal, the Nebraska Court of Appeals determined that the appellants did not file a timely appeal and dismissed the appeal for lack of jurisdiction. We granted the appellants' petition for further review. We conclude that the appellants timely appealed from the district court's order and remand the cause for further proceedings.

BACKGROUND

The appellants filed this action against the State on January 28, 1999. Their amended petition alleged that they were each employed as investigators with the Nebraska Equal Opportunity Commission and were each diagnosed with depression. For their first cause of action, the appellants alleged that they were each terminated from their employment on the basis of their depression—DeBose on March 16, 1995, and McCullough on May 30, 1995. For their second cause of action, they alleged that on March 14, 1995, they were each refused reasonable accommodation for their depression. The appellants alleged that their causes of action arose under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2000); the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1998); § 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794 (1994); and the public policy of Nebraska.

The State demurred to the petition, arguing that the court lacked jurisdiction. On September 13, 2001, the district court sustained the demurrer and dismissed the appellants' amended petition. The court, citing *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000), found that § 48-1118(2) provided the applicable statute of limitations and

that the appellants failed to file their petition within that 300-day statute of limitations.

On September 17, 2001, the appellants filed a "Plaintiff[s'] Motion for New Trial and Reconsideration." It stated in full:

> **COME NOW** the Plaintiffs, and request the Court to review its decision to dismiss the Plaintiffs' entire Amended Petition. For good cause, Plaintiffs state that the first cause of action is brought under § 504 of the Rehabilitation Act. The Defendants have stated their only objection to that claim is that the Plaintiffs didn't allege that the State receives federal funds. This can be easily remedied by amendment, because those are indeed the facts. Moreover, the 300 day filing time limits do not apply to the public policy of this State.

On October 12, 2001, the district court overruled the appellants' motion. The appellants filed a notice of appeal and deposited the statutory docket fee on October 26.

In an unpublished opinion, the Court of Appeals dismissed the appeal for lack of jurisdiction. *DeBose v. State*, No. A-01-1188, 2003 WL 21057283 (Neb. App. May 13, 2003) (not designated for permanent publication). The Court of Appeals found that the appellants' motion, which asked the district court only to review its decision to dismiss, was a motion for reconsideration that did not terminate the 30-day appeal period. Thus, the Court of Appeals determined that the appellants failed to file a timely appeal under Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2002).

ASSIGNMENTS OF ERROR

In their petition for further review, the appellants contend that the Court of Appeals erred in finding that their appeal was untimely filed.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

ANALYSIS

[2] We granted the appellants' petition for further review to determine if the Court of Appeals erred in dismissing the appeal for lack of jurisdiction. In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002); § 25-1912(1). The appellants' notice of appeal was filed within 30 days of the court's denial of the appellants' motion for new trial and reconsideration. However, the Court of Appeals determined that the appellants' motion did not terminate the 30-day appeal period, because it was a motion for reconsideration and did not extend the time to perfect an appeal. Thus, the court concluded that it was without jurisdiction because the appellants' notice of appeal was filed more than 30 days after the district court sustained the State's demurrer and dismissed the appellants' petition.

[3] Whether appellate jurisdiction has been properly vested depends on whether the appellants' motion terminated the appeal period. Nebraska law provides that the running of the time for filing a notice of appeal may be terminated by the filing of certain motions, including a motion for new trial under Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2002), a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), or a motion to set aside a verdict or judgment under Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2002). *State v. Bellamy, supra*; § 25-1912(3). A motion for reconsideration, however, does not act as a motion for new trial so as to terminate the appeal period. *State v. Bellamy, supra*. Distilled to its essence, this case presents the following question: What type of motion did the appellants file?

[4-6] In *State v. Bellamy*, we considered whether a motion for reconsideration acted as a motion to alter or amend a judgment. We held that whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title. *Id.* To qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of the judgment. *Id.* A motion which merely seeks to correct clerical

errors or one seeking relief that is wholly collateral to the judgment is not a motion to alter or amend a judgment. *Id.*

The appellants' motion seeks a "review" of the district court's decision to dismiss the appellants' petition. In support of obtaining that "review," the appellants asserted that a deficiency in their petition could be fixed if they were allowed to amend it. Specifically, the appellants' motion asserts that the portion of their action brought under § 504 of the Rehabilitation Act should survive the State's demurrer upon amendment of the petition. Thus, in effect, the appellants' motion requests reinstatement of their action, at least in part. We conclude that this request seeks substantive alteration of the district court's judgment. Thus, the appellants' motion is properly characterized as a motion to alter or amend a judgment, which terminated the appeal period. Because the appellants filed their notice of appeal within 30 days of the denial of their motion to alter or amend a judgment, the Court of Appeals had jurisdiction over their appeal.

CONCLUSION

We conclude that the Court of Appeals erred in dismissing the appeal for lack of jurisdiction. Following the dismissal of their petition by the district court, the appellants terminated the 30-day appeal period by a motion to alter or amend a judgment under § 25-1329. The appellants timely appealed after that motion was denied.

[7] We recognize that upon granting further review which results in the reversal of a decision of the Court of Appeals, this court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). However, in this case, the Court of Appeals did not reach any of the appellants' assignments of error. We conclude that under these circumstances, it is appropriate for the Court of Appeals to consider the appellants' arguments in the first instance, and we do not reach their assignments of error. Instead, we reverse the judgment of the Court of Appeals, and remand the cause to the Court of Appeals for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE ESTATE OF MAMIE G. REED, DECEASED. VELMA M. COOK, PERSONAL REPRESENTATIVE, APPELLEE, AND RICHARD A. ROWLAND, APPELLANT, V. JOHN E. LYNCH, SUCCESSOR PERSONAL REPRESENTATIVE, APPELLEE.

672 N.W.2d 416

Filed December 19, 2003. No. S-01-1195.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Supreme Court: Courts.** The Nebraska Supreme Court has been charged with administering the system of justice by exercising managerial authority over the inferior courts. Through its inherent judicial power, the Nebraska Supreme Court has authority to do all things that are reasonably necessary for the proper administration of justice, whether any previous form of remedy has been granted or not.
4. **Courts.** Courts are charged with the duty of guarding their proceedings against everything which interferes with the orderly administration of justice.
5. **Supreme Court.** When the Nebraska Supreme Court was created, it brought with it inherent powers, i.e., powers that are essential to the existence, dignity, and functions of the court from the very fact that it is a court.
6. **Supreme Court: Rules of the Supreme Court.** It is essential for the Nebraska Supreme Court, as a part of its inherent authority, to provide inferior courts with case progression standards in order to ensure that cases are properly disposed of in a timely and efficient manner.
7. **Supreme Court: Courts: Attorneys at Law.** Lawyers, as officers of the court, are subject to the directives of the Nebraska Supreme Court, and lawyers are required to comply with orders of inferior courts issued in response to directives of this court.
8. **Supreme Court: Courts.** The directives issued by the Nebraska Supreme Court are an expression of the court's authority to manage inferior courts.
9. **Courts: Constitutional Law: Statutes.** A court cannot, in enforcing directives of a superior court, deprive a party of legal or substantive rights by acting in an arbitrary or unreasonable manner which is inconsistent with or contravenes principles of general law or constitutional or statutory provisions.
10. **Decedents' Estates: Attorneys at Law: Costs.** Before a court may tax costs against the attorney for a personal representative, the court must first determine upon the evidence presented whether any reasons exist for a delay in promptly administering the estate and whether the attorney is personally responsible for such delay in the administration of the estate.
11. **Decedents' Estates: Attorney and Client.** An attorney hired to represent a personal representative is employed for the benefit of the personal representative.

12. **Due Process: Notice: Final Orders.** Basic principles of due process require reasonable notice and a fair opportunity to be heard at some stage of the proceedings prior to a final determination.
13. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and CARLSON and MOORE, Judges, on appeal thereto from the County Court for Douglas County, JEFFREY L. MARCUZZO, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed.

Richard A. Rowland, of Wright & Associates, pro se.

Jay A. Ferguson for appellee John E. Lynch, and John E. Lynch, pro se.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

This appeal arises from a probate matter wherein the county court removed the personal representative and her attorney, appointed a successor personal representative, and assessed costs against the former personal representative and her attorney. The Nebraska Court of Appeals reversed the order assessing costs, see *In re Estate of Reed*, 11 Neb. App. 915, 663 N.W.2d 147 (2003), and this court granted the successor personal representative's petition for further review.

SCOPE OF REVIEW

[1] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

FACTUAL BACKGROUND

Velma M. Cook was appointed personal representative of the estate of Mamie G. Reed on February 12, 1996. Richard A. Rowland filed documents on Cook's behalf in his capacity as her attorney. The short-form inventory indicated that the estate consisted of a house located in Omaha, Nebraska, with a market value of approximately $9,000, as well as miscellaneous furniture and appliances with a market value of $100.

On June 18, 1998, this court issued a directive concerning case progression standards for probate cases. The document, which was captioned "Directive To All County Courts," provided in relevant part as follows:

> In all probates not completed within 24 months, the county court shall order the personal representative to show cause why the probate should not be closed within 3 months or the personal representative removed and a new personal representative appointed. Upon removal of the personal representative, the county court shall appoint a new personal representative, who shall proceed forthwith to complete the administration of the probate. The county court shall tax the costs of completion of the administration to the former personal representative and his or her attorney.

In keeping with our directive, the county court issued an order to show cause on August 25, 1998, which ordered Cook to file closing documents by August 31 or show cause why the estate had to be kept open longer. The order to show cause provided in part:

> In the event of failure to file the closing documents or file the detailed report by the deadline the personal representative shall be removed and powers terminated without further notice and the costs and accruing costs taxed to the personal representative and to his or her attorney, including and not limited to the successor personal representative's fees and his or her attorney's fees.

On August 31, 1998, Cook filed the following response to the August 25 order via Rowland, her attorney:

> The sole property of the estate is a residence at 1606 Laird Street, Omaha, Nebraska. Said property has been held for

> sale by the Personal Representative but only one offer of $9,900 has been received. The prospective buyer was unable to obtain a loan and the sale did not take place. Unfortunately, the home was not in good repair at the time of death of . . . Cook's mother, Mamie Reed, and the heirs don't have the funds to bring the home up to A-one status. However, the[y] do not wish to give the property away either. The current assessed value is $8,300 [and] gives a reasonable sale value of between $9,000 to $10,000. It is requested the estate be continued for an additional 90 days for closure and if sale is not realized within the next 60 days, the property will be deeded and distributed to the heirs and the estate closed.

Without further notice or hearing, the county court entered an order on March 10, 1999, removing Cook as the personal representative and appointing John E. Lynch as successor personal representative. The order provided that "[a]ny and all costs incurred by . . . Lynch in his fiduciary capacity shall be taxed jointly and individually" to Cook and Rowland.

On March 11, 1999, Rowland filed a motion to amend the county court's order of March 10 for the following reasons:

> 1. That the undersigned has kept the Court informed of his unsuccessful attempts to contact [Cook] in this matter.
>
> 2. That the undersigned personally contacted the Court informally on this matter to discuss withdrawal or other positive action that could be taken by the attorney, that [the county court judge] requested that he not withdraw and that at the end of the continuance the Court would order the removal of [Cook] or take other appropriate action.
>
> 3. That the only property of the estate is the residence at 1606 Laird Street, Omaha, Nebraska[,] which, is believed to be lived in by a disabled relative, that the property has minimal value and [Cook] and her siblings believe should be left as is.
>
> 4. That numerous letters (attached hereto) have been sent to . . . Cook in an effort to complete the estate, that in addition the undersigned has attempted to communicate by telephone and on two occasions has attempted to contact . . . Cook by a personal visit to her home and to the estate

residence. No one answered at either location and messages were left requesting . . . Cook contact the undersigned. A neighbor of . . . Cook's was further contacted on one visit and requested to have . . . Cook make contact all to no avail.

5. That the undersigned received only an initial payment of $100.00 in this matter.

WHEREFORE, the undersigned moves this Court to amend the Order of March 10, 1999, in this matter by removing him from responsibility for costs in this matter.

This motion was scheduled for hearing on April 6, 1999. The bill of exceptions for the hearing provides as follows: "(A hearing date of 4/6/99 was requested to be part of this bill of exceptions. However, since this hearing was not tape recorded it cannot be included as part of this bill of exceptions.)"

The only record of what transpired at the April 6, 1999, hearing is subsequent testimony by Rowland, who stated: "Well I asked [the county court judge], obviously, to overrule the motion and to take me off of it. And I guess I made some arguments pertaining to his conversation that went back to the — the courthouse steps of reminding him of what he said." There is no record of the county court's ruling on the motion to amend the March 10 order.

Subsequently to the appointment of Lynch as successor personal representative, the county court issued another order to show cause to Cook and Rowland, directing Cook to close the estate and pay any court costs due on or before May 13, 1999. Upon failure to do so, Cook was ordered to appear on or before May 13 before a judge in the probate division of the county court. The order provided that failure to comply with this order would result in her removal without further notice and would subject her to sanctions for contempt of court. No further action on this order to show cause appears in the record. On April 8, letters of personal representative were issued to Lynch.

In April 1999, Lynch wrote to Rowland, Cook, and Reed's heirs, advising them that the administrative costs, filing fees, and court costs would be between $300 and $500. Lynch estimated his attorney fees would be at least $1,500. He advised that the assets in the estate appeared to be insufficient to pay the expenses

and that one of two things needed to occur within the next 60 days. The first option was for the family to contribute money to the estate to pay outstanding bills. Ownership of the house could then be deeded to the family members, and the estate could be closed. The second option was to sell the house as soon as possible, use the proceeds to pay the bills, and distribute the remaining assets to the heirs. Lynch estimated that the house was worth between $5,000 and $10,000 and that there would be at least $2,000 in expenses. He requested that the heirs contact him by April 16. The heirs failed to respond.

Lynch learned on May 6, 1999, that there was a foreclosure proceeding pending against the real estate in Reed's estate. Lynch knew that the property was occupied, but he was not familiar with the occupant. He subsequently learned that a hearing on the foreclosure was set for May 25. He was unsuccessful in obtaining a continuance of the foreclosure, and therefore, on May 24, the estate filed a petition in bankruptcy to stop the foreclosure. The purpose of filing bankruptcy was to stall the foreclosure until the house could be sold. At the time the bankruptcy petition was filed, there were liens against the property in the amount of $5,922.03.

An order was entered in the U.S. Bankruptcy Court for the District of Nebraska on July 16, 1999, dismissing the petition in bankruptcy. The occupant was evicted from the house, and Lynch subsequently sold it for $8,000. Of that sum, $6,338 was required to satisfy liens against the property. After all expenses were paid, the estate balance was $503.95.

During 2000, various motions, which are too numerous to set forth in detail, were filed by Cook, Rowland, and Lynch. On February 10, Lynch filed an application for surcharge requesting $4,370 in fees, $903.05 in administrative costs, and $185 in publication costs. This application spawned further motions filed by Cook and Rowland.

Cook and Rowland sought to have the county court declare that this court's directive of June 18, 1998, is unconstitutional. On October 17, 2000, the county court overruled the motion and dismissed a counterclaim filed by Cook against Lynch. On November 17, Cook filed an appeal with the Court of Appeals from the county court's order overruling the motion to determine

this court's directive unconstitutional and from the ruling dismissing the counterclaim filed by Cook. This appeal was dismissed by the Court of Appeals. See *In re Estate of Reed*, 10 Neb. App. xxii (No. A-00-1177, May 22, 2001).

In August 2001, Lynch filed a supplemental application for attorney fees of $9,044 and administrative costs of $1,158.05, plus additional administrative costs in the amount of $113.50 and an expert witness fee in the amount of $1,000. Lynch requested attorney fees and costs for an additional attorney hired by Lynch in the amount of $4,623.09, for a total sum of $15,938.64. This application was heard in the county court on September 27. The record of this hearing consists of four volumes of testimony and exhibits totaling in excess of 1,200 pages. Many of the exhibits are duplicative of other exhibits and pleadings in the record.

By order filed October 4, 2001, the county court approved Lynch's final accounting of the estate and found Cook and Rowland "jointly and sever[ally] personally liable to John E. Lynch for attorney fees and personal representative fees in the amount of $16,300.59." The court also denied a motion to withdraw as counsel filed by Rowland. On October 31, Rowland filed an appeal from this order with the Court of Appeals.

On June 17, 2003, the Court of Appeals released *In re Estate of Reed*, 11 Neb. App. 915, 663 N.W.2d 147 (2003). The only assignment of error considered by the Court of Appeals was Rowland's assertion that the county court was without authority to assess costs against him in his role as Cook's attorney. The Court of Appeals noted that in his amended notice of appeal, Rowland indicated that the appeal was being prosecuted on his own behalf, not on behalf of Cook. Rowland acknowledged in his brief that Cook did not participate in this appeal. Therefore, the Court of Appeals concluded that matters involving Cook's rights were beyond the purview of the appeal.

In the Court of Appeals, Rowland argued that the county court had made no determination that he was personally responsible for any delay in the administration of the estate and that there was no showing that he had authority to act on his own to administer the estate without the consent of Cook. Rowland claimed that as a result, there was no authority to hold him personally responsible for costs associated with administration of the estate.

The Court of Appeals concluded that in his capacity as Cook's attorney, Rowland did not owe the estate any duty to ensure that Cook timely administered the estate and that, therefore, Rowland had no authority to act on behalf of the estate without the direction of his client, Cook. The Court of Appeals noted that its research revealed no authority, nor had Lynch provided authority, for the assessment of costs against an attorney representing a personal representative in an estate proceeding.

The Court of Appeals found that the record did not contain any evidence or a finding that Rowland was personally responsible for the delay in the administration of the estate. It therefore concluded that the county court was without authority to order Rowland to pay the costs incurred by Lynch. The Court of Appeals reversed the judgment of the county court and remanded the cause with directions to "remove Rowland from the county court's judgment." *Id.* at 919, 663 N.W.2d at 150. On the application of Lynch, we granted further review.

ASSIGNMENTS OF ERROR

In his petition for further review, Lynch assigned the following errors: The Court of Appeals erred (1) in finding no authority for assessing costs against an attorney representing a personal representative in an estate proceeding and (2) in finding that the record contains no evidence that Rowland was personally responsible for delay in the administration of the estate. Lynch asserted that county courts must have authority to ensure that estates are closed within a reasonable period of time.

ANALYSIS

At the outset, we note that we will not address the removal of Cook as personal representative of Reed's estate because that issue is not before us in this appeal. We also feel obligated to comment on the state of the record presented herein. It is an organizational morass and does not comply with Neb. Ct. R. of Prac. 5B (rev. 2002). Many of the documents contained in the record are not in chronological order. There are numerous duplications of exhibits in the bill of exceptions, and there is no record of the April 6, 1999, hearing regarding Rowland's motion to amend the order of March 10.

On June 18, 1998, this court issued the directive set forth above concerning case progression standards for probate cases. We are now presented with the questions whether the county court had authority, pursuant to this court's directive, to assess costs against Rowland and, if so, whether the county court properly exercised such authority.

Contrary to the Court of Appeals' determination that the county court has no authority to assess costs against an attorney representing a personal representative in an estate proceeding, we conclude that the county court has such authority because of this court's inherent authority to direct inferior courts regarding case progression standards and the manner in which such directives may be enforced.

The Nebraska Supreme Court was created by the state Constitution, which vests the judicial power of the state in a Supreme Court, an appellate court, district courts, county courts, and other inferior courts created by law. See Neb. Const. art. V, § 1. The Constitution provides: "In accordance with rules established by the Supreme Court and not in conflict with other provisions of this Constitution and laws governing such matters, general administrative authority over all courts in this state shall be vested in the Supreme Court and shall be exercised by the Chief Justice." *Id.* This constitutional grant of authority allows this court to establish rules that the inferior courts must follow in managing their dockets.

[3,4] We have considered the issue of this court's authority on previous occasions. We have stated: "The inherent judicial power of a court is that power which is essential to the court's existence, dignity, and functions." *State v. Joubert*, 246 Neb. 287, 294, 518 N.W.2d 887, 893 (1994), citing *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937). "Such power is not derived from legislative grant or specific constitutional provision, but from the very fact that this court has been created and charged by the Constitution with certain duties and responsibilities." *Joubert*, 246 Neb. at 294, 518 N.W.2d at 893. The Nebraska Supreme Court has been charged with administering the system of justice by exercising managerial authority over the inferior courts. "Through its inherent judicial power, this court has authority to do all things that are reasonably necessary

for the proper administration of justice, whether any previous form of remedy has been granted or not." *Id.* at 296, 518 N.W.2d at 894. See, also, *State v. Davidson*, 260 Neb. 417, 429, 618 N.W.2d 418, 428 (2000) ("courts are charged with the duty of guarding their proceedings against everything which interferes with the orderly administration of justice"); *In re Complaint Against Jones*, 255 Neb. 1, 7, 581 N.W.2d 876, 883 (1998) ("[t]his court has always had an existing inherent authority over the inferior courts").

[5,6] In *Noffsinger v. Nebraska State Bar Assn.*, 261 Neb. 184, 189, 622 N.W.2d 620, 625 (2001), we stated that "when the Supreme Court was created, it brought with it inherent powers, i.e., powers that are essential to the existence, dignity, and functions of the court from the very fact that it is a court." The Supreme Court has administrative authority over all inferior courts. It is essential for the Supreme Court, as a part of its inherent authority, to provide inferior courts with case progression standards in order to ensure that cases are properly disposed of in a timely and efficient manner.

[7] In addition, lawyers, as officers of the court, are subject to the directives of the courts. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). Lawyers are required to comply with orders of inferior courts issued in response to this court's directives.

[8] The county court had the authority to enforce this court's directive in regard to Rowland and the Reed estate. The directives issued by this court are an expression of this court's authority to manage inferior courts. Thus, the Court of Appeals erred in concluding that the county court had no authority to order Rowland to pay costs incurred by Lynch in administering the estate.

[9] We next proceed to address whether the county court properly exercised such authority in this case. Today we hold that a court cannot, in enforcing directives of a superior court, deprive a party of legal or substantive rights by acting in an arbitrary or unreasonable manner which is inconsistent with or contravenes principles of general law or constitutional or statutory provisions. Thus, we consider whether the action of the county court in assessing costs was arbitrary and unreasonable.

In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

In the case at bar, the county court ordered the removal of Cook as personal representative and ordered that Cook and Rowland be jointly and severally personally responsible for the costs incurred by Lynch. The record establishes that the county court removed Rowland as the attorney for Cook without a hearing. It did so after Rowland, in his capacity as Cook's attorney, had requested a 90-day continuance and had set forth his plan to attempt to close the estate during this 90-day period.

[10] Before a court may tax costs against the attorney for a personal representative, the court must first determine upon the evidence presented whether any reasons exist for a delay in promptly administering the estate and whether the attorney is personally responsible for such delay in the administration of the estate. The case at bar is devoid of a record of a hearing on this matter. Although the record indicates that Rowland filed a motion to amend the order of March 10, 1999, which assessed costs against Rowland, there is no record of a hearing at which the motion was addressed.

On its face, this court's directive of June 18, 1998, gave the county court authority to act. The directive set forth the conditions which would justify the taxing of costs in a proper case. However, before assessing such costs, a county court should conduct an evidentiary hearing to determine why the attorney for the personal representative did not comply with the orders issued by the court. At such a hearing, the attorney should be given the opportunity to explain the reasons why he or she has been unable to comply with the court's orders. Once the court has been apprised of the facts, it is in a better position to determine a reasonable course of action regarding administration of the estate. The court can then also determine whether costs should be assessed against the attorney for the former personal representative.

[11] An attorney hired to represent a personal representative is employed for the benefit of the personal representative. See *In re Estate of Reed*, 11 Neb. App. 915, 663 N.W.2d 147 (2003). As such, the personal representative is the attorney's client. *Id.* As noted by the Court of Appeals, there was no finding by the county court that Rowland was personally responsible for any delay in the administration of the estate or that Rowland had any authority to act on his own to administer the estate without Cook's approval.

The county court was correct in attempting to follow the directive of this court concerning case progression standards for probate cases. However, the county court acted in an arbitrary and unreasonable manner when it imposed liability for costs on Rowland without first conducting a hearing to determine whether he was personally responsible for any delay in the administration of the estate.

Further evidence of the unreasonableness of the result is demonstrated by the fact that the assets of this estate consisted of approximately $100 in personal property and real estate with a value between $8,000 and $10,000. The real estate was in foreclosure, and it was subject to liens which ultimately amounted to more than $6,300. The real estate was sold for $8,000, and after payment of the mortgage, the balance in the estate was $503.95. Yet, Cook and Rowland were ordered to pay more than $16,300 in costs.

[12] In addition, basic principles of due process require reasonable notice and a fair opportunity to be heard at some stage of the proceedings prior to a final determination. See *Beaman v. Cook Family Foods*, 244 Neb. 431, 507 N.W.2d 462 (1993). Thus, an attorney who serves as counsel for a personal representative has the right to be heard before a court can assess costs against him. Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

[13] Once it is determined that due process applies, the question remains what process is due. *Id.* The determination of whether the procedures afforded an individual comport with

constitutional requirements for procedural due process presents a question of law. *Newman v. Rehr*, 263 Neb. 111, 638 N.W.2d 863 (2002). In this case, the county court did not provide Rowland with the opportunity to be heard before it found him jointly and severally liable for the costs incurred by Lynch. Thus, we find that Rowland was denied due process.

CONCLUSION

For the reasons set forth herein, we conclude that county courts have authority to assess costs against an attorney representing a personal representative in an estate proceeding but that the county court in the case at bar erred in assessing costs against Rowland.

That portion of the decision of the Court of Appeals which reversed the judgment of the county court and remanded the cause with directions to remove Rowland from the judgment is affirmed. That portion of the Court of Appeals' decision which held that there is no authority for assessing costs against an attorney representing a personal representative in an estate proceeding is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

McCORMACK, J., not participating.

TIMOTHY L. SWANSON, APPELLEE, v. PARK PLACE AUTOMOTIVE AND FARMERS INSURANCE GROUP, APPELLANTS.

672 N.W.2d 405

Filed December 19, 2003. No. S-03-167.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2002), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.

3. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
4. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation: Proof.** In a workers' compensation case involving a preexisting condition, the claimant must prove by a preponderance of evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability.
6. **Workers' Compensation.** A claimant in a workers' compensation case involving a preexisting condition may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition, no disability would have resulted.
7. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.
8. **Workers' Compensation.** As the trier of fact, the single judge of the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
9. **Trial: Expert Witnesses.** Where the testimony of the same expert is conflicting, resolution of the conflict rests with the trier of fact.
10. **Workers' Compensation.** The single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even where the issue is not one of live testimonial credibility.
11. **Workers' Compensation: Words and Phrases.** The term "impairment" is a medical assessment, while the term "disability" is a legal issue. Permanent medical impairment is related directly to the health status of the individual, whereas disability can be determined only within the context of the personal, social, or occupational demands or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment.
12. **Workers' Compensation.** Without a finding of permanent medical impairment, there can be no permanent restrictions. Without impairment or restrictions, there can be no disability or labor market access loss. Absent permanent impairment or restrictions, the worker is fully able to return to any employment for which he or she was fitted before the accident, including occupations held before the injuries occurred.
13. **Workers' Compensation: Words and Phrases.** An impairment rating is simply a medical assessment of what physical abilities have been adversely affected or lost by an injury.
14. **Workers' Compensation.** Although a medical impairment rating given by a doctor may be an important factor, the extent of loss of use does not necessarily equal the extent of medical impairment. While a numeric percentage impairment rating may be significant, and even preferable, it is not a sine qua non of a finding of permanent medical impairment.

15. **Workers' Compensation: Expert Witnesses.** An expert medical opinion need not be couched in "magic words" such as "reasonable medical certainty" or "reasonable probability."
16. **Workers' Compensation: Expert Witnesses: Testimony.** While medical impairment can be established only through properly qualified medical testimony, that testimony need not establish a specific impairment rating in order to be legally sufficient.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

David A. Dudley, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellants.

Darrell K. Stock, of Snyder & Stock, for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Timothy L. Swanson was injured in an accident that occurred while he was test-driving an automobile for his employer, Park Place Automotive (Park Place), and he was awarded workers' compensation benefits. The primary issue presented in this appeal is whether Swanson could receive loss of earning power and vocational rehabilitation benefits without having been assigned a permanent functional impairment rating.

BACKGROUND

Swanson was injured on May 21, 1999, when the vehicle he was test-driving struck another vehicle in a parking lot. Swanson had pain in his back and leg following the accident and went to the hospital on the same day. Swanson was referred to Dr. Daniel Ripa, who became Swanson's treating physician for the injuries at issue in this appeal. Swanson continued to receive medical treatment and physical therapy, but his condition did not improve, and on March 6, 2000, Swanson had a "hemilaminotomy with lateral recessed decompression of the left S1 nerve overlying small lumbar disk herniation left L5-S1 level." After the surgery, Dr. Ripa determined that Swanson had achieved maximum medical improvement. Dr. Ripa opined that Swanson should avoid lifting in excess of 25 to 30 pounds on a

repetitive basis; should not be involved in activities that require prolonged bending, stooping, squatting, kneeling, or repetitive bending below the knee level; and should permanently avoid lifting greater than 50 pounds. The record also contains a loss of earning capacity analysis, in which a vocational rehabilitation specialist opined that based on Swanson's physical restrictions, his loss of earning capacity was approximately 15 percent.

Prior to his 1999 accident, Swanson had been treated for back and leg pain. Swanson was treated by a chiropractor in 1988 for low-back pain and improved as a result of the treatment. Swanson again received chiropractic treatment for several instances of back pain between 1989 and 1999. In his deposition, Swanson stated that he had not had leg pain prior to the accident and that when giving his medical history to Dr. Ripa, Swanson had not reported any prior leg pain. However, at trial, Swanson testified that he had testified inaccurately at his deposition and that he had in fact told Dr. Ripa about his prior leg pain.

The record contains two letters from Dr. Ripa to Swanson's counsel, both dated April 7, 2000, expressing an opinion regarding the connection between Swanson's preexisting back condition, the accident, and Swanson's subsequent injuries and treatment. There does not appear to be any explanation in the record for the existence of the two separate letters. One letter states, in relevant part, that "most likely the ongoing current medical treatment is related, at least in some degree, to his original radiographic abnormalities but may well have been exacerbated in his motor vehicle accident." The other letter states, less ambiguously, that Swanson's "motor vehicle accident of May 1999 exacerbated his low back condition and resulted in the necessary medical treatment including the surgery." No objection was made at trial to the exhibit containing Dr. Ripa's opinion(s) regarding Swanson's injury.

The single judge, relying on Dr. Ripa's opinion, determined that Swanson's accident "injured his low back, which required surgery." The single judge awarded temporary total disability benefits and directed Park Place to pay Swanson's present and future medical expenses. However, because Dr. Ripa did not assign Swanson a permanent functional impairment rating, no permanent partial disability benefits were awarded, nor were

vocational rehabilitation benefits. See *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). Both parties filed an application for review in the Workers' Compensation Court. A three-judge review panel affirmed the single judge's finding that Swanson's low-back injury was caused by the automobile accident. However, the review panel concluded that *Green* did not preclude an award of loss of earning power or vocational rehabilitation benefits in the absence of a permanent functional impairment rating, so long as permanent restrictions had been imposed by a physician. The review panel reversed the single judge on that issue. Park Place filed a timely appeal.

ASSIGNMENTS OF ERROR

Park Place assigns that the review panel erred in ruling that (1) the evidence presented at trial was sufficient to show that Swanson suffered a work-related injury to his lower back, rather than his condition's being the result of a natural progression of a preexisting condition, and (2) Swanson was entitled to loss of earning power and vocational rehabilitation benefits even though he had not been assigned a permanent functional impairment rating.

Park Place also argues, very briefly, that Swanson would not be entitled to vocational rehabilitation because he left a job provided by Park Place that was within his physical restrictions. However, because this was not assigned as error, we do not consider it. See *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003) (errors argued but not assigned will not be considered on appeal).

STANDARD OF REVIEW

[1-4] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2002), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003). When testing the sufficiency of the evidence to support findings

of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

ANALYSIS

Sufficiency of Evidence of Work-Related Injury

Park Place's first assignment of error challenges the sufficiency of the evidence to support the single judge's finding that Swanson suffered a compensable, work-related injury. Park Place argues that Swanson's injury was the result of the natural progression of his preexisting back condition.

Park Place adduced evidence before the single judge to support that conclusion. As noted above, Swanson had a history of back problems, and Park Place offered the opinion of Dr. Charles Taylon, a neurosurgeon, who opined that "[a]ny back problems that [Swanson] had [after the accident] are clearly a continuation of the problem he was having just a short time before the accident." Dr. Taylon further opined that there was no evidence that the accident had anything to do with Swanson's subsequent need for surgery and questioned whether the accident had anything to do with Swanson's back pain.

[5,6] However, as also noted above, Swanson offered the opinion of Dr. Ripa, his treating physician, who opined that Swanson's "motor vehicle accident . . . exacerbated his low back condition and resulted in the necessary medical treatment including the surgery." In a workers' compensation case involving a preexisting condition, the claimant must prove by a preponderance of evidence that the claimed injury or disability was caused

by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability. *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997); *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996). Such claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition, no disability would have resulted. *Id.* In short, "the lighting up or acceleration of preexisting conditions by accident is compensable." *Hale v. Vickers, Inc.*, 10 Neb. App. 627, 634, 635 N.W.2d 458, 468 (2001).

[7] This case presents conflicting expert opinions on whether Swanson's postaccident surgery was necessitated by his accident or was the natural progression of a preexisting back condition. The single judge accepted Dr. Ripa's opinion and determined that Swanson suffered a compensable work-related injury. Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999).

Park Place offers two arguments against Dr. Ripa's opinion. First, Park Place argues that Dr. Ripa's opinion lacked appropriate foundation because, according to Park Place, Swanson did not provide Dr. Ripa with a complete and truthful medical history. Second, Park Place contends that the evidence of Dr. Ripa's opinion is inconsistent and unreliable. We note, initially, that Park Place's arguments are essentially foundational objections to Dr. Ripa's expert opinion testimony. However, the exhibits setting forth Dr. Ripa's opinion were received into evidence without objection. Because it did not make a proper foundational objection before the single judge, Park Place failed to preserve its foundational arguments for our review. See, *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

However, even if we consider Park Place's arguments, they are without merit. First, Park Place relies on Swanson's deposition, in which Swanson stated that while he had reported prior back trouble to Dr. Ripa, Swanson had not reported any prior leg

pain. However, at trial, Swanson testified that his deposition was inaccurate and that he had in fact told Dr. Ripa about his prior leg pain. Park Place's brief asserts that "the plaintiff admits that he did not provide Dr. Ripa with any information regarding his prior back and leg problems." Brief for appellants at 11. This is not an accurate statement of the record. Both Swanson's deposition and his trial testimony indicate that Dr. Ripa was informed of Swanson's prior back pain. Swanson's deposition indicates that Dr. Ripa was not informed of any prior leg pain associated with the back pain, but Swanson testified at trial that Dr. Ripa had been informed of Swanson's leg pain, and Swanson testified that his deposition was incorrect.

[8] As the trier of fact, the single judge of the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003). Swanson was impeached at trial with his inconsistent deposition testimony, and the credibility of that testimony was a matter for the single judge to decide. The single judge's decision to accept Dr. Ripa's opinion was not clearly wrong because of the conflict in Swanson's testimony.

Park Place also relies on the presence in the record of two separate opinion letters from Dr. Ripa to Swanson's attorney, both dated April 7, 2000, which, as set forth above, contain different language relating Swanson's preexisting condition to the need for his surgery. One letter reads as follows:

> I was asked by . . . Swanson to write you regarding our opinion on his MRI scan from 12-19-97 compared to the most recent MRI scan that led to his surgery. The two MRI scans are relatively similar in appearance. It would thus be my medical opinion that *most likely the ongoing current medical treatment is related, at least in some degree, to his original radiographic abnormalities but may well have been exacerbated in his motor vehicle accident in May, 1999.*
>
> I am sorry we can't be more specific than that. Please contact us if further information is required.

(Emphasis supplied.)

The other letter states as follows:

> I was asked by . . . Swanson to write you regarding our opinion on his MRI scan from 12-19-97 compared to the

most recent MRI scan that led to his surgery. The two MRI scans are relatively similar in appearance. It is my opinion however that *based upon history provided and the physical examinations of . . . Swanson that his motor vehicle accident of May 1999 exacerbated his low back condition and resulted in the necessary medical treatment including the surgery that was required to relieve his disk herniation and nerve root compression.*

Please contact us if further information is required.

(Emphasis supplied.)

Park Place argues that these letters conflict and should be disregarded because they are inconsistent. However, the text of the two letters expresses essentially the same conclusion with respect to Swanson's medical condition. One letter expresses the opinion that Swanson's preexisting condition "may well have been exacerbated" in his accident, and the other letter states that Swanson's accident "exacerbated his low back condition." While one letter states Dr. Ripa's opinion on causation in more definitive language, there is nothing in either letter that is directly contradictory to the other.

Furthermore, the two letters express qualitatively different foundations for the two opinions. One letter mentions only a comparison of MRI scans, while the other letter expresses an opinion based on MRI scans *and* medical history and physical examinations—providing a potential explanation for the differing language, if not substance, of the opinions.

[9,10] Given these circumstances, we cannot say the single judge was clearly wrong in relying on Dr. Ripa's definitively stated opinion about the cause of Swanson's injuries. Even if the letters were read to conflict to any degree, where the testimony of the same expert is conflicting, resolution of the conflict rests with the trier of fact, the single judge, who in this case resolved that conflict against Park Place. See, *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 483 N.W.2d 523 (1992); *Doggett v. Brunswick Corp.*, 217 Neb. 166, 347 N.W.2d 877 (1984); *Watson v. Alpo Pet Foods*, 3 Neb. App. 612, 529 N.W.2d 139 (1995). Cf. *Noordam v. Vickers, Inc.*, 11 Neb. App. 739, 659 N.W.2d 856 (2003). The single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony,

even where the issue is not one of live testimonial credibility. See *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994).

Park Place's arguments regarding Dr. Ripa's opinion, and the sufficiency of the evidence, were resolved against Park Place by the single judge, and the single judge's findings were not clearly wrong. Therefore, Park Place's first assignment of error is without merit.

Evidence of Permanent Medical Impairment

[11] Park Place argues that Swanson was not entitled to loss of earning power and vocational rehabilitation benefits, because he had not been assigned a permanent functional impairment rating. Park Place relies on our opinion in *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002), in which we explained the concept of permanent medical impairment. We stated that "[t]he term 'impairment' is a medical assessment, while the term 'disability' is a legal issue." *Id.* at 204, 639 N.W.2d at 102. Permanent medical impairment is related directly to the health status of the individual, whereas disability can be determined only within the context of the personal, social, or occupational demands or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment. *Id.*, citing *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring).

[12] We held, in *Green, supra*, that before permanent partial disability benefits can be awarded, the claimant must prove that he or she has a permanent impairment.

> Without a finding of permanent medical impairment, there can be no permanent restrictions. Without impairment or restrictions, there can be no disability or labor market access loss. Absent permanent impairment or restrictions, the worker is fully able to return to any employment for which he or she was fitted before the accident, including occupations held before the injuries occurred.

Id. at 206, 639 N.W.2d at 103.

In this case, the single judge concluded there was no evidence of a permanent medical impairment, apparently because there was no medical opinion in the record establishing Swanson's

functional (or percentage) impairment rating. However, we agree with the review panel that the single judge erred as a matter of law in this regard. Because the single judge's determination that Swanson did not prove a permanent medical impairment was premised on a legal error, the review panel correctly concluded that the single judge's finding should be reversed.

[13,14] Once again, we trudge into the needlessly murky distinction between "permanent medical impairment" versus "permanent functional impairment rating." An impairment rating is simply a medical assessment of what physical abilities have been adversely affected or lost by an injury. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002), citing *Phillips, supra*. Although the medical impairment rating given by a doctor may be an important factor, the extent of loss of use does not necessarily equal the extent of medical impairment. *Phillips, supra*. In other words, while a numeric percentage impairment rating may be significant, and even preferable, it is not a sine qua non of a finding of permanent medical impairment. As explained, under similar circumstances, by the Supreme Court of Tennessee:

> We do not think that, when medical evidence establishes permanency, the failure of a medical expert to attribute a percentage of anatomical disability can justify a denial of compensation if the other evidence demonstrates that an award of benefits is appropriate. Otherwise the remedial purpose of the Workers' Compensation Act could easily be frustrated. . . .
>
> While an anatomical disability rating . . . is preferable and ordinarily, if not uniformly, part of the proof offered by either or both parties, the ultimate issue is not the extent of anatomical disability but that of vocational disability, the percentage of which does not definitively depend on the medical proof regarding a percentage of anatomical disability.

Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 457 (Tenn. 1988). Accord, e.g., *Star Enterprises v. DelBarone*, 746 A.2d 692 (R.I. 2000); *Klein Independent School Dist. v. Wilson*, 834 S.W.2d 3 (Tex. 1992); *Walker v. New Fern Restorium*, 409 So. 2d 1201 (Fla. App. 1982); *Hunter v. Industrial Commission of Arizona*, 130 Ariz. 59, 633 P.2d 1052 (Ariz. App. 1981). But cf.

Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 882 (2000) (holding on statutory grounds that specific percentage rating is required).

We stated in *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 206, 639 N.W.2d 94, 103 (2002), that "[w]ithout a finding of permanent medical impairment, there can be no permanent restrictions. Without impairment or restrictions, there can be no disability or labor market access loss." That is a correct statement of the law—a physician-ordered permanent physical restriction, based on a medically established permanent impairment of a body function, establishes a permanent medical impairment for purposes of determining loss of earning capacity. There is no suggestion in *Green* that a permanent functional *impairment rating* is a necessary prerequisite to an award of indemnity or vocational rehabilitation services in loss of earning power cases.

Dr. Ripa's opinion clearly establishes that Swanson was permanently injured and subject to permanent physical restrictions. Swanson was to avoid lifting in excess of 25 to 30 pounds on a repetitive basis, and he was not to be involved in activities that required prolonged bending, stooping, squatting, kneeling, or repetitive bending below the knee level. Further, Dr. Ripa ordered Swanson to permanently avoid lifting greater than 50 pounds. These permanent physical restrictions led to a loss of earning capacity analysis in the range of 15 percent.

[15,16] We have long held, in the context of evaluating an expert medical opinion, that such testimony need not be couched in "magic words" such as "reasonable medical certainty" or "reasonable probability." See, e.g., *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000). Similarly, while medical impairment can be established only through properly qualified medical testimony, see *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999), that testimony need not establish a specific percentage impairment rating in order to be legally sufficient. Dr. Ripa's opinion, had the single judge properly considered it on this issue, would have been sufficient to sustain a finding of a permanent medical impairment.

Since the single judge's finding that there was no evidence of medical impairment was based on an incorrect application of the law, the review panel correctly concluded that the single judge's

finding on that issue should be reversed and the cause remanded for a redetermination of Swanson's loss of earning power and entitlement to vocational rehabilitation services. Park Place's second assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the judgment of the Workers' Compensation Court review panel is affirmed. Because Park Place's appeal to this court did not result in a reduction of the award, Swanson is awarded fees for the services of his attorney in this court, in the amount of $2,430. See, Neb. Ct. R. of Prac. 9F (rev. 2001); Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002); *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000).

AFFIRMED.

HENDRY, C.J., and MCCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM J. FELDHACKER, APPELLANT.
672 N.W.2d 627

Filed January 2, 2004. No. S-02-131.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: 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. **Speedy Trial: Words and Phrases.** The phrase "period of delay" in Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995) refers to a specified period of time in which trial did not commence.
4. **Speedy Trial: Proof.** The State must prove that there was good cause why trial did not commence during the period of delay in order to exclude it from the speedy trial computation under Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995). If a trial court relies on that section in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice and the trial court must make specific findings as to the good cause or causes which resulted in the extensions of time.
5. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11; the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.

6. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and INBODY, Judges, on appeal thereto from the District Court for Seward County, ALAN G. GLESS, Judge. Judgment of Court of Appeals affirmed as modified.

William J. Feldhacker, pro se.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

STEPHAN, J.

William J. Feldhacker appealed from an order of the district court for Seward County denying his motion for absolute discharge based upon an alleged violation of his constitutional and statutory rights to a speedy trial. The Nebraska Court of Appeals affirmed as modified, determining that although the district court erred in excluding a certain time period, there were still 5 days remaining in which Feldhacker could be brought to trial under the Nebraska speedy trial act. *State v. Feldhacker*, 11 Neb. App. 608, 657 N.W.2d 655 (2003), *modified on denial of rehearing* 11 Neb. App. 872, 663 N.W.2d 143. We granted petitions for further review filed by each party.

I. BACKGROUND

1. DISTRICT COURT

We adopt the Court of Appeals' summary of the factual and procedural background in the district court, which we set forth

verbatim here. See *State v. Feldhacker*, 11 Neb. App. at 609-12, 657 N.W.2d at 659-60.

> [O]n August 30, 2000, the State filed an information in the district court for Seward County charging Feldhacker with three felonies, two misdemeanors, and one infraction. On September 21, Feldhacker's counsel filed a motion to discover; a motion for disclosure of *Brady* materials, pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); a motion for a *Jackson v. Denno* hearing, pursuant to *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); and a motion for disclosure of intention to use evidence of other crimes or other acts. All four pretrial motions were set for hearing before the trial court on October 31.
>
> On October 24, 2000, the State filed a motion to continue the *Jackson v. Denno* hearing, which continuance was not objected to by Feldhacker's counsel, David L. Kimble, and the hearing was reset for December 4. On October 31, Feldhacker sent an "Inmate Request Form" to the Seward County District Court requesting to see the trial judge for a bond hearing and to inquire about Kimble's performance. On November 2, Feldhacker sent a similar request addressed to the district court specifically stating that Kimble was lying to him and that his right to legal counsel was being denied. On November 6, the court filed both inmate requests with the clerk of the court and set a hearing for November 13.
>
> On November 13, 2000, the previously mentioned discovery and disclosure motions were heard and a discovery compliance deadline was set for December 13. On December 4, the *Jackson v. Denno* hearing was held in the district court. After testimony was received from Troopers Randy Bybee and Marcus Warnke of the Nebraska State Patrol, the following exchange occurred:
>
> "[State's attorney]: Your Honor, there is one other person, and I have spoken with Mr. Kimble about on [sic] this person. It would be Trooper [Franklin] Peck, and he had just a couple of statements that [Feldhacker] made, and Mr. Peck was unavailable to be here today. But I will be typing

up an affidavit in regards to what the circumstances were and the statements. And Mr. Peck would sign that affidavit, and I will present that to Dave Kimble. And I believe he would not have an objection from me supplementing this hearing date in regards to that affidavit.

"THE COURT: Mr. Kimble?

"MR. KIMBLE: So stipulated.

"THE COURT: All right. The stipulation's approved and accepted."

On January 4, 2001, the State submitted Trooper Franklin Peck's affidavit. The district court made its final ruling on the *Jackson v. Denno* motion on January 22, finding that all of Feldhacker's statements made to Troopers Bybee, Warnke, and Peck were voluntary and therefore admissible at trial.

On January 23, 2001, Feldhacker sent another inmate request form to the clerk of the Seward County District Court requesting a transcript of the *Jackson v. Denno* hearing. The request was filed with the court on January 24 and denied on February 13.

On March 22, 2001, the district court set a status hearing for April 10. On the day of the scheduled status hearing, Feldhacker's counsel filed a motion to produce a written copy or an audiotape of the communications among the state troopers regarding the apprehension and arrest of Feldhacker. The production motion was subsequently resolved between the parties. Furthermore, Feldhacker's counsel orally requested a continuance of the status hearing, which continuance was granted by the court, and the status hearing was reset for April 24.

On April 12, 2001, Feldhacker sent two written inmate requests, this time specifically to the trial judge, requesting, inter alia, discovery materials, trial court transcripts, and hearing updates. On April 16, the district court set a hearing for April 24, based on Feldhacker's requests. On April 24, the status hearing was had, whereby Feldhacker's previously mentioned requests were denied with the exception of the request for trial transcripts. On April 25, Feldhacker's counsel filed a praecipe for transcript of the

Jackson v. Denno hearing. The transcript was completed on May 16.

On July 3, 2001, Feldhacker requested by written motion that Kimble be removed and that the court grant Feldhacker an absolute discharge because his statutory right to a speedy trial was denied. The request and pro se motion for absolute discharge was filed by the clerk of the district court on July 10. On July 10, the trial court denied Feldhacker's request to terminate his counsel and set a hearing for July 24 on Feldhacker's motion for absolute discharge. On July 24, the motion for absolute discharge was heard and submitted, and the court gave both parties 14 days for written arguments.

Sometime after July 24, 2001, Feldhacker succeeded in his efforts to remove Kimble as his attorney. Feldhacker's next two court-appointed attorneys were also replaced. On September 12, Feldhacker notified the court by inmate request that his family had retained Matthew L. McBride as his new counsel.

On September 24, 2001, McBride filed an amended motion for absolute discharge asserting Feldhacker's right to a speedy trial discharge pursuant to Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 1995); Neb. Const. art. I, § 11; and the Sixth Amendment to the U.S. Constitution. The amended motion was heard and submitted on September 25. Sometime after September 25, Feldhacker removed McBride as his counsel and replaced him with his present attorney. [We note that Feldhacker appeared pro se in briefs and argument before this court.]

On December 31, 2001, the district court overruled Feldhacker's amended motion for absolute discharge. Based on Feldhacker's statutory claim, the court found: "Combining all the excludable periods preceding July 10, 2001, I find 179 days excludable. The last day for commencement of trial would have been August 24, 2001. [Feldhacker] filed his first motion for absolute discharge (filed July 10, 2001) 45 days prematurely." Based on Feldhacker's constitutional claim, the court, applying the four-factor balancing test set out in *Barker v. Wingo*, 407

U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), found that "no violation of Mr. Feldhacker's constitutional speedy trial right appears from this record."

2. Court of Appeals

Feldhacker appealed to the Court of Appeals, generally assigning that the district court erred in denying his motion for absolute discharge on both statutory and constitutional grounds. The Court of Appeals first addressed the time period excludable for disposition of Feldhacker's pretrial motions pursuant to Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995). It concluded that the entire 123-day period from September 22, 2000, the day after Feldhacker filed his pretrial motions, to January 22, 2001, the day the trial court made its final ruling on Feldhacker's motion pursuant to *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), was excluded from the statutory speedy trial computation pursuant to § 29-1207(4)(a).

Next, the Court of Appeals addressed the period from January 24, 2001, when Feldhacker filed an inmate request form seeking certain hearing transcripts, to February 13, when the district court denied the request. The court held that the district court erred in excluding this period from the speedy trial computation under § 29-1207(4)(a) because the inmate request form was directed to the clerk, not the judge, and therefore did not fall within the scope of the statutory exclusion.

The Court of Appeals next considered the period from Feldhacker's motion for continuance of a status hearing filed on April 10, 2001, to April 24, the date of the rescheduled hearing. The court noted that Feldhacker conceded that the period from April 11 to 24, inclusive, consisting of 14 days, was excludable under § 29-1207(4)(a), and so held.

Finally, the Court of Appeals considered the district court's exclusion pursuant to § 29-1207(4)(f) of the period between the filing of Feldhacker's praecipe for transcripts of his *Jackson v. Denno* and preliminary hearings on April 25, 2001, and the delivery of those transcripts to Feldhacker's counsel on May 16. In a modification of its original opinion, the Court of Appeals determined this exclusion to be error, reasoning that the period during which the court reporter prepared the transcripts was

"simply trial preparation and does not automatically become a period of delay under § 29-1207(4)(f)." *State v. Feldhacker*, 11 Neb. App. 872, 874, 663 N.W.2d 143, 145 (2003). The court concluded that the period in question, which it computed as 22 days, was not excludable from the speedy trial computation under § 29-1207(4)(f).

Based upon the foregoing analysis, the Court of Appeals concluded that while the district court did not err in denying the motion for absolute discharge on statutory grounds, it erred in determining that 45 days remained on the speedy trial clock. Based upon its calculation under *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002), the Court of Appeals modified the judgment of the district court "so that 5 days remain to begin Feldhacker's trial under the Nebraska speedy trial act," calculated from the day that the district court takes action on the mandate. *State v. Feldhacker*, 11 Neb. App. 608, 619, 657 N.W.2d 655, 665 (2003), *modified on denial of rehearing* 11 Neb. App. 872, 663 N.W.2d 143.

Finally, the Court of Appeals concluded that the district court did not err in determining that there had been no violation of Feldhacker's constitutional right to a speedy trial. Applying the four-part balancing test originally formulated in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and utilized by this court, see *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000), the Court of Appeals reasoned that while Feldhacker had asserted his constitutional right to a speedy trial, the other three factors did not weigh in his favor.

II. ASSIGNMENTS OF ERROR

In his petition for further review, Feldhacker assigns, summarized and restated, that the Court of Appeals erred in (1) determining that the period from October 31, 2000, the original hearing date set for his pretrial motions, to January 22, 2001, the date upon which the district court made its final ruling on the *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), motion, is excludable in computing the time for trial under § 29-1207(4) and (2) determining that his constitutional right to a speedy trial guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11, has not been violated.

In its petition for further review, the State assigns, restated, that the Court of Appeals erred by (1) misinterpreting our holding in *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998), (2) conducting a de novo review of the district court's finding of " 'good cause' " instead of applying a "clearly erroneous" standard of review, and (3) failing to address the State's argument that Feldhacker did not affirmatively assert his constitutional right to a speedy trial.

III. STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Baker, supra*; *State v. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002).

[2] 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. *Id.*

IV. ANALYSIS

1. Statutory Speedy Trial Issues

Both parties have assigned error with respect to the Court of Appeals' determination of whether certain periods should be excluded from the statutory speedy trial calculation. We address these arguments in the chronological sequence of the periods to which they relate.

(a) October 31, 2000, to January 22, 2001

Feldhacker's pretrial motions filed on September 21, 2000, included a *Jackson v. Denno* motion and were originally set for hearing on October 31. The district court granted a continuance of the hearing date to December 4 in response to a motion for continuance filed by the State which recited that "the State of Nebraska has advised [the] attorney for [Feldhacker] of this Motion and he has no objection to this Motion." The district court ruled on the *Jackson v. Denno* motion on January 22, 2001, after holding the record open, to permit the State to submit additional evidence, to which Feldhacker's counsel stipulated on the record that he had no objection.

Feldhacker contends that the Court of Appeals erred in excluding the period from the original date set for hearing on the *Jackson v. Denno* motion until its disposition because (1) he did not consent to the continuance of the hearing date, (2) the State did not exercise "due diligence," and (3) the State did not prove "good cause" for the delay. Brief for appellant in support of petition for further review at 8. None of these arguments have merit.

As noted, Feldhacker did not object to the continuance and therefore consented. In addition, § 29-1207(4)(a) does not include any requirement that the State show "due diligence" or "good cause." See *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). We have specifically declined to "rewrite the provisions of § 29-1207(4)(a) to include and require a reasonable time or good cause for delay in disposition of the pretrial matters described or characterized in § 29-1207(4)(a) as a part of the Nebraska speedy trial act." *State v. Lafler*, 225 Neb. 362, 373, 405 N.W.2d 576, 583-84 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). In *Lafler*, we cited and followed the reasoning of the U.S. Supreme Court in *Henderson v. United States*, 476 U.S. 321, 106 S. Ct. 1871, 90 L. Ed. 2d 299 (1986). *Henderson* construed a provision of the federal Speedy Trial Act of 1974 which was substantially similar to § 29-1207(4)(a). Noting that courts "often find it impossible to resolve motions on which hearings have been held until the parties have submitted posthearing briefs or additional factual materials," the Court in *Henderson* specifically held that the federal statutory provision relevant to pretrial motions filed by a criminal defendant excluded the "time after a hearing has been held where a district court awaits additional filings from the parties that are needed for proper disposition of the motion." 476 U.S. at 331.

The Court of Appeals thus did not err in affirming the finding of the district court that the entire period between filing and final disposition of Feldhacker's pretrial motions was excluded from the speedy trial computation. In computing the excluded period, the Court of Appeals correctly followed *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002), and determined that the first excludable day was September 22, 2000, the day after Feldhacker filed his pretrial motions. See, also, *State v. Oldfield*, 236 Neb. at 443,

461 N.W.2d at 561 (holding "an excludable period under § 29-1207(4)(a) commences on the day immediately after the filing of a defendant's pretrial motion"). To the extent that *State v. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002), and *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), suggest a different method of computation, they are disapproved.

(b) April 25 to May 16, 2001

This period was excluded by the district court pursuant to § 29-1207(4)(f). It reflects the period of time between Feldhacker's filing of praecipes for transcriptions of various hearings which had been held in the district and county courts and the completion and delivery of the transcript to Feldhacker. The district court determined that the State had shown " 'good cause' " for exclusion of this period from the speedy trial computation in that Feldhacker had requested the transcripts and other materials in order to prove at trial his claim that the State's case was fabricated and that he was innocent. The court specifically found that the delay was "not attributable to any negligence or misconduct on the part of the State."

In reversing the order of the district court on this issue, the Court of Appeals reasoned that because Feldhacker was entitled to the transcripts, their preparation was "simply trial preparation and does not automatically become a period of delay under § 29-1207(4)(f)." *State v. Feldhacker*, 11 Neb. App. 872, 874, 663 N.W.2d 143, 145 (2003). The court held that the State had the burden to prove that "there was in fact a period of delay involved and that there was good cause to exclude that period of delay." *Id.* at 875, 663 N.W.2d at 146. In concluding that the burden was not met, the Court of Appeals noted:

> Here, the record shows nothing but a "period of time" of 22 days as opposed to a "period of delay" between praecipe and completion of transcript. There was no showing by the State that this period of time was outside the norm for preparation of such a record or that the court reporters were in any way delayed.

Id.

We agree with the State's argument on further review that there is no meaningful distinction between the phrases "period of

time" and "period of delay." Although § 29-1207(4) uses the phrase "period of delay," any such period is necessarily described and quantified in terms of time. Thus, in interpreting and applying the speedy trial act, we have used the words "time" and "delay" interchangeably. For example, in *State v. Murphy*, 255 Neb. 797, 804, 587 N.W.2d 384, 389 (1998), we held that "the period of time" between a trial court's ruling on a motion for depositions until the depositions are completed is not excludable under § 29-1207(4)(a), but "such a period" may or may not be excluded under § 29-1207(4)(f). See, also, *State v. Turner*, 252 Neb. 620, 629, 564 N.W.2d 231, 237 (1997) (stating "where the excludable period properly falls under § 29-1207(4)(a) rather than the catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude the *delay*," and "the plain terms of § 29-1207(4)(a) exclude all *time* between the time of the filing of the defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the *delay*" (emphasis supplied)); *State v. Lafler*, 225 Neb. 362, 372-73, 405 N.W.2d 576, 583 (1987) (stating "the Nebraska Legislature, in § 29-1207(4)(a), has not indicated a limitation, restriction, or qualification of *time to be excluded* as the result of a defendant's specific pretrial act or conduct, that is, exclusion of a *period of delay* in computing the time for commencement of trial pursuant to the Nebraska speedy trial act" (emphasis supplied)), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

[3,4] The phrase "period of delay" in § 29-1207(4)(f) refers to a specified period of time in which trial did not commence. The State must prove that there was good cause why trial did not commence during such period in order to exclude it from the speedy trial computation under § 29-1207(4)(f). If a trial court relies on that section in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice and the trial court must make specific findings as to the good cause or causes which resulted in the extensions of time. *State v. Murphy, supra*; *State v. Kinstler*, 207 Neb. 386, 299 N.W.2d 182 (1980). Here, the district court made a specific finding that there was good cause to exclude the period during which the requested transcripts were being prepared because Feldhacker

had represented to the court that he needed such transcripts, as well as other materials, to defend himself at trial by proving his claim that the charges against him were fabricated. The Court of Appeals was required to give deference to this factual finding unless it determined it to be clearly erroneous. See, *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002); *State v. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002). Although the appellate court explained its disagreement with the reasoning underlying the district court's finding of good cause, it did not make a specific determination that the finding was clearly erroneous.

The district court's finding of good cause was not clearly erroneous. The record supports a finding that Feldhacker had represented that he was not prepared to go to trial until he had the various items of "evidence" which he believed would prove his innocence. The State did nothing to delay the preparation of the transcripts. Thus, it was not clearly erroneous for the trial court to conclude that there was "good cause" why trial did not commence during the period between Feldhacker's formal request for the transcripts and their completion. Accordingly, we conclude that the Court of Appeals erred in determining that this period is not excludable from the speedy trial clock under § 29-1207(4)(f). However, we determine that the first day of the excludable period should have been April 26, 2001, the day after the praecipe was filed. See *State v. Baker, supra*. Thus, there are 21 excludable days.

2. Speedy Trial Calculation

Except for the fact that it does not exclude the 21-day period from April 26 to May 16, 2001, we agree with the speedy trial calculation set forth in the opinion of the Court of Appeals. See *State v. Feldhacker*, 11 Neb. App. 608, 657 N.W.2d 655 (2003), *modified on denial of rehearing* 11 Neb. App. 872, 663 N.W.2d 143. Thus, we modify the judgment of the Court of Appeals to reflect that under the Nebraska speedy trial act, there are 26 days remaining in which to bring Feldhacker to trial, beginning when the district court takes action on the mandate.

3. Constitutional Speedy Trial Issues

[5,6] The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11; the

constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002); *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000). Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. *State v. Tucker, supra.*

In affirming the district court's determination that Feldhacker was not deprived of his constitutional right to a speedy trial, the Court of Appeals determined that the first, second, and fourth factors which make up the balancing test weighed in favor of the State. It concluded that the third factor, i.e., assertion of the right, favored Feldhacker. On further review, Feldhacker argues that the Court of Appeals erred in its analysis of the three factors which the court found to weigh against a constitutional violation. We have examined Feldhacker's arguments and are not persuaded by them. We agree with the analysis of the Court of Appeals as set forth in its opinion.

[7] In its petition for further review, the State argues that the Court of Appeals erred in determining that under the third factor of the test, Feldhacker had asserted his constitutional right to a speedy trial. However, an appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003); *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). Resolution of the issue of whether Feldhacker "asserted his constitutional right" for purposes of the balancing test would serve no purpose in deciding the matter before us, as we agree with the Court of Appeals that the other three factors which compose the test weigh in favor of the State and defeat Feldhacker's claim that he was denied his constitutional right to a speedy trial. Accordingly, we do not reach the issue of whether the Court of

Appeals was correct in its conclusion that Feldhacker asserted such right.

V. CONCLUSION

We modify the judgment of the Court of Appeals only to the extent that it erred in holding that the 21-day period from April 26 to May 16, 2001, was not excludable from the statutory speedy trial calculation. As a result, the State will have 26 days from the date when the district court acts on the mandate in which to bring Feldhacker to trial, and not 5 days as determined by the Court of Appeals. In all other respects, the judgment of the Court of Appeals is affirmed.

AFFIRMED AS MODIFIED.

McCORMACK, J., not participating.

UNISYS CORPORATION, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLANT AND CROSS-APPELLEE.

673 N.W.2d 15

Filed January 2, 2004. No. S-02-1056.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____. Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
4. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Statutes: Legislature: Intent.** When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.

6. ____: ____: ____. To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language.
7. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
8. **Statutes.** A statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous.
9. ____. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
10. ____. In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject.
11. ____. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Shawn D. Renner and Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for appellant.

Jefferson Downing and Gary L. Young, of Keating, O'Gara, Davis & Nedved, P.C., and Joann Hyle, of Pepper Hamilton L.L.P., for appellee.

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

The Nebraska Life and Health Insurance Guaranty Association (Association) appeals from an order of the district court for Lancaster County denying its motion for summary judgment and granting the cross-motion for summary judgment filed by Unisys Corporation. The district court held that certain Unisys employees were entitled to coverage under the Nebraska Life and Health Insurance Guaranty Association Act (Act), Neb. Rev. Stat. §§ 44-2701 to 44-2720 (Reissue 1998), after the insolvency of an insurance company which had issued certain contracts to Unisys retirement plans in which the employees had invested. Specifically, the court held that the contracts at issue

were "annuity contracts" under Nebraska law and that the employees were the equitable or beneficial owners of the contracts. The Association contends in this appeal that both determinations were erroneous.

FACTS

The Association is an unincorporated association of insurers created by statute to protect certain Nebraska residents against failure in the performance of contractual obligations of certain impaired or insolvent insurers. See § 44-2701. Unisys is a Delaware corporation with an office in Pennsylvania. Unisys established and is the named fiduciary and plan administrator of the Unisys Savings Plan and the Unisys Retirement Investment Plan (collectively the Plans). The Plans are designed to encourage savings and provide retirement and other benefits to Unisys employees. In furtherance of this purpose, the Plans permit eligible Unisys employees to defer and invest a portion of their compensation in the Plans. Investments made by each participating employee are held in a separate account. The Plans permit withdrawals from employee accounts in the event of the employee's retirement, death, voluntary or involuntary termination of employment, or inservice withdrawals.

In accordance with the terms of the Plans, a trust was established to hold the Plans' assets. Northern Trust Company, an Illinois bank, was the trustee in 1987 and 1988 when the contracts at issue in this case were purchased. Northern Trust was succeeded as trustee by Mellon Bank, a resident of Pennsylvania, which was succeeded as trustee by CoreStates, another Pennsylvania bank. The current trustee is First Union Bank, a bank with its principal place of business in North Carolina.

The Plans identified several investment options from which each participating employee could elect to have current contributions invested, including a "Fixed Income Fund" and an "Insurance Contract Fund." Portions of these two funds were invested in four contracts issued by Executive Life Insurance Company (Executive Life), an insurance company organized under the laws of California and licensed to transact business in Nebraska. Each contract designated the Plans' trustee as the owner of the contract. Two of the contracts defined the term

"participant" as "[a]n individual on whose behalf the Trustee will purchase retirement benefits," and the remaining two contracts defined the term as "[a]n individual on whose behalf the [Trustee] will purchase or provide retirement benefits."

In accordance with the Plans' provisions, all four Executive Life contracts permitted the trustee to deposit a premium which would earn interest at a guaranteed rate over a fixed term. Each contract provided that the trustee "may direct [Executive Life] to purchase an individual annuity contract for a participant before the retirement date." The contracts each included an additional provision which permitted the trustee to

> withdraw the annuity value required to purchase an annuity for a participant who retires. The [Trustee] will then apply for an individual retirement annuity contract, on a form provided by [Executive Life]. The contract will be owned by the participant, and will specify the dates and amounts of payments, and all other terms and conditions of the . . . annuity.

Each contract provided that at the end of the fixed term, Executive Life would pay to the trustee, as owner, the accumulated fund value, calculated on the basis of all premium deposits, less any withdrawals and scheduled payments, plus interest earned at the guaranteed rate and left on deposit with Executive Life.

On April 11, 1991, the commissioner of insurance of the State of California placed Executive Life in conservation, thereby freezing all assets of the company. On December 6, Executive Life was declared insolvent by a California court. At the time that the assets of Executive Life were frozen, 278 Unisys employees residing in Nebraska participated in the Plans and had over $1,061,564 invested in the Executive Life contracts. When Executive Life was placed in conservatorship, all payments and withdrawals under the Executive Life contracts were suspended. In response, the Plans suspended all transactions with respect to that portion of the fixed income fund and the insurance contract fund represented by the Executive Life contracts as of March 31, 1991. The Plans also froze the proportional share of each affected employee's account balance, which was calculated by applying the percentage of the fixed income fund and the insurance contract fund invested in the four Executive Life contracts to each individual employee's account balance in those funds. After these

actions were taken, the affected employees were not permitted to make any deposits or withdrawals from the "frozen" portion of their accounts, and therefore each employee's "frozen account" balance was unchanged when Executive Life was declared insolvent on December 6. Subsequently, each employee has received a quarterly account statement showing separately the balance in his or her regular account and the balance in his or her frozen Executive Life account. Under a rehabilitation plan for Executive Life approved by a California court, the affected Unisys employees have recovered a portion of the amount in their frozen accounts. On behalf of these employees, Unisys submitted a claim to the Association for the unpaid balance and interest. The Association denied the claim.

Unisys then filed this action in the district court for Lancaster County. In its operative amended petition, Unisys sought a declaratory judgment that the Executive Life contracts were annuity contracts covered by the Act and that the Nebraska resident participants were entitled to compensation under the Act for amounts still owed by Executive Life under the contracts. The Association filed an answer denying these allegations and asserting certain affirmative defenses. Each party moved for summary judgment.

The district court granted Unisys' motion for summary judgment and denied that of the Association, concluding that the Executive Life contracts were annuity contracts under the Act and that the Act extended coverage to the Plan participants as the equitable or beneficial owners of the contracts. The court denied Unisys' motion for prejudgment and postjudgment interest. The Association filed this timely appeal, and Unisys cross-appealed.

ASSIGNMENTS OF ERROR

The Association assigns, restated, that the district court erred in (1) concluding that the Executive Life contracts were annuity contracts covered by the Act and (2) concluding that the Nebraska resident plan participants were equitable or beneficial owners of the contracts and thus covered by the Act.

In its cross-appeal, Unisys assigns that the district court erred in denying its motions for prejudgment and postjudgment interest.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003); *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003). Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law. *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001).

[3] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002); *Fontenelle Equip., supra.*

[4] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003); *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003).

ANALYSIS

[5,6] We begin with the principle that when asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995). To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language. *Id.* The purpose of the Act as stated in § 44-2701 is to

> protect resident policyowners . . . of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts of member insurers, subject to certain limitations, against failure in the performance of contractual obligations due to the impairment or insolvency of the member insurer issuing such policies or contracts and to assist in the detection and prevention of insurer insolvencies.

The Act is to be liberally construed "to effect the purposes enumerated in section 44-2701 which shall constitute an aid and guide to interpretation." § 44-2704. See *Dobias, supra.*

The parties admitted in their pleadings that Executive Life is a foreign insurer which became insolvent in 1991. The Act, as it was written during the relevant time period, provides that in this circumstance, the Association shall, subject to the approval of the director:

> (a) Guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of residents;
>
> (b) Assure payment of the contractual obligations of the insolvent insurer to residents, including obligations to resident certificate holders of group insurance policies or contracts regardless of the domicile of the group policy or contract holders; and
>
> (c) Provide such money, pledges, notes, guarantees, or other means as are reasonably necessary to discharge such duties . . . .

§ 44-2707(4). This obligation is limited by the provision that it "shall not apply to the extent that guaranty protection is provided to residents of this state by the laws of the domiciliary state or jurisdiction of the insolvent insurer other than this state." *Id.* The funds required to carry out the Association's obligations under the Act are obtained by assessments levied against member insurers. See § 44-2708.

The version of the Act applicable to this case defines "[c]overed policy" to mean "any policy or contract or portion of such policy or contract which is not subject to assessment and for which coverage is provided under section 44-2703." § 44-2702(5). Section 44-2703 provides that the Act "shall apply to all direct life insurance policies, health insurance policies,

annuity contracts, supplemental contracts, and certificates under group policies or contracts issued anywhere by a member insurer." A "[m]ember insurer" is defined as "any person authorized to transact in this state any kind of insurance provided for under section 44-2703." § 44-2702(8). The Association admits in its brief that Executive Life was "an insurance company organized under the laws of California and licensed to transact business in Nebraska." Brief for appellant at 10.

The two issues presented in the Association's appeal are (1) whether the Executive Life contracts were "annuity contracts" covered by the Act and (2) if so, whether the Nebraska resident participants in the Plans had an interest in the contracts which would entitle them to compensation under the Act.

ANNUITY CONTRACTS

We are not the first court to consider the question of whether contracts similar to or identical to those before us here are "annuity contracts" within the meaning of a statute guarantying the obligations of an insolvent insurer. Other courts have reached different resolutions of this issue, due in large part to differing statutory definitions of the terms "annuity" and "annuity contract." For example, in *Ariz. Life & Disability v. Honeywell*, 190 Ariz. 84, 945 P.2d 805 (1997), the Supreme Court of Arizona addressed whether contracts issued by Executive Life to the trustee of certain employee retirement plans established by Honeywell were "annuities" as defined by Arizona law so as to qualify for coverage under Arizona's guaranty act. The court employed a test drawn from the "specialized meaning" of the term " 'Annuities' " set forth in Arizona's insurance code. *Ariz. Life & Disability*, 190 Ariz. at 88, 945 P.2d at 809. The code defined " 'Annuities' " as " 'all agreements to make periodic payments, other than contracts defined . . . as "life insurance", where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life.' " *Id.*, quoting and citing Ariz. Rev. Stat. § 20-254.01 (1990). The court interpreted the contracts as incorporating the terms of the voluntary retirement plan which they funded. The plan expressly required payment in the event of a participating employee's death. The court therefore concluded

that the contracts met the statutory definition of annuity "because the continuation and amount of periodic payments by [Executive Life] of both principal and interest depended upon the lives of [the retirement plan] participants." *Ariz. Life & Disability*, 190 Ariz. at 91, 945 P.2d at 812.

In *Board v. Life & Health Ins.*, 335 Md. 176, 642 A.2d 856 (1994), the court addressed whether two contracts issued by Executive Life as funding mechanisms for a public employees' retirement plan were "annuities" covered by Maryland's guaranty act. That act did not define the term, but a Maryland insurance statute provided:

> " ' "Annuities" means all agreements to make periodical payments where the making or continuance of all or some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life . . . . The business of annuities shall be deemed to include additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, or special benefit, or annuity, in the event of total or permanent disability of the holder. An "annuity contract" is a contract providing for an "annuity" as defined in this section.' "

Id. at 182, 642 A.2d at 859, quoting Md. Code. Ann., Insurance, art. 48A, § 65 (Michie 1994). The Maryland court first examined the Executive Life contracts and their relationship to the retirement plan. According to those terms, if a plan participant died, retired, or suffered severe financial hardship due to illness, the trustee could require Executive Life to pay the pro rata share of that participant's account in the plan. In addition, if the participant retired, became seriously ill, or died, and the participant elected an annuity, the trustee could direct Executive Life to issue the annuity upon payment of the appropriate premium. The court found that these provisions made the withdrawal provisions of the contracts " 'life-contingent,' " reasoning:

> [Executive Life] could be called upon, whenever a participant died, to pay its pro rata share of that participant's account in the [employees' retirement plan]. This amount would be the initial value of the share together with interest at the guaranteed rate, compounded daily. The actual return which [Executive Life] might have realized on its

> investment of the premium deposits (*i.e.,* deferrals), as of the times of demands for payments generated by death or illness of participants, could have been below the amount which [Executive Life] had promised to pay to the [trustee]. Thus, [Executive Life's] assumption of the economic risk was life-contingent.

Board, 335 Md. at 186, 642 A.2d at 861. After reaching this conclusion, the court determined that the only remaining issue was whether the contracts met the periodic payment element of the statutory definition of annuity. In this respect, the court reasoned that the contracts " 'provid[ed] for' " an annuity because they provided options to obtain individual policies specifying life-contingent periodic payments. *Id.* at 187, 642 A.2d at 861. The court also found that this interpretation was in accord with significant Maryland legislative history on the issue.

Applying different statutory definitional tests, other courts have held that contracts similar to those at issue here are not annuity contracts within the meaning of a guaranty statute. For example, in *Bennet v. Va Life, Acc. & Sickness Ins.*, 251 Va. 382, 385, 468 S.E.2d 910, 912 (1996), the Supreme Court of Virginia addressed whether certain "Guaranteed Interest Contracts" purchased by a retirement plan from InterAmerican Insurance Company of Illinois were " 'annuity contracts' " entitled to coverage under Virginia's guaranty act. The Virginia statutory scheme specifically defined "annuity," see Va. Code Ann. § 38.2-106 (Michie 1999), and then specifically excluded contracts which would otherwise be considered annuity contracts if such contracts were "not issued to and owned by an individual, except to the extent of . . . any annuity benefits guaranteed to an individual by an insurer under such contract or certificate." Va. Code Ann. § 38.2-1700(C)(5) (Michie 1999). Based upon this statutory language, the court concluded that because the contracts were issued to a trustee, and not to the individual plan participants, they could not be both " 'issued to' " and " 'owned by' " an individual under § 38.2-1700(C)(5). *Bennet*, 251 Va. at 386, 468 S.E.2d at 913. In addition, the court concluded that the "exception" to § 38.2-1700(C)(5) could not be met because an "annuity" was an agreement " 'to make periodic payments in fixed dollar amounts pursuant to the terms of a contract for a

stated period of time or for the life of the person or persons specified in the contract.' " *Bennet*, 251 Va. at 387-88, 468 S.E.2d at 913, quoting § 38.2-106.

Similarly, in *South Carolina Ins. v. Liberty Ins.*, 344 S.C. 436, 545 S.E.2d 270 (2001), the court addressed whether certain agreements entered into between an insurance company and various trustees of privately funded employee retirement plans were "annuity contracts" under South Carolina's guaranty act. The act itself did not define the term, but the South Carolina insurance code defined "annuity" as "every contract or agreement to make periodic payments, whether in fixed or variable dollar amounts, or both, at specified intervals." S.C. Code Ann. § 38-1-20(6) (West Cum. Supp. 2000). Applying this definition, the court concluded that the agreements were not annuities because they did not make periodic payments at specified intervals and only provided the trustees with an option to purchase an annuity. See, also, *Krahling v. First Trust Nat. Ass'n*, 123 N.M. 685, 944 P.2d 914 (N.M. App. 1997) (holding guaranteed investment contracts issued by Executive Life to pension plan not "annuities" under New Mexico's statutory definition of that term because they did not provide periodic payments dependent on continuation of human life).

[7-9] These cases have no direct application to the issue before us here because neither the applicable version of the Act nor Nebraska's insurance code define the terms "annuity" or "annuity contract." We are instead guided by the following well-established principles. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003); *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 605, 650 N.W.2d 760 (2002). In addition, a statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002); *Philpot v. Aguglia*, 259 Neb. 573, 611 N.W.2d 93 (2000). A statute is ambiguous when the language used cannot be adequately understood either from the

plain meaning of the statute or when considered in pari materia with any related statutes. *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002); *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002).

The Commonwealth Court of Pennsylvania, considering the precise issue before us in this case, noted common-law authority which defined " 'annuity' " as a

> " 'term somewhat loosely used in financial and legal nomenclature and is perhaps incapable of exact definition. Generally speaking, it designates a right-bequeathed, donated or purchased-to receive fixed periodical payments, either for life or a number of years. Its determining characteristic is that the annuitant has an interest only in the payments themselves and not in any principal fund or source from which they may be derived.' "

Unisys Corp. v. Pa. Life & Health Ins. Guar., 667 A.2d 1199, 1202 (Pa. Commw. 1995), quoting *Dwight Estate*, 389 Pa. 520, 134 A.2d 45 (1957), quoting *Commonwealth, Appellant, v. Beisel*, 338 Pa. 519, 13 A.2d 419 (1940). Black's Law Dictionary defines the term "annuity" alternatively as follows:

> **1.** An obligation to pay a stated sum, usu[ally] monthly or annually, to a stated recipient. • These payments terminate upon the death of the designated beneficiary. **2.** A fixed sum of money payable periodically. **3.** A right, often acquired under a life-insurance contract, to receive fixed payments periodically for a specified duration. Cf. PENSION. **4.** A savings account with an insurance company or investment company, usu[ally] established for retirement income. • Payments into the account accumulate tax-free, and the account is taxed only when the annuitant withdraws money in retirement.

Black's Law Dictionary 88-89 (7th ed. 1999). While not directly applicable to this case, another Nebraska statute defines "[a]nnuity contract" as a "contract or contracts issued by one or more life insurance companies or designated trusts and purchased by the retirement system in order to provide any of the benefits" specified in a public employee retirement system. Neb. Rev. Stat. § 16-1021(2) (Reissue 1997). Given the breadth of the term "annuity" and the absence of an applicable statutory narrowing

definition, we conclude that the term "annuity contract" as used in the Act is ambiguous and thus open for construction. We are obligated by the Act itself to give it a liberal construction so as "to effect the purposes enumerated in section 44-2701," as set forth above. § 44-2704.

The Executive Life contracts have certain characteristics of annuities. Two of the contracts expressly incorporate application forms identifying the contracts as "Group Annuity Contract[s]." The application forms for the remaining two contracts do not appear in the record, but the substantive provisions of those contracts are similar to those which are designated by their accompanying application forms as group annuity contracts. All four contracts define "[a]nnuitant" as "[t]he individual upon whose life the amount and duration of benefits depends." All of the contracts also provide that the trustee may withdraw the annuity value and purchase an individual annuity for a plan participant. In addition, all four contracts provide a participant with the option to choose from three types of annuity benefit payments. The Commonwealth Court of Pennsylvania relied on these characteristics in concluding that the same Executive Life contracts at issue here were "annuity contracts" within the meaning of Pennsylvania's guaranty statute which, like ours, did not specifically define the term "annuity." See *Pa. Life & Health Ins. Guar., supra*. The district court relied upon this Pennsylvania case in reaching its conclusion that the contracts at issue are "annuity contracts" within the meaning of the Act.

The Association argues that the district court's construction is erroneous because "the presence of an unexercised future annuity option" does not make the contracts " 'annuity contracts' " within the meaning of the Act. Brief for appellant at 16. It argues that the contracts are "at best . . . 'unallocated annuity contracts,' " defined as " 'any annuity contract or group annuity certificate which is not issued to and owned by an individual, except to the extent any annuity benefits are guaranteed to an individual by an insurer under such contract or certificate.' " Brief for appellant at 17-18, quoting *Georgia Life & Health v. Gilman Paper Co.*, 249 Ga. App. 767, 549 S.E.2d 751 (2001). Although the phrase "unallocated annuity contract" does not appear in the version of the Act applicable to this case, the Act was amended in

2001 to specifically provide that it shall not apply to an "unallocated annuity contract," defined as "an annuity contract or group annuity certificate that is not issued to and owned by an individual, except to the extent of any annuity benefits guaranteed to an individual by an insurer under the contract or certificate." 2001 Neb. Laws, L.B. 360, codified at §§ 44-2702(16) and 44-2703(2)(b)(xi) (Cum. Supp. 2002).

[10] In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001); *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). By its 2001 amendments to the Act, the Legislature has affirmed that from a definitional standpoint, an "unallocated annuity contract" is a species of the broader phrase "annuity contract." Because the Legislature did not specifically exclude unallocated annuity contracts from the scope of the Act until the 2001 amendment, it is reasonable and logical to conclude that prior thereto, the statutory phrase "annuity contract" included an "unallocated annuity contract." While this is likely an issue of last impression, we conclude that the Executive Life contracts at issue in this case were "annuity contracts" falling within the scope of the Act as it was written at the time that Executive Life became insolvent.

PARTICIPANTS' INTEREST

As noted, the Act was intended to protect "resident policyowners, insureds, including certificate holders under group insurance policies or contracts, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, [and] annuity contracts" against an insurer's failure to meet contractual obligations due to insolvency. § 44-2701. The term "[r]esident" is defined by the Act to mean "any person who resides in this state at the time a member insurer is determined to be an impaired or insolvent insurer and to whom a contractual obligation is owed." § 44-2702(11). The Association contends that because a nonresident corporate trustee was designated as the owner of the Executive Life contracts, the Unisys employees on whose behalf this action was brought have no enforceable claim under the Act. The district court rejected this argument, reasoning

that while the trustee was the legal owner of the contracts, the employees were the beneficial owners and that their residence in Nebraska was determinative on the issue of coverage.

The district court relied in part upon *Unisys Corp. v. Pa. Life & Health Ins. Guar.*, 667 A.2d 1199 (Pa. Commw. 1995). Construing statutory language substantially similar to §§ 44-2701 and 44-2702(11), the Pennsylvania court reasoned that because the trustee, as legal owner of the Executive Life contracts, held the proceeds of the contracts for the exclusive benefit of the resident Unisys employees who were participants under the contracts, the employees were equitable owners of the contracts entitled to the protection of Pennsylvania's guaranty act. The Arizona Supreme Court employed similar reasoning in *Ariz. Life & Disability v. Honeywell*, 190 Ariz. 84, 95, 945 P.2d 805, 816 (1997), interpreting statutory language which provided that Arizona's guaranty act applied to contracts " 'issued to residents of this state.' " The court concluded that although the Executive Life contracts at issue were issued to the nonresident trustee, the Arizona resident participants were the equitable owners of the contracts and that thus the contracts were "issued to" them. *Id.* The court noted that the insurance fund's argument to the contrary would defeat the policy of Arizona's guaranty act "to protect individual participants of annuity contracts, among others, from insurance company insolvency." *Id.* at 96, 945 P.2d at 817.

In arguing that the district court erred in holding that the Unisys employees residing in Nebraska were beneficial owners of the contracts entitled to protection under the Act, the Association relies upon authority from other jurisdictions holding that persons situated similarly to the Unisys employees in this case are not entitled to the protection of state insurance guaranty acts. Some of these cases involve interpretation of statutes which are significantly different from the Act before us here. For example, in *Bennet v. Va Life, Acc. & Sickness Ins.*, 251 Va. 382, 385, 468 S.E.2d 910, 912 (1996), the court addressed statutory language granting coverage only to contracts " 'issued to and owned by an individual.' " The court held that nothing in this express statutory language permitted an interpretation that a mere beneficial or equitable owner could satisfy the statutory requirements. In *Georgia Life & Health v. Gilman Paper Co.*,

249 Ga. App. 767, 771, 549 S.E.2d 751, 755 (2001), the court held that an unallocated annuity contract owned by a nonresident trustee was excluded from coverage under Georgia's guaranty act which extended coverage only " 'to the persons who are the contract holders and who . . . [a]re residents.' " Unlike the guaranty acts in these states, however, the Act in Nebraska does not include language limiting protection to circumstances in which annuity contracts are issued to and owned by an individual, nor does it limit coverage to "contract holders."

[11] Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision. *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002); *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999). Reading §§ 44-2701 and 44-2702(11) together, we conclude that the Act was intended to protect Nebraska residents who are the beneficiaries of a contractual obligation under an annuity contract issued by an insurer who subsequently becomes insolvent. Although the Executive Life contracts designate the Trustee as the legal owner who is authorized to exercise contractual rights, it is clear that the employee participants whose retirement contributions purchased the contracts are the persons entitled to the benefit of the contractual obligations undertaken by Executive Life. Stated another way, it is the resident employees, not the nonresident trustee, who are injured by the insolvency. We agree with the district court that such employees are entitled to protection under the Act.

Prejudgment and Postjudgment Interest

In its cross-appeal, Unisys contends that the district court erred in refusing to award it prejudgment and postjudgment interest. The court's refusal was based upon our decision in *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995). In that case, the insureds under a health insurance policy obtained a judgment against the insurer in the amount of $31,462.23 for covered expenses, plus additional amounts for interest, costs, and attorney fees, for a total of $55,314.61. Before payment of the judgment, the insurer became insolvent. The insureds then filed a claim with the Association for $55,314.61. The Association paid $31,462.23, representing the amount of the

covered expenses on the insurance policy at issue, but refused to pay the remaining amount of the judgment against the insurer attributable to interest, costs, and attorney fee sums. On appeal, we addressed the extent of the Association's obligation under the Act. We noted that § 44-2707(3)(b) provides that if a health insurer becomes insolvent, the Association is to " '[a]ssure payment of the contractual obligations of the insolvent insurer to residents.' " *Dobias*, 247 Neb. at 903, 531 N.W.2d at 220. We further noted that § 44-2702(4) defines " '[c]ontractual obligation' " as " 'any obligation under a policy or contract or portion of such policy or contract for which coverage is provided under section 44-2703.' " *Dobias*, 247 Neb. at 903, 531 N.W.2d at 220. We found that such language did not make the Association as guarantor the legal successor of the insolvent insurer, but only created statutory liability for the Association. After reviewing case law from other jurisdictions addressing similar situations, we concluded that the statutory language limited the Association's liability for "contractual obligations" of an insolvent insurer to only those obligations of the insurer that arose under the policy, and did not "encompass liability of an insolvent insurer arising under law rather than under the provisions of the policy such insurer issued." *Dobias*, 247 Neb. at 906, 531 N.W.2d at 221. We thus held that the Association was not liable for the interest, costs, and attorney fees.

This case is distinguishable from *Dobias* in that the interest claimed is not that assessed against the insolvent insurer, but, rather, that accruing *after* demand to satisfy the contractual obligations of the insurer was asserted against and denied by the Association. Prejudgment interest in Nebraska is awarded pursuant to Neb. Rev. Stat. § 45-103.02 (Cum. Supp. 2002). That statute allows prejudgment interest to accrue on unliquidated claims if certain preliminary steps are followed. There is no dispute that Unisys complied with these steps in this action. Although Neb. Rev. Stat. § 45-103.04 (Cum. Supp. 2002) provides that prejudgment interest does not accrue in certain actions, including any action arising under Chapter 42 of the Nebraska Revised Statutes or any action involving the State of Nebraska or its political subdivisions, there is no express exemption for organizations such as the Association. Similarly,

postjudgment interest in Nebraska is awarded pursuant to Neb. Rev. Stat. § 45-103.01 (Cum. Supp. 2002). That statute provides that postjudgment interest "shall accrue on decrees and judgments for the payment of money from the date of rendition of judgment until satisfaction of judgment." § 45-103.01. There are no statutory exemptions for this type of interest.

The Association argues that it cannot be held responsible for prejudgment or postjudgment interest because § 44-2707(9) provides that "[t]he contractual obligations of the impaired or insolvent insurer for which the association becomes or may become liable shall be as great as but no greater than the contractual obligations of the impaired or insolvent insurer . . . ." However, this statutory language does not address the question of whether the Association can be liable for interest assessed directly against it, as distinguished from interest assessed in the first instance against the insolvent insurer, as was the case in *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995).

Although both parties rely on authority from other jurisdictions, we find it unnecessary because the issue can be resolved under the plain language of applicable Nebraska statutes. As we have noted, the claimed interest was never an obligation of the insolvent insurer, but, rather, accrued after the Association refused a request to satisfy the insurer's contractual obligation. The issue is whether the Association should be treated differently than any other civil litigant with respect to liability for prejudgment and postjudgment interest. We find nothing in the Act or in the applicable statutes governing assessment of interest in a civil action which would warrant such treatment. Accordingly, we conclude that the district court erred in failing to award prejudgment and postjudgment interest to Unisys pursuant to §§ 45-103.01 and 45-103.02.

CONCLUSION

For the reasons stated above, we conclude that the district court did not err in concluding that the Executive Life contracts were "annuity contracts" within the meaning of the Act and that the Unisys employees residing in Nebraska on whose behalf this action was brought had an interest in such contracts which

entitled them to benefits under the Act. However, we conclude that the district court erred in declining to award prejudgment and postjudgment interest to Unisys under §§ 45-103.01 and 45-103.02. Accordingly, we affirm in part, and in part reverse, and remand for determination and assessment of prejudgment and postjudgment interest.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., and WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. THOMAS M. PETERSEN, RESPONDENT.

672 N.W.2d 637

Filed January 2, 2004. No. S-03-1189.

Original action. Judgment of suspension.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

This is an attorney reciprocal discipline case in which the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, filed a motion for reciprocal discipline against respondent, Thomas M. Petersen.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on April 14, 1995. On September 17, 2003, the U.S. Court of Appeals for the Eighth Circuit suspended respondent for 30 days due to his "failure to perform his duties toward [a] client in a pending appeal." The case file reflects that despite receiving extensions of time, respondent failed to file a brief in a client's criminal appeal which was pending before the Eighth Circuit. Respondent's failure ultimately led to the necessity of appointing substitute counsel.

On October 17, 2003, the Counsel for Discipline received a letter from respondent notifying the Counsel for Discipline of respondent's suspension by the Eighth Circuit. On October 21, the Counsel for Discipline filed a motion for reciprocal discipline against respondent. On October 28, this court entered a show cause order directing the parties to show cause why this court should or should not enter an order imposing the identical discipline, or greater or lesser discipline, as the court deems appropriate, pursuant to Neb. Ct. R. of Discipline 21 (rev. 2001). Both parties responded to the show cause order. In his response, respondent admitted the essential facts that resulted in his discipline by the Eighth Circuit.

ANALYSIS

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). In the context of reciprocal disciplinary proceedings, a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction. *State ex rel. NSBA v. Van*, 251 Neb. 196, 556 N.W.2d 39 (1996). We therefore determine that the imposition of discipline is appropriate in this case.

With respect to the type of discipline appropriate in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the

events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000). We apply these factors to the instant reciprocal discipline case.

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel. Counsel for Dis. v. Hart*, 265 Neb. 649, 658 N.W.2d 632 (2003); *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002). The record of respondent's disciplinary proceedings before the Eighth Circuit indicates that respondent had personal problems not necessary to repeat here which the Eighth Circuit took into account in imposing discipline. We have likewise taken these matters into account in the present case.

We have considered the case file and the applicable law. Upon due consideration, the court finds that respondent should be suspended from the practice of law for 30 days.

CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that respondent should be and is hereby suspended from the practice of law for a period of 30 days, and we therefore order him suspended from the practice of law for a period of 30 days, effective immediately, after which period respondent may apply for reinstatement. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

LARIAT CLUB, INC., DOING BUSINESS AS LARIAT CLUB, APPELLANT, v. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

673 N.W.2d 29

Filed January 9, 2004. No. S-02-324.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** Appeals from orders or decisions of the Nebraska Liquor Control Commission are taken in accordance with the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
3. ____: ____: ____. A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Administrative Law: Liquor Licenses.** The Nebraska Liquor Control Commission is an agency within the provisions of the Administrative Procedure Act.
7. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
8. **Administrative Law: Due Process: Notice.** Generally, under due process principles, the notice of an administrative agency hearing should inform a party of the issues involved in order to prevent surprise at the hearing and allow that party an opportunity to prepare.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions.

S. Nicholas Boggy, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellant.

Don Stenberg, Attorney General, and Hobert B. Rupe for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Appellant, the Lariat Club, Inc., appeals from the decision of the district court for Lancaster County affirming the decision of the Nebraska Liquor Control Commission (the Commission) which canceled the liquor license of the Lariat Club. Because the Commission reached its decision based upon an issue not identified in the notice sent to the Lariat Club, the Lariat Club was denied due process, and we reverse, and remand with directions.

STATEMENT OF FACTS

Calburt L. Sheets is the sole stockholder and manager of the Lariat Club, a bar located in Fremont, Nebraska. On January 21, 2001, a State Patrol officer stopped a vehicle driven by Sheets due to a warrant that had been issued as a result of Sheets' failure to pay an outstanding fine imposed following his conviction for driving under the influence of alcohol. At the time he was stopped, Sheets was driving with a suspended driver's license. After he stopped Sheets' vehicle, the State Patrol officer smelled marijuana, and following a search, marijuana was found in Sheets' left front pants pocket. According to the record, Sheets was arrested for driving under a suspended license; possession of marijuana, less than 1 ounce; and possession of drug paraphernalia. Sheets later pled guilty to driving under suspension, and the other charges were dropped.

On March 29, 2001, the Commission issued a show cause order to the Lariat Club. The show cause order directed the Lariat Club to show cause "as to whether or not the license should be suspended, canceled or revoked due to owner Calburt L. Sheets, having an outstanding warrant, was found [sic] driving without a license, in possession of marijuana and a DWI in 1997." A hearing was scheduled for April 19 on the show cause order. Following receipt of the show cause order, the Lariat Club requested that the rules of evidence apply at the hearing.

After being rescheduled, the hearing on the show cause order was held on May 15, 2001. The record from the hearing contains the live testimony of two witnesses. The patrol officer who arrested Sheets testified. Sheets testified on behalf of the Lariat Club. The Commission's case file regarding the show cause

hearing was received in evidence. The case file contained, inter alia, information pertaining to Sheets' January 21 arrest, and a 6-page document, prepared apparently from the Commission's records, which pertained to the nature of the Lariat Club's business and its liquor license. The Lariat Club did not introduce any exhibits into evidence.

After the hearing, the Commission deliberated. The Commission voted to cancel the liquor license of the Lariat Club. When asked by the attorney for the Lariat Club to state the basis for the cancellation, the Commission's chairperson responded, "Well, it's on the basis of [Sheets'] — the character, I mean, you know." Thereafter, on May 23, 2001, the Commission entered an order canceling the liquor license of the Lariat Club, "based upon the character and reputation of the licensee, Calburt L. Sheets." The Lariat Club applied for a rehearing of the Commission's decision, which was denied.

The Lariat Club filed a petition in error with the district court for Lancaster County, appealing the Commission's decision to cancel the liquor license of the Lariat Club. On February 13, 2002, the district court held an evidentiary hearing on the Lariat Club's petition. The Lariat Club offered into evidence the "transcript" and the "bill of exceptions" from the Commission proceedings. In an order filed February 28, the district court affirmed the Commission's decision to cancel the liquor license of the Lariat Club. The Lariat Club appeals.

ASSIGNMENTS OF ERROR

On appeal, the Lariat Club assigns five errors, which we restate as four. The Lariat Club claims, restated, that (1) the Commission denied the Lariat Club due process by failing to give the Lariat Club proper notice of the issues involved at the hearing; (2) the Commission was without authority to cancel the liquor license of the Lariat Club; (3) the Commission's order canceling the liquor license of the Lariat Club failed to state findings of fact and conclusions of law as required by Neb. Rev. Stat. § 84-915 (Reissue 1999); and (4) the Commission's decision canceling the liquor license of the Lariat Club was unsupported by competent evidence and was arbitrary, capricious, and unreasonable.

STANDARDS OF REVIEW

[1-5] Appeals from orders or decisions of the Commission are taken in accordance with the Administrative Procedure Act (APA). Neb. Rev. Stat. § 53-1,116 (Cum. Supp. 2002); *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *DLH, Inc. v. Nebraska Liquor Control Comm., supra*; *City of Omaha v. Kum & Go, supra.* A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Id.* When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

For its first assignment of error, the Lariat Club states that the Commission reached its decision to terminate the liquor license of the Lariat Club based on an issue that was not identified in the March 29, 2001, show cause order, and because that issue was not stated in the show cause order, the Lariat Club claims that its due process rights were violated. We agree.

[6] In support of its due process argument, the Lariat Club asserts that the Commission failed to comply with statutory and regulatory notice requirements. The Commission is an agency within the provisions of the APA. Neb. Rev. Stat. § 84-901 (Reissue 1999); *J K & J, Inc. v. Nebraska Liquor Control Commission*, 194 Neb. 413, 231 N.W.2d 694 (1975), *overruled in part on other grounds, 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission*, 199 Neb. 729, 261 N.W.2d 614 (1978). Neb.

Rev. Stat. § 84-913 (Reissue 1999), a provision under the APA, provides, inter alia, as follows:

> In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable.

Similarly, regulations adopted by the Commission to govern the procedure in "contested cases" provide:

> Notices of formal hearings conducted under the provisions of the Nebraska Liquor Control Act and the Rules and Regulations of the Nebraska Liquor Control Commission shall contain the [following:]
>
> . . . date and time of the hearing; [t]he place of the hearing; [t]he nature of the proceeding; and [t]he issues involved, if they can be fully stated at the time. If the issues cannot be fully stated at the time of the notice, an amended notice containing the issues involved shall be issued as soon as the issues can be fully stated.

237 Neb. Admin. Code, ch. 1, § 002.01A through D (1994).

[7] The proceedings at issue in this appeal were conducted pursuant to the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 1998 & Cum. Supp. 2000) and the regulations of the Commission. The Commission is empowered to promulgate rules and regulations to carry out the Nebraska Liquor Control Act. *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003). Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002).

There is no dispute in the present case that the only notice the Lariat Club received regarding the issues involved at the May 15, 2001, hearing was the Commission's March 29 show cause order. The Lariat Club claims that when the Commission deliberated and decided to cancel the liquor license of the Lariat Club based upon Sheets' "character and reputation," that decision was based upon an issue not listed in the show cause order. The Lariat Club

states that had it received notice that Sheets' character and reputation were at issue, it would "have had an opportunity to prepare . . . rebuttal . . . evidence [addressing the] alleged lack of character and reputation. Witnesses attesting to [Sheets'] character and reputation could have been called." Brief for appellant at 14. The Lariat Club claims that by virtue of a lack of notice, its due process rights were violated by the Commission.

[8] It has long been recognized that under circumstances similar to those in the present case, due process requires "at a minimum . . . that [the] adjudication be preceded by notice and opportunity for hearing." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Generally, under due process principles, the notice of an administrative agency hearing should inform a party of the issues involved in order to prevent surprise at the hearing and allow that party an opportunity to prepare. See, generally, *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

In the instant case, the Lariat Club was not advised that the issue of Sheets' "character and reputation" would be considered by the Commission. The show cause order made no mention that Sheets' "character and reputation" would be included in the issues to be decided at the hearing. Thus, contrary to the provisions of § 84-913 and 237 Neb. Admin. Code, ch. 1, § 002.01A through D, the Lariat Club was not informed of the issues involved at the hearing. As a result, the Lariat Club was denied the opportunity to meet the issues involved at the hearing by presenting evidence. See *Halbert v. Nebraska Liquor Control Commission*, 206 Neb. 687, 294 N.W.2d 864 (1980) (stating that Commission's failure to give liquor license applicant sufficient notice of issue involved in case as required under § 84-913 denied applicant opportunity to prepare to meet issue and to produce evidence). See, also, *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*, 251 Neb. 61, 67, 554 N.W.2d 778, 781 (1996) (stating that only issues that could properly be considered by Commission during show cause hearing were issues "explicitly listed in the notice provision of the order to show cause"). See, generally, *Block v. Lincoln Tel. & Tel. Co.*, 170 Neb. 531, 103 N.W.2d 312 (1960).

We conclude that because the Commission failed to provide the Lariat Club with notice as required under § 84-913 and the

Commission's own regulations, the Lariat Club was denied due process. See, *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). As a result of such denial, the Commission's decision with regard to the liquor license of the Lariat Club did not conform to the law. See *DLH, Inc. v. Nebraska Liquor Control Comm., supra.* Accordingly, we reverse the decision of the district court which affirmed the decision of the Commission to cancel the liquor license of the Lariat Club, and we remand the cause with directions to the district court to remand the cause to the Commission to vacate its order.

Because of our resolution of the Lariat Club's appeal based on its first assignment of error, we need not consider the remaining assignments of error. See *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003) (stating that appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

CONCLUSION

The Commission reached its decision to cancel the liquor license of the Lariat Club based upon an issue not identified in the show cause order sent to the Lariat Club. The Lariat Club was denied the opportunity to prepare for the hearing and, thus, was denied due process. The decision of the Commission did not conform to the law. The judgment of the district court affirming the Commission's decision is reversed, and the cause is remanded with directions to the district court to remand the cause to the Commission to vacate its order which canceled the liquor license of the Lariat Club.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. MERRITT E. JAMES, RESPONDENT.

673 N.W.2d 214

Filed January 9, 2004. No. S-02-1010.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule is a ground for discipline.
4. **Attorney and Client.** Generally speaking, an attorney's representation of a client ends, absent an agreement otherwise, upon the death of that client.
5. **Statutes.** A statute is vague only if it either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application.
6. **Constitutional Law: Prosecuting Attorneys: Discrimination.** The general rule regarding prosecutorial discretion in law enforcement is that unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. This means that in order to establish arbitrary discrimination inimical to constitutional equality, there must be more than an intentional and repeated failure to enforce legislation against others as it is sought to be enforced against the person claiming discrimination.
7. **Constitutional Law: Prosecuting Attorneys: Discrimination: Proof.** To support a defense of selective or discriminatory prosecution, the defendant must show not only that others similarly situated have not been prosecuted but that the selection of the defendant for prosecution has been invidious or in bad faith, based upon considerations such as race, religion, or the desire to prevent the exercise of the defendant's constitutional rights.
8. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
9. ____. Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the Nebraska Supreme Court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
10. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
11. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.

12. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
13. ____. The propriety of a disciplinary sanction must be considered with reference to the sanctions imposed by the Nebraska Supreme Court in prior cases presenting similar circumstances.
14. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Merritt E. James, pro se.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

The Counsel for Discipline filed formal charges against respondent Merritt E. James. After a formal hearing, the referee concluded that James had violated the Code of Professional Responsibility and recommended a suspension of 30 days. For the reasons stated below, we suspend James from the practice of law for 90 days.

FACTUAL AND PROCEDURAL BACKGROUND

James was admitted as a member of the Nebraska State Bar Association on June 22, 1964, and is currently engaged in private practice in Lincoln, Nebraska. This action concerns two grievances that were filed against James; the first arose from James' representation of Jacqueline Bradley (Bradley) and the second from James' representation of Daniel Kouba.

REPRESENTATION OF JACQUELINE BRADLEY

On April 5, 1996, Bradley was injured at a Shopko store in Lincoln when boxes of card tables fell from a shelf and landed on her head and neck. Although Bradley continued to shop after the accident, she did file a report with Shopko before leaving the premises. On April 29, Bradley retained James, under a contingent

fee arrangement, to represent her in a claim for damages against Shopko. Bradley was familiar with James because he had previously represented her in a personal injury case.

During her initial meeting with James, Bradley described the events of the accident and the nature of her injuries. Bradley provided James with the name of Shopko's insurance company, as well as the name and telephone number of the assigned insurance adjuster. Bradley also told James that two women had witnessed the injury, but that she did not know the witnesses or how to reach them.

On May 30, 1996, James visited the Shopko store with Bradley. James did not visit with any Shopko employees during his time at the store. On the same day, James took Bradley's statement regarding the accident. James advised Bradley to continue her medical care until she reached full recovery and to contact him thereafter. James stated that this had been the procedure he followed during the handling of Bradley's prior claim.

After the meeting, James did not contact Shopko to see if there was an accident report, nor did he make an attempt to locate the witnesses to the accident or contact Shopko's insurance company. James did not meet with Bradley again until January 18, 1999. During this meeting, Bradley informed James that she was nearing the end of her medical treatment.

After meeting with Bradley on January 18, 1999, James contacted Bradley's medical providers to gather her medical records. James also requested that Bradley provide him with documentation from her employer in order to verify lost wages. After receiving and reviewing Bradley's medical records, James took no additional steps regarding her claim until November, when he met with Bradley to discuss her case.

At the November 1999 meeting, Bradley told James that she had been diagnosed with lung cancer, but that it was not terminal. During that meeting, James again requested that Bradley provide him with documentation concerning her lost wages so that he could prepare a demand letter to Shopko's insurer. After this meeting, James took no further steps regarding the case, nor did he hear from Bradley. Over 3 years had passed since James had first met with Bradley to discuss the accident.

Bradley died on January 27, 2000. James learned of her death a few days later while skimming through the obituary section of the local newspaper. After learning of Bradley's death, James did not contact her husband, Craig Bradley (Craig), nor did James attempt to contact any possible personal representative of her estate. The 4-year statute of limitations for Bradley's claim expired on April 5, 2000. Craig attempted to contact James in May, but he was not successful. James contends that he never received any telephone calls or messages from Craig.

On May 22, 2000, Craig's attorney wrote to James requesting an update on Bradley's case. James did not reply to this letter, but he does claim to have called Craig and to have left his name and telephone number on Craig's answering machine. On September 13, 2001, Craig sent a grievance to the Counsel for Discipline, alleging that James refused to update him on the status of Bradley's claim.

Representation of Daniel Kouba

On December 22, 2000, Daniel Kouba hired James, pursuant to a contingent fee agreement, to represent him in a workers' compensation case. Kouba became dissatisfied with James and discharged James as his attorney on February 20, 2002. James contends Kouba's dissatisfaction arose from matters outside of James' control; specifically, an adverse determination by an administrative judge regarding Kouba's unemployment compensation appeal. Kouba, on the other hand, stated in his grievance letter to the Counsel for Discipline that James was providing inadequate representation. In any event, on February 20, Kouba discharged James and specifically instructed James to turn over Kouba's file to his new attorney. James did not acknowledge the discharge, nor did he turn over the file to Kouba's new attorney. On March 28, Kouba filed a grievance against James alleging that James would not deliver Kouba's file to his new attorney.

Formal Charges

On September 9, 2002, formal charges were filed against James. The charges alleged that James violated his oath of office as an attorney, the disciplinary rules, and various provisions of the Code of Professional Responsibility. The charges contained

two separate counts. With respect to count I, the representation of Bradley, James was charged with violating Canon 1, DR 1-102(A)(1) and (5), and Canon 6, DR 6-101(A)(3), of the Code of Professional Responsibility. With respect to count II, the representation of Kouba, James was charged with violating DR 1-102(A)(1) and (5) and Canon 9, DR 9-102(B)(4). The aforementioned provisions of the Code of Professional Responsibility state:

> DR 1-102 Misconduct.
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> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
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> . . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
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> . . . .
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> DR 6-101 Failing to Act Competently.
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> (A) A lawyer shall not:
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> . . . .
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> (3) Neglect a legal matter entrusted to him or her.
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> . . . .
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> DR 9-102 Preserving Identity of Funds and Property of a Client.
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> . . . .
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> (B) A lawyer shall:
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> . . . .
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> (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

James filed an answer to the charges on October 11. James admitted many of the factual allegations, denied others, and denied any violation of the Code of Professional Responsibility.

A hearing was held before a referee on January 29, 2003, and the referee filed his report on February 19. With respect to count I, the referee concluded that there was clear and convincing evidence that James had violated DR 1-102(A)(1) and (5) and DR 6-101(A)(3). With respect to count II, the referee concluded that there was clear and convincing evidence that James had violated DR 1-102(A)(1) and (5) and DR 9-102(B)(4). As to both counts, the referee determined that James had violated his oath

of office as an attorney. The referee recommended that James be suspended from the practice of law for 30 days. On February 27, James filed exceptions to the referee's report.

ASSIGNMENTS OF ERROR

James assigns seven errors, more properly restated as three: (1) The evidence was insufficient to establish violations of the Code of Professional Responsibility by clear and convincing evidence, (2) DR 1-102(A)(1) and (5) are unconstitutionally vague and do not comport with due process of law, and (3) the referee's recommendation that James be suspended for 30 days was excessive.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Counsel for Dis. v. Mills, ante* p. 57, 671 N.W.2d 765 (2003).

ANALYSIS

SUFFICIENCY OF EVIDENCE

[2,3] To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Mills, supra*; *State ex rel. Counsel for Dis. v. Muia*, 266 Neb. 970, 670 N.W.2d 635 (2003). Violation of a disciplinary rule is a ground for discipline. *Muia, supra*. Generally speaking, James argues that the evidence is insufficient to establish that he violated the Code of Professional Responsibility.

BRADLEY GRIEVANCE

As to count I, there is clear and convincing evidence that James violated DR 1-102(A)(1) and (5). Neb. Ct. R. of Discipline 9(E) (rev. 2001) states, inter alia, that

> [u]pon receipt of notice of a Grievance from the Counsel for Discipline, the member against whom the Grievance is directed shall prepare and submit to the Counsel for Discipline, in writing, within fifteen working days of

> receipt of such notice, an appropriate response to the Grievance, or a response stating that the member refuses to answer substantively and explicitly asserting constitutional or other grounds therefor.

Neb. Ct. R. of Discipline 3(B) (rev. 2001) provides that "[a]cts or omissions by a member . . . which violate . . . provisions of these rules, shall be grounds for discipline . . . ."

James was initially contacted about Craig's grievance on October 3, 2001. In this letter, the Counsel for Discipline notified James that pursuant to rule 9(E), he had 15 working days to send a written response to the allegations and that he would be subject to discipline if he failed to respond. Knowing the potential ramifications of inaction, James chose not to acknowledge the grievance within 15 working days.

The Counsel for Discipline contacted James again on November 16, 2001. James provided a brief written response on November 18, specifically promising to contact the Counsel for Discipline when he returned from a trip on November 27. However, as of February 8, 2002, the Counsel for Discipline had not heard from James. Therefore, on February 8, the Counsel for Discipline requested, via letter, a copy of James' file regarding Bradley's case. Again, James did not reply, and on February 21, the Counsel for Discipline wrote to James again, requesting to see Bradley's file. In response, James telephoned the Counsel for Discipline, stating that he could not find Bradley's file, but that he would continue to look for it. On March 20, the Counsel for Discipline requested an update on the status of Bradley's file. James did not respond to this request.

On June 4, 2002, an Assistant Counsel for Discipline faxed and mailed a letter to James requesting a meeting to discuss Craig's grievance. The letter stated, inter alia, that if James failed to respond, the Counsel for Discipline would request a temporary suspension of his license. The same day, James contacted the Counsel for Discipline to schedule a meeting to discuss Craig's grievance. That meeting took place on June 12, during which James turned over Bradley's file. However, it was not until July 15 that the Counsel for Discipline finally received James' complete written response to the grievance. In other words, it took James over 9 months to fully respond to the

Counsel for Discipline. Such conduct runs afoul of rule 9(E) and clearly violates DR 1-102(A)(1) and (5).

James contends that his conduct should be excused because he could not find Bradley's file and that, therefore, he could not adequately respond to the grievance. This excuse is without merit. If James truly could not find Bradley's file, the proper response to the grievance would have been to notify the Counsel for Discipline of such and to construct a response as best as possible from memory and other available resources. A member of the bar may not, however, simply ignore the Counsel for Discipline.

James also argues that his brief written response, received by the Counsel for Discipline on November 20, 2001, served to stop the clock from running under rule 9(E). This argument is also without merit. As an initial matter, this response was received well after the time limit established by rule 9(E). In addition, it was an incomplete response to the charges contained in Craig's grievance. Moreover, James failed to contact the Counsel for Discipline when he returned to Lincoln, despite an assurance in his letter that he would do so.

As to this last point, James argues that beyond a member's duty to respond to the initial notice of a grievance, there are no guidelines concerning a member's duty to respond to further inquiries on behalf of the Counsel for Discipline. This is incorrect. See, DR 1-102(A)(5); *State ex rel. NSBA v. Simmons*, 259 Neb. 120, 123, 608 N.W.2d 174, 177 (2000) ("a failure to make timely responses to inquiries of the Counsel for Discipline . . . violates ethical canons and disciplinary rules which prohibit conduct prejudicial to the administration of justice"); *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997). While we refuse to set a rigid timeline for determining when a response to a followup inquiry is not timely, we conclude that James' failure to answer the repeated inquiries from the Counsel for Discipline was prejudicial to the administration of justice, in violation of DR 1-102(A)(5).

There is also clear and convincing evidence that James violated DR 6-101(A)(3) by neglecting Bradley's personal injury case. Most important to the charge of neglect is that James made no attempt to contact Craig or any possible personal

representative about Bradley's claim prior to the expiration of the statute of limitations.

James argues that he was under no duty to contact Craig or any possible personal representative because (1) the attorney-client relationship ended when Bradley died and (2) he did not, nor did he wish to, represent Craig or the personal representative of the estate. Moreover, James argues that even if he had a duty to contact Bradley's personal representative, no prejudice occurred, because after Bradley's death, there was no witness to the accident and, therefore, her claim was of little or no value to the estate.

[4] Generally speaking, an attorney's representation of a client ends, absent an agreement otherwise, upon the death of that client. See, Restatement (Third) of the Law Governing Lawyers § 31(2)(b) (2000); 7 Am. Jur. 2d *Attorneys at Law* § 184 (1997). Thus, for instance, James lacked the authority to file the claim without the approval of Bradley's personal representative. See *Long v. Krause*, 104 Neb. 599, 178 N.W. 188 (1920). However, James was also without authority to decide that it was acceptable to allow Bradley's claim to become time barred without the approval of her personal representative. In other words, even after Bradley's death, James had an affirmative duty to protect the claim that she had entrusted to him. See, Restatement, *supra*, § 31, comment *e.*; *id.*, § 33; *id.*, § 33, comment *b*. See, also, Canon 2, EC 2-32 and DR 2-110(2). By failing to alert Craig or the personal representative of the impending expiration of the statute of limitations, James deprived the appropriate decision-maker of the choice to proceed with the claim and thereby deprived the estate of a potential asset. Such conduct constitutes neglect and establishes a violation of DR 6-101(A)(3).

Kouba Grievance

In regard to count II, there is clear and convincing evidence that James violated DR 1-102(A)(1) and (5). James was initially notified by the Counsel for Discipline of Kouba's grievance on April 3, 2002. James was directed to provide an appropriate response within 15 working days and was notified that by failing to do so, he would be subject to discipline. On April 4, James

turned over Kouba's file to Kouba's new attorney; however, James failed to file a response with the Counsel for Discipline.

The Counsel for Discipline wrote to James on April 25, 2002, and again on May 8, requesting a response to the grievance. However, it was not until June 4, when the Assistant Counsel for Discipline threatened to request a temporary suspension of his license, that James telephoned to set up a meeting to discuss Kouba's grievance. Moreover, it was not until June 12 that James filed his written response to Kouba's grievance. By failing to respond to the grievance within 15 days of the notification and failing to timely respond to the repeated inquiries from the Counsel for Discipline, James violated DR 1-102(A)(1) and (5).

In addition, there is clear and convincing evidence that James violated DR 9-102(B)(4) by failing to promptly turn over Kouba's file to his new attorney. On February 20, 2002, Kouba discharged James and instructed James to deliver Kouba's file to his new attorney. James, however, did not deliver Kouba's file until April 4, which was 1 day after James received written correspondence from the Counsel for Discipline regarding the Kouba grievance.

James contends that Kouba was not prejudiced by his inaction and that, therefore, no discipline should spring from his delayed response. James' argument is without merit. Although it may be true that the delayed delivery of Kouba's file did not prejudice Kouba's claim, it hardly excuses James' conduct or justifies his inaction. The more relevant question is whether James failed to "promptly" turn over Kouba's file by retaining it for more than 6 weeks after it was requested by Kouba. Here we draw guidance from *In re Hunter*, 163 Vt. 599, 656 A.2d 203 (1994), where the Supreme Court of Vermont determined that an attorney who retained a client's file for over 2 months after it was requested by the client violated DR 9-102(B)(4). See, also, *State ex rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003) (attorney violated DR 9-102(B)(4) by waiting several months to return unused portion of retainer to client despite repeated requests from client and Counsel for Discipline). We conclude that under these circumstances, a delay of more than 6 weeks was dilatory and constitutes a violation of DR 9-102(B)(4).

DUE PROCESS

James also contends that DR 1-102(A)(1) and (5) are unconstitutionally vague and do not comport with due process of law. However, James' argument is based solely on the claim that rule 9(E) is vague. Specifically, James argues that rule 9(E) fails to provide (1) members of the bar with adequate notice as to what conduct is prohibited and (2) the Counsel for Discipline with adequate standards to prevent arbitrary enforcement.

[5] James' argument is without merit. We have previously stated that a statute is vague only if " 'it either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application.' " *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 455, 441 N.W.2d 161, 168 (1989), quoting *Cunningham v. Lutjeharms*, 231 Neb. 756, 437 N.W.2d 806 (1989).

In *Kirshen, supra*, an attorney failed to timely respond to the Counsel for Discipline in violation of rule 9(E) and was charged with violating DR 1-102(A)(1) and (6). We determined that DR 1-102(A)(6) was not vague because a reasonable attorney would understand that violating rule 9(E) would constitute conduct that adversely reflected the fitness to practice law. Likewise, here, we conclude that a reasonable attorney would understand that rule 9(E) requires that upon receiving a grievance from the Counsel for Discipline, he or she has 15 working days to submit either a substantive response to the grievance or a response stating that the member refuses to substantively respond and the reason therefor.

Similarly, we believe that adequate standards are in place to ensure that rule 9(E) is not arbitrarily enforced by the Counsel for Discipline. Rule 3(B) clearly states that a violation of the disciplinary rules "shall be grounds for discipline." In other words, by failing to respond to a grievance within the time provided by rule 9(E), a member violates the disciplinary code and becomes subject to discipline under rule 3(B). To this, James contends that the Counsel for Discipline does not file charges every time a member fails to respond to a grievance within the time provided by rule 9(E). Although James cites no examples or evidence of this claim, we believe that his assertion merits further discussion.

The disciplinary rules grant the Counsel for Discipline discretion to decide whether reasonable grounds for discipline exist. See rule 9. If so, the Counsel for Discipline is to forward a complaint to the Committee on Inquiry, from which an inquiry panel is authorized to (1) dismiss the complaint, (2) issue a reprimand, or (3) direct the Counsel for Discipline to file formal charges. See rule 9(H). While no specific guidelines exist as to what action either the Counsel for Discipline or the inquiry panel must take, each of their actions is based on whether "reasonable grounds" for discipline exist. See rule 9. Moreover, it is obvious that their decisions are informed by considerations in the disciplinary rules, the Code of Professional Responsibility, relevant case law, and other practical factors peculiar to each case. We believe that these factors and guidelines afford sufficient legal guidance to obviate the danger of arbitrary or discriminatory enforcement. See *Myers v. Mississippi State Bar*, 480 So. 2d 1080 (Miss. 1985).

[6,7] Furthermore, James' argument is largely predicated on the claim that he has been singled out for prosecution while numerous other violators of rule 9(E) have gone unpunished. We conclude that this argument is akin to a defense based on selective prosecution. Discussing selective prosecution in another context, we have stated:

> The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. . . . This means that in order to establish arbitrary discrimination inimical to constitutional equality, there must be more than an intentional and repeated failure to enforce legislation against others as it is sought to be enforced against the person claiming discrimination. . . . Also, there must be more than a showing that a law or ordinance has not been enforced against others and that it is sought to be enforced against the person claiming discrimination. . . . To support a defense of selective or discriminatory prosecution, the defendant must show not only that others similarly situated have not been prosecuted but that the selection of the

> defendant for prosecution has been invidious or in bad faith, based upon considerations such as race, religion, or the desire to prevent his exercise of his constitutional rights.

(Citations omitted.) *State v. Katzman*, 228 Neb. 851, 855, 424 N.W.2d 852, 856 (1988). James has not attempted to satisfy the aforementioned evidentiary burden, and therefore, we conclude that his assertions of selective prosecution are without merit.

DISCIPLINE

As noted above, the referee recommended that James be suspended from the practice of law for 30 days. James argues that this recommendation is excessive and that if discipline is necessary, it should come in the form of a reprimand.

[8,9] We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001), quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by this court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. *State ex rel. Counsel for Dis. v. Mills, ante* p. 57, 671 N.W.2d 765 (2003).

[10,11] With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490, quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000).

[12] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar

as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Mills, supra.*

[13] The evidence in the present case establishes that James violated his oath of office as an attorney, engaged in conduct prejudicial to the administration of justice, neglected a legal matter entrusted to him, and failed to promptly deliver client property. The propriety of a disciplinary sanction must be considered with reference to the sanctions imposed by this court in prior cases presenting similar circumstances. *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We believe the case of *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000), presents a more serious but factually similar situation to that currently before us. In *Mefferd*, counsel was charged with disciplinary violations stemming from his representation of two different clients. With respect to the first client, counsel was charged with failing to return an overpayment and failing to timely respond to the grievance forwarded by the Counsel for Discipline. With respect to the second client, counsel was charged with neglect of a legal matter and failing to timely respond to the grievance forwarded by the Counsel for Discipline. We determined that counsel violated DR 1-102(A)(1), (5), and (6); DR 6-101(A)(3); and DR 9-102(B)(4), and suspended him from the practice of law for 1 year.

Furthermore, we view an attorney's failure to respond to inquiries and requests for information from the office of the Counsel for Discipline as a grave matter and as a threat to the credibility of attorney disciplinary proceedings. "The disciplinary process as a whole must function effectively in order for the public to have confidence in the integrity of the profession and to be protected from unscrupulous acts." *Mefferd*, 258 Neb. at 626, 604 N.W.2d at 847.

James' initial refusal to respond to repeated inquiries from the Counsel for Discipline demonstrates nothing less than a total "disrespect for our disciplinary jurisdiction and [a] lack of concern for the protection of the public, the profession, and the administration of justice." See *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 473, 441 N.W.2d 161, 178 (1989). The Counsel for Discipline should not be forced to threaten an attorney with the

suspension of his or her license in order to get him or her to respond to requests for information.

We also note that this action is not James' first encounter with the disciplinary rules of this state. In 1981, we concluded that James' failure to use a trust account for a client's funds and to promptly transmit a client's funds to the client constituted unprofessional conduct and warranted a public reprimand. See *State ex rel. Nebraska State Bar Assn. v. James*, 209 Neb. 306, 307 N.W.2d 524 (1981). James was also given a private reprimand in December 2000 for violating DR 1-102(A)(1), DR 2-110(B)(3), and DR 6-101(A)(3).

[14] Lastly, the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Gallner, supra*. The Counsel for Discipline admits that James was respectful and honest throughout these proceedings, and both the referee and the Counsel for Discipline agree that James is fit for the continued practice of law. However, when viewed through the prism of the overall disrespect James has shown for this court's disciplinary proceedings, the nature of the current violations, and James' prior disciplinary violations, his conduct merits more than the 30-day suspension recommended by the referee.

CONCLUSION

It is, therefore, the judgment of this court that James should be and is hereby suspended from the practice of law for 90 days, and we therefore order him suspended from the practice of law for a period of 90 days, effective immediately, after which period James may apply for reinstatement. James is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. James is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

CYNTHIA J. CLABORN, APPELLEE, V. BILLY E. CLABORN, APPELLANT.

673 N.W.2d 533

Filed January 9, 2004. No. S-02-1069.

1. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.
2. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
3. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 1998), the purpose of a property division is to distribute the marital assets equitably between the parties.
4. **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.
5. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
6. **Property Division.** Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
7. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
8. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
9. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
10. ____. Disparity in income or potential income may partially justify an award of alimony.
11. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
12. **Rules of the Supreme Court: Child Support.** In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation.
13. ____: ____. Under the Nebraska Child Support Guidelines, paragraph D, 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.

14. **Divorce: Child Support.** A divorce decree does not require a parent to remain in the same employment, and child support may be calculated based on actual income when a career change is made in good faith.
15. **Child Support.** Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in that parent's support obligation would seriously impair the needs of the children.
16. **Rules of the Supreme Court: Child Support.** Earning capacity may be used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines where evidence is presented that the parent is capable of realizing such capacity through reasonable effort.
17. ____: ____. Before the September 2002 amendment to the Nebraska Child Support Guidelines, it was permissible for a court to order the noncustodial spouse to share payment for unreimbursed medical expenses.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed as modified.

Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellant.

Mark D. Kratina, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Billy E. Claborn appeals from a dissolution decree entered in July 2002, claiming that the district court erred in its division of property, award of alimony, calculation of child support, and division of medical and dental expenses not covered by insurance. We determine that the district court erred in its division of property and award of alimony. We affirm as modified.

BACKGROUND

Cynthia J. Claborn and Billy were married in 1980. In May 2001, Cynthia filed a petition for dissolution of marriage. At trial, the parties stipulated that Cynthia would be awarded custody of the two minor children. Two children who had reached the age of majority also resided with Cynthia. Cynthia testified that she would like to continue to live in the home purchased during the marriage until the youngest child graduated from high school. That child will reach the age of majority on September 16, 2004.

At the time of trial, Cynthia was 42 years old. She was employed by Avaya, Inc., and had worked there for about 23 years. At the end of 2000, her monthly gross income was $2,575, and she estimated her total monthly expenses at $4,046. This estimate included the mortgage payment on the house and food for adult children still living there. At the time of trial, she had been on paid medical leave for about 5 months because of depression, anxiety, and stress. Although the leave was paid, she was unable to work and collect compensation for overtime. However, she anticipated that she would return to work in 1 or 2 months.

Billy was employed at Jackson Home Appliance, his father's family business, as an office manager. At the end of 2000, his monthly gross income was $4,250. The record indicates that in the past, Billy would sometimes make additional money working odd jobs, but he was working only at Jackson Home Appliance at the time of trial. The record also shows that before Cynthia filed for dissolution, Billy was working about 80 hours per week.

In May 2001, Billy entered a treatment facility for alcohol and chemical dependency. When he returned, he worked 40 hours per week, cutting his income about in half. He testified that he needed a break because of the stress that he was under and that he was not mentally capable of earning more money. He also stated that when he went into treatment, sales of used appliances "fizzled out," and that this cut the need for him to perform some duties related to delivering used appliances.

Billy's father testified that he initially was going to fire Billy when the dissolution action was filed, but instead, he reduced Billy's duties and wages because he did not think Billy was capable any more. He stated that Billy's hours and pay were not cut as a way to reduce Billy's child support obligations.

Both parties provided information about items of property and joint debts. The record shows that Cynthia has a retirement annuity with no present value but that it might have value when she is 65. She also has a retirement savings account of $8,759.52. Cynthia testified about medical expenses she paid that were not covered by insurance. The evidence showed that Billy obtained proceeds from the sale of a motorcycle, but he claims he used the money to pay other obligations. There was also evidence that Cynthia incurred debt for some uninsured

medical bills before trial and paid some joint debt. However, the motorcycle proceeds, the joint debts Cynthia claimed to have paid, and debts for medical bills were not addressed by the court and are not included in the decree.

The parties stipulated that the family residence had a value of $185,000, with a first mortgage of $117,000 and a second mortgage of $22,500. The proceeds from the second mortgage were used to purchase Billy's one-third interest in the rental property. They further stipulated that the rental property was worth $275,000, in which property Billy had a one-third interest. The rental property was encumbered with mortgages of $141,000. Cynthia claimed Billy's monthly gross income was $4,250, but Billy claimed it was approximately $2,166.

The district court calculated Billy's child support obligation based on an income of $3,807. The court also ordered that uncovered medical and dental expenses be shared equally by the parties. The court awarded alimony of $1,000 per month until the youngest child reaches the age of majority. At that time, the alimony would be reduced to $750 for 36 months and then reduced to $500 for another 36 months. The court awarded the residence to Cynthia, subject to the $117,000 first mortgage. The court awarded Billy his one-third interest in the rental properties, subject to mortgages of $141,000. The court ordered Billy to pay the $22,500 second mortgage on the residence. The court awarded Cynthia the retirement annuity plan. The court ordered Cynthia to pay $9,940 of remaining joint debts, plus the $117,000 first mortgage on the home. The court ordered Billy to pay $31,200 in debts, which included the $22,500 second mortgage. The court divided other personal property, including awarding a boat to Billy that the parties state is worth either $6,000 or $8,000; the record supports the value of $6,000.

ASSIGNMENTS OF ERROR

Billy assigns, rephrased, that the district court erred in how it allocated assets. Specifically, he assigns that the court erred in (1) determining the division of property, (2) failing to include the retirement annuity plan in marital property, (3) awarding alimony, (4) calculating child support based on his previous

earning capacity, and (5) ordering him to pay one-half of the first $1,200 of uninsured medical and dental expenses.

STANDARD OF REVIEW

[1] Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record. *Foster v. Foster*, 266 Neb. 32, 662 N.W.2d 191 (2003).

[2] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002).

ANALYSIS

Property Division and Cynthia's Retirement Plans

Billy first contends that the property award was inequitable. Both parties included charts in their briefs to show the court's property division but disagree about the property values and the allocation of debts. For example, they disagree over the value of a boat, whether certain debts were included, and whether proceeds from a motorcycle sale were included. The following is an explanation of the district court's award:

CYNTHIA

Assets		
Home Equity:		$68,000
Value	$185,000	
First mortgage	(117,000)	
Retirement plan		8,759
Debts		(9,940)
Total Equity		$66,819

BILLY

Assets		
Rental properties equity:		$44,666
(based on one-third interest)		
Value	$275,000	
Mortgages	(141,000)	
	$134,000	
Bayliner boat		6,000

Debts	
Second mortgage	(22,500)
Boat loan	(8,700)
Total Equity	$19,466

[3,4] Under Neb. Rev. Stat. § 42-365 (Reissue 1998), the purpose of a property division is to distribute the marital assets equitably between the parties. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). 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. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002).

[5,6] In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Schaefer v. Schaefer*, 263 Neb. 785, 642 N.W.2d 792 (2002); *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Gibilisco v. Gibilisco, supra.*

Here, the award of $66,819 of assets to Cynthia and $19,466 to Billy is unreasonable and unfair. Cynthia was awarded over two-thirds of the marital estate, when the record does not support such an unequal distribution of property. The youngest child will reach the age of majority on September 16, 2004, and it would be beneficial for Cynthia to remain in the house until that time. But we determine that to fairly divide the property, the house should be sold after September 16, 2004, and the two mortgages paid off. Billy shall continue to pay the second mortgage until the house is sold. At that time, the second mortgage will be paid in full from the proceeds of the sale.

Billy next argues that the district court erred in its division of Cynthia's retirement savings plan and annuity plan. We have reviewed the record and conclude that the court did not err in how it divided those plans.

Having determined that the house should be sold after September 16, 2004, with the mortgages paid off from the proceeds, and that the retirement plans should be awarded to Cynthia, based on the values in the record, we order the following division of property:

CYNTHIA

Assets		
Home equity:		$45,500
Value	$185,000	
First mortgage	(117,000)	
Second mortgage	(22,500)	
Retirement plan		8,759
Debts		(9,940)
Total Equity		$44,319

BILLY

Assets		
Rental properties equity:		$44,666
(based on one-third interest)		
Value	$275,000	
Mortgages	(141,000)	
	$134,000	
Bayliner boat		6,000
Debts		
Boat loan		(8,700)
Total Equity		$41,966

ALIMONY

Billy contends that the alimony award was unreasonable because Cynthia was employed throughout the marriage.

[7,8] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id.*

[9,10] The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). However, disparity in income or potential income may partially justify an award of alimony. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

Here, the record shows that Cynthia was employed for the duration of the marriage. At the time of trial, she was taking a paid leave of absence from work because of depression, but intended to return to work. Nothing in the record indicates that Cynthia cannot work or that she requires any training to support herself. Although the record shows that there was some disparity of income during a period of the marriage, the record also shows that Billy was having difficulties continuing to work over 40 hours per week.

Because Cynthia was experiencing depression which did not allow her to earn extra income in the form of overtime, we agree that an award of alimony through September 2004 was appropriate. After that time, however, the record does not support an alimony award. We determine that the district court's award of alimony past September 2004 was unreasonable and untenable. Thus, we reverse that part of the award. The alimony as awarded by the district court should be paid through September 2004 and then end.

Child Support

Billy argues that the court erred when it calculated child support based on his earning capacity instead of his current income.

[11,12] The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003). In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation. *Wagner v. Wagner*, 262 Neb. 924, 636 N.W.2d 879 (2001).

[13-16] Under the Nebraska Child Support Guidelines, paragraph D, 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. *Id.* A divorce decree does not require a parent to remain in the same employment, and child support may be calculated based on actual income when a career change is made in good faith. *Id.* But child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in that parent's support obligation would seriously impair the needs of the children. *Id.* We have also said that earning capacity may be used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines where evidence is presented that the parent is capable of realizing such capacity through reasonable effort. *Brockman v. Brockman*, 264 Neb. 106, 646 N.W.2d 594 (2002).

Here, there was testimony that Billy reduced his work hours for treatment purposes and because he was unable to work additional hours. There also, however, was an inference that he sought to continue reduced work hours to lower his child support obligations. We note that the district court used an income amount that was in between the amounts requested by the parties. We also note that the court had the opportunity to see and hear the witnesses, and was in a better position to judge what Billy's earning capacity was. We conclude that the court did not abuse its discretion when setting the amount of child support.

MEDICAL EXPENSES

Finally, Billy argues that it was improper to require him to pay one-half of any necessary medical and dental expenses not covered by insurance because the child support guidelines already include the first $1,200 of those expenses in the calculation.

[17] The child support guidelines were amended in September 2002 to state that the guidelines include ordinary medical expenses. Before September 2002, however, we held that it was permissible for a court to order the noncustodial spouse to share payment for unreimbursed medical expenses. See *Druba v. Druba*, 238 Neb. 279, 470 N.W.2d 176 (1991).

Here, the decree was entered in July 2002, which is before the change in the guidelines. We apply the law that was in effect at that time and decline to overrule cases allowing courts to order payment of unreimbursed medical expenses before September

2002. Accordingly, the district court did not err when it ordered Billy to pay one-half of unreimbursed medical expenses.

CONCLUSION

We determine that the district court erred in its division of property and award of alimony and modify those parts of the decree. We affirm on all other issues.

AFFIRMED AS MODIFIED.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JAMES R. COVEY, APPELLANT.

673 N.W.2d 208

Filed January 9, 2004. No. S-03-406.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: 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. **Speedy Trial: Good Cause.** Under a plain reading of Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995), before an evaluation for good cause need be made, there must first be a "period of delay."
4. **Speedy Trial: Pretrial Procedure.** The plain terms of Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) exclude all time between the time of the filing of a defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay.

Appeal from the District Court for Harlan County: STEPHEN ILLINGWORTH, Judge. Affirmed as modified.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Ronald D. Moravec for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

On October 23, 2001, the State filed an information in the district court for Harlan County charging James R. Covey with first degree murder and use of a weapon to commit a felony. On February 14, 2003, Covey filed a motion to discharge on the ground that he had not been brought to trial within the 6-month time period allowed under the speedy trial statute, Neb. Rev. Stat. § 29-1207 (Reissue 1995). On March 28, the court denied Covey's motion to discharge.

In its journal entry and order, the court noted that Covey had filed a "Motion to Quash Death Penalty" on October 29, 2001, and a "Motion to Change Venue" on December 3. The court reasoned that because neither motion had been ruled on at the time Covey filed his motion to discharge, the 6-month time period under § 29-1207 stopped running upon the filing of the motions and that the 6-month time period had not expired. If the court's March 28, 2003, ruling were deemed entirely correct, the entire period of time following the filing of the "Motion to Quash Death Penalty" would be excluded from the speedy trial calculation. Covey appeals the denial of his motion to discharge.

As discussed below, we conclude that the "Motion to Quash Death Penalty" should be considered under § 29-1207(4)(f), has not caused delay, has not triggered any excludable time, and has not reached final disposition. We further conclude that the motion to change venue should be considered under § 29-1207(4)(a), has triggered excludable time, and has not reached final disposition. Based on our analysis, the entire time period which commenced on the day after the filing of the motion to change venue should be excluded and the speedy trial statute has not been violated. Thus, although the district court correctly denied the motion to discharge, its ruling was clearly erroneous in its determination that the first day of the excludable period commenced upon the October 29, 2001, filing of the "Motion to Quash Death Penalty." The first day of the excludable period should be December 4, 2001, and the period of exclusion has not concluded. Based on the foregoing, the motion to discharge was properly denied and we affirm as modified.

STATEMENT OF FACTS

On October 23, 2001, the State filed an information charging Covey with first degree murder and use of a weapon to commit a felony in connection with the killing of Starlett Covey. Covey was arraigned on October 29. Covey filed a "Motion to Quash Death Penalty" on October 29. In this motion, Covey stated that "in the event of Defendant's conviction for first-degree murder," he sought a hearing for the purpose of "quashing and precluding" the imposition of a death sentence. In this motion, Covey asserted that the Nebraska death penalty statutes were unconstitutional on their face and as applied. On the day the "Motion to Quash Death Penalty" was filed, the court noted on the trial docket that it would not take up the motion because it was premature.

On December 3, 2001, Covey filed a motion to change venue in which he sought as relief a change of venue "from Harlan County to another county." In the motion, Covey stated, inter alia, that at the time of filing the motion, he was not aware of any evidence supporting a motion to change venue. Covey specifically "request[ed] the court hold this motion [to change venue] in abeyance."

The court held a hearing on December 14, 2001, to consider various motions filed by Covey, including the motion for change of venue. In a December 26 order, the court stated that the motion to change venue would not be ruled upon until the time of jury selection.

While it is not necessary to our resolution of this case, we note for the sake of completeness that at various points in the proceedings, Covey freely and voluntarily waived speedy trial from December 14, 2001, to June 1, 2002, and from May 20 to September 20, 2002. We further note that following the court's ruling sustaining Covey's motion to suppress evidence, the State filed a notice of its intention to prosecute an appeal therefrom on September 4, 2002, and that the Nebraska Court of Appeals entered a mandate summarily dismissing the appeal for lack of jurisdiction. See *State v. Covey*, 11 Neb. App. lxi (No. A-02-993, Nov. 14, 2002).

A pretrial hearing was held on February 7, 2003, at which hearing the district court set trial for February 18. On February 14, Covey filed a motion to discharge seeking absolute discharge

on the basis that he had not been brought to trial within the 6-month time period required under § 29-1207. Covey made no allegation that his constitutional right to speedy trial had been violated, nor does he do so in this appeal. A hearing was held on February 21. On March 28, the court filed an order denying Covey's motion to discharge. The court determined in effect that the "Motion to Quash Death Penalty" filed October 29, 2001, and the motion for change of venue filed December 3 were pretrial motions under § 29-1207(4)(a) and that neither motion had been ruled on. The court found that the entire time since the motions had been filed should be excluded and that, therefore, the time for trial pursuant to § 29-1207 had not run when Covey filed his motion to discharge on February 14, 2003. Covey appeals the denial of his motion to discharge.

ASSIGNMENT OF ERROR

Covey asserts that the district court erred in denying his motion to discharge.

STANDARDS OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002).

[2] 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. *Id.*

ANALYSIS

Resolution of this appeal is made by reference to § 29-1207. The speedy trial statute, § 29-1207, provides in relevant part:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> (2) Such six-month period shall commence to run from the date an indictment is returned or the information filed. . . .
>
> . . . .
>
> (4) The following periods shall be excluded in computing the time for trial:

> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

Covey argues that under the speedy trial statute, his case should have been brought to trial on or before February 7, 2003, and that the district court erred in denying his motion to discharge. He notes that the information was filed October 23, 2001, and that 6 months would have run on April 23, 2002. Covey concedes that a delay of an additional 290 days was attributable to certain of his motions, not all discussed here, and his express waivers.

In his brief on appeal, Covey states that the "Motion to Quash Death Penalty" does not relate to pretrial issues and that the motion to change venue is "not a pretrial motion." Brief for appellant at 26. Covey thus asserts that neither motion falls under § 29-1207(4)(a), and he further asserts that no actual delay under § 29-1207(4)(f) can be attributed to the filing of these motions. Covey concludes that no time other than the 290 days noted above should be excluded from the time for trial computed pursuant to § 29-1207 and that, therefore, he should have been brought to trial on or before February 7, 2003.

The State argues in response that the district court was correct when it determined that both the "Motion to Quash Death Penalty" and the motion to change venue were pretrial motions of Covey under § 29-1207(4)(a) and that, therefore, the time from filing until final disposition of such motions should be excluded in computing the time for trial. The State asserts that because neither motion reached final disposition prior to Covey's filing his motion to discharge on February 14, 2003, the entire time since the filing of the motions should be excluded,

and that the speedy trial 6-month time period had not run on February 14, when Covey filed his motion to discharge.

"Motion to Quash Death Penalty": § 29-1207(4)(f).

Covey filed his "Motion to Quash Death Penalty" on October 29, 2001, and on the same day, the district court noted on the trial docket that it would not take up the substance of this motion because it was premature. The "Motion to Quash Death Penalty" states that a hearing on its substance should only be taken up "in the event of Defendant's conviction for first degree murder." Thus, by its terms, this motion was not to be decided before trial as to guilt nor did it impact the commencement of trial. Although captioned a "motion to quash," it is neither a motion "to quash the indictment or information" nor a "pretrial" motion under § 29-1207(4)(a). The district court erred when it treated this motion as a pretrial motion under § 29-1207(4)(a). Further, this motion is not a motion identified in § 29-1207(4)(b) through (e), and we therefore consider the impact, if any, of this motion under the catchall provision, § 29-1207(4)(f).

[3] Section § 29-1207(4)(f) provides for the exclusion of "[o]ther periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause." Under § 29-1207(4)(f), time may be excluded for a period of delay where good cause is shown. Under a plain reading of § 29-1207(4)(f), before an evaluation for good cause need be made, there must first be a "period of delay." We have previously assumed the necessity of a period of delay as a prerequisite to an evaluation of good cause under § 29-1207(4)(f). Thus, in *State v. Baker*, 264 Neb. 867, 872, 652 N.W.2d 612, 617 (2002), we pointed out that "§ 29-1207(4)(f) provides that other periods of delay may be excluded if the court finds they are for good cause." See, also, *State v. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002) (noting that under § 29-1207(4)(f), State did not sustain its burden to show good cause for delay).

In the instant case, there was no period of delay occasioned by the "Motion to Quash Death Penalty," no assessment of "good cause" is indicated, and an evaluation of this motion under § 29-1207(4)(f) does not result in the exclusion of time. The district court's ruling was clearly erroneous when it found that the

"Motion to Quash Death Penalty" should be evaluated under § 29-1207(4)(a) and that the filing of the motion triggered a period of exclusion.

Motion to Change Venue: § 29-1207(4)(a).

Covey filed his motion to change venue on December 3, 2001. On December 26, the court stated that it would not rule on the motion until the time of jury selection. Covey asserts that the motion to change venue was not a motion under § 29-1207(4)(a) and that no time should be excluded due to the filing of this motion. We reject this argument.

Section 29-1207(4) provides that in computing the 6-month period for statutory speedy trial purposes,

> [t]he following periods shall be excluded in computing the time for trial:
>
> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue . . . .

Because § 29-1207(4)(a) lists "motions for a change of venue" and the motion to change venue filed by Covey on December 3, 2001, sought to "change venue from Harlan County to another county," Covey's motion is one of the type of pretrial motions described in § 29-1207(4)(a).

Covey argues that the motion to change venue caused no delay and that, therefore, no time should be excluded as a result of the filing of the motion to change venue. Covey asserts that the phrase "period of delay" in § 29-1207(4)(a) requires the State to show that proceedings resulting from a pretrial motion of the type anticipated in § 29-1207(4)(a) caused actual delay in the progression of the case to trial before time attributable to the pendency of the motion is excluded from the statutory speedy trial computation. Given the language of § 29-1207(4)(a), we do not agree.

[4] We have stated that "the plain terms of § 29-1207(4)(a) exclude all time between the time of the filing of the defendant's pretrial motions and their final disposition, regardless of the

promptness or reasonableness of the delay." *State v. Turner*, 252 Neb. 620, 629, 564 N.W.2d 231, 237 (1997). Thus, we have recognized that under § 29-1207(4)(a), the period of delay is defined by the statute itself as the period between the filing and final disposition of the pretrial motion. We have also stated that "where the excludable period properly falls under § 29-1207(4)(a) rather than the catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude the delay," and that "conspicuously absent from § 29-1207(4)(a) is any limitation, restriction, or qualification of the time which may be charged to the defendant as a result of the defendant's motions." *State v. Turner*, 252 Neb. at 629, 564 N.W.2d at 237. See, also, *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

Under § 29-1207(4)(a), the time from filing until final disposition of the motion to change venue must be excluded in computing the time for trial for statutory speedy trial purposes. We have stated that final disposition under § 29-1207(4)(a) occurs on the date the motion is "granted or denied." *State v. Recek*, 263 Neb. 644, 649, 641 N.W.2d 391, 396 (2002). The December 26, 2001, order was not a "final disposition" of the motion to change venue, and no action resulting in a final disposition of the motion was taken prior to February 14, 2003, when Covey filed his motion to discharge. Therefore, the entire time since December 4, 2001, the day following Covey's filing of the motion to change venue, was properly excludable from the statutory speedy trial computation at the time the court considered Covey's motion to discharge. See *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002) (stating that excludable period under § 29-1207(4)(a) commences on day immediately after filing of defendant's pretrial motion).

We note in the present case that in his motion to change venue, Covey asked the court to "hold this motion in abeyance," thus inviting the court to defer final disposition of the motion. As we noted in *State v. Turner, supra*, if the defendant wished to avoid the effects of excludable time, he could have withdrawn the motion and thus allowed the computation of time for statutory speedy trial purposes to proceed. Absent such withdrawal,

§ 29-1207(4)(a) requires the exclusion of time from filing until final disposition of the motion computed under *State v. Baker, supra.*

The excludable period attributable to Covey's motion to change venue commenced on December 4, 2001, which was well within 6 months after the information was filed on October 23, and the excludable period did not end prior to the filing of the motion to discharge. Because the entire time since December 4, 2001, was excludable from the speedy trial computation when Covey filed his motion to discharge on February 14, 2003, the statutory time for bringing Covey to trial had not run. The district court did not err in denying Covey's motion to discharge based on statutory speedy trial grounds.

CONCLUSION

The district court's finding that the time commencing with the filing of the "Motion to Quash Death Penalty" should be excluded was clearly erroneous. The district court's order of March 28, 2003, indicating that the excludable time commenced with the filing of the "Motion to Quash Death Penalty" was incorrect in this respect. However, the district court correctly excluded the time following the filing of Covey's motion to change venue, and the statutory time for speedy trial had not run before Covey filed his motion to discharge. Thus, the district court did not err in denying Covey's motion to discharge. However, because the excludable time began December 4, 2001, rather than upon Covey's filing the "Motion to Quash Death Penalty," the ruling of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

MAXINE BROWN, APPELLEE, V. HARBOR FINANCIAL MORTGAGE CORPORATION AND FEDERAL INSURANCE COMPANY, APPELLANTS.

673 N.W.2d 35

Filed January 9, 2004. No. S-03-606.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.

2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
7. ____. To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
8. **Workers' Compensation: Statutes.** "Such payments" contained in the second sentence of Neb. Rev. Stat. § 48-125(1) (Cum. Supp. 2002) refers to all "amounts of compensation" provided for in the first sentence of § 48-125(1).
9. **Workers' Compensation: Statutes: Final Orders.** For purposes of Neb. Rev. Stat. § 48-125(1) (Cum. Supp. 2002), compensation sent within 30 days of the notice of disability or the entry of a final order, award, or judgment of compensation is not delinquent.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Brenda S. Spilker and Walter E. Zink II, of Baylor, Evnen, Curtiss, Grimitt & Witt, for appellants.

Philip M. Kelly, of Douglas, Kelly, Ostdiek, Bartels & Neilan, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Harbor Financial Mortgage Corporation and Federal Insurance Company appeal the decision of the Nebraska Workers' Compensation Court review panel which, inter alia, affirmed the trial court's decision to grant the motion of appellee, Maxine Brown, for the assessment of waiting-time penalties against appellants pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002). Because the payment at issue was not delinquent, we reverse, and remand with directions.

STATEMENT OF FACTS

The parties do not dispute the material facts in the case. On October 28, 1999, appellee sustained an injury arising out of and in the course of her employment with Harbor Financial Mortgage Corporation. Appellee filed a petition in the Nebraska Workers' Compensation Court seeking benefits for an injury to her lower back which she sustained while lifting a box. On August 28, 2002, the trial court entered an award ordering appellants, inter alia, to pay appellee disability benefits, the sum total of which is not apparent in the record on appeal. Appellants did not appeal the award.

On September 25, 2002, the claims office for First City Financial Corporation, the parent company of Harbor Financial Mortgage Corporation, processed check No. 8220559 in the amount of $39,079.58, representing the payment of workers' compensation benefits owed to appellee pursuant to the award. The check was dated September 25, 2002. The envelope containing the check was addressed to appellee's counsel and was postmarked on September 26. The check was received by appellee's counsel on September 30.

Although not relevant to the resolution of the pending appeal, we note that it was later determined that the amount of check No. 8220559 was insufficient to pay appellee the total benefits she received in the award, and a subsequent check in the amount of $2,043.35, representing the additional amount due and a 50-percent penalty payment, was sent to appellee. This subsequent check and its corresponding penalty payment are not at issue in the present appeal.

On October 8, 2002, appellee filed a motion pursuant to § 48-125, seeking an assessment of waiting-time penalties, claiming, inter alia, that she received check No. 8220559 more than 30 days after the entry of the award. Section 48-125 provides, in pertinent part, as follows:

> (1) Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death, except that fifty percent shall be added for waiting time for all delinquent

> payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court. Such payments shall be sent directly to the person entitled to compensation or his or her designated representative.

In a "Further Award" entered November 20, 2002, the trial court determined that appellants' payment represented by check No. 8220559 was delinquent. In reaching this determination, the trial court relied upon the language of Neb. Rev. Stat. § 48-101 (Reissue 1998). Section 48-101 provides as follows:

> When 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 if the employee was not willfully negligent at the time of receiving such injury.

The trial court reasoned that because appellee was entitled to "receive" workers' compensation benefits under § 48-101, those benefits were delinquent under § 48-125 if not received by appellee within 30 days from the entry of the award. Finding that appellee did not receive payment for her workers' compensation benefits until September 30, 2002, the trial court determined that that payment was delinquent and ordered appellants to pay appellee an additional amount of $19,539.79 as a waiting-time penalty, together with an attorney fee of $250.

Appellants appealed the trial court's November 20, 2002, decision to the workers' compensation court review panel. In an order filed April 23, 2003, the review panel stated that "a detailed opinion would have no precedential value," affirmed the trial court's assessment of a waiting-time penalty and attorney fee, and assessed an additional attorney fee of $1,386. Appellants appeal.

ASSIGNMENT OF ERROR

On appeal, appellants claim, restated, that the review panel erred when it affirmed the trial court's determination that appellants' payment of benefits was delinquent and affirmed the trial court's assessment of a waiting-time penalty and attorney fee, and further erred when it awarded an attorney fee on appeal.

STANDARDS OF REVIEW

[1-4] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* Statutory interpretation presents a question of law. *In re Estate of Breslow*, 266 Neb. 953, 670 N.W.2d 797 (2003). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Morris v. Nebraska Health System, supra*; *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

ANALYSIS

At issue on appeal is whether the payment which is the subject of this case was delinquent under § 48-125(1). Appellants contend that the language of § 48-125(1) governs, and they argue specifically on the facts of this case that because the envelope containing their payment of benefits was postmarked within 30 days from the entry of the award, their payment was timely. In contrast, appellee claims that the trial court was correct when it relied upon the language of § 48-101 and concluded that appellants' payment was delinquent, because appellee did not actually receive the payment until more than 30 days after the entry of the award. We agree with appellants' reading of the controlling statutory language.

[5-7] In reaching our decision in this appeal, we are guided by fundamental rules of statutory analysis. In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *In re Interest of Tamantha S., ante* p. 78, 672 N.W.2d 24 (2003); *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *In re Interest of Tamantha S., supra*; *Galaxy Telecom v. J.P. Theisen & Sons*, 265

Neb. 270, 656 N.W.2d 444 (2003). Further, to the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *Ponseigo v. Mary W., ante* p. 72, 672 N.W.2d 36 (2003).

In accordance with these precepts, we conclude that the trial court erred in relying upon the language of § 48-101 and that the review panel erred when it affirmed the order of the trial court. Contrary to the view expressed by the lower courts, we conclude that the specific provisions of § 48-125(1) rather than the general language of § 48-101 control, and we resolve the issue in this appeal by reference to § 48-125(1). See *Ponseigo v. Mary W., supra.*

To repeat, § 48-125 provides in part as follows:

> (1) Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death, except that fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court. Such payments shall be sent directly to the person entitled to compensation or his or her designated representative.

[8] As an initial matter, we note that the phrase "[s]uch payments" contained in the second sentence of the above-quoted material refers to all "amounts of compensation" provided for in the first sentence of § 48-125(1). Thus, under the language of § 48-125(1), we hold compensation "sent" within 30 days is not delinquent. Because § 48-125(1) is the specific statute controlling the determination of the delinquency of payments, the lower courts' reliance on the general statute, § 48-101, was error as a matter of law. See *Ponseigo v. Mary W., supra.*

[9] Applying § 48-125(1) to the facts of the instant case, the record affirmatively demonstrates that the award was entered on August 28, 2002, and that the envelope containing the payment at issue was postmarked September 26. Based upon this affirmative showing, the payment at issue was not "sent" after 30 days from the date of the award and therefore was not delinquent

within the meaning of § 48-125(1). Because the payment at issue in this case was sent with sufficient postage by mail and properly addressed, and the record affirmatively demonstrates the controlling dates, we are not required to nor do we comment on other modes of transmittal of payment or the adequacy of associated proof. Based on the foregoing, the trial court erred when it determined that appellants' payment was delinquent and ordered appellants to pay appellee an additional amount of $19,539.79 as a waiting-time penalty, together with an attorney fee of $250. Affirmance thereof and the award of an additional attorney fee by the review panel were error.

CONCLUSION

The evidence in this record affirmatively demonstrates that the payment at issue in this case was not sent after 30 days from the date of the award and the payment is, therefore, not delinquent under § 48-125(1). For the reasons stated above, we reverse the order of the review panel which affirmed the trial court's award of a waiting-time penalty and attorney fee and awarded an additional attorney fee on appeal. We remand the cause to the review panel with directions to reverse the trial court's assessment of a waiting-time penalty and attorney fee against appellants, and we further reverse the award of the attorney fee before the review panel.

REVERSED AND REMANDED WITH DIRECTIONS.

RAY TRIMBLE, AN INDIVIDUAL, APPELLEE, V. M.E. WESCOM, ALSO KNOWN AS MICK E. WESCOM, AND SALLY WESCOM, INDIVIDUALS, APPELLEES, AND HOWARD D. VANN AND R. THOMAS VANN, INDIVIDUALS, APPELLANTS.

673 N.W.2d 864

Filed January 16, 2004. Nos. S-01-168, S-01-469.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.

3. **Contracts: Words and Phrases.** If a contract is unambiguous, the court will enforce the contract in accordance with the plain meaning of the words of the contract.

Petitions for further review from the Nebraska Court of Appeals, SIEVERS, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, JOSEPH S. TROIA, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Aimee J. Haley and Larry A. Jobeun, of Fullenkamp, Doyle & Jobeun, for appellants.

Ann M. Grottveit, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellee Ray Trimble.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Ray Trimble brought this breach of contract action to recover a real estate commission on the sale of land in Douglas County.

SCOPE OF REVIEW

[1] Regarding questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Martin v. Nebraska Dept. of Corr. Servs., ante* p. 33, 671 N.W.2d 613 (2003).

FACTS

In early 1997, Howard D. Vann contacted Trimble, a licensed real estate broker who, at the time, was an agent for R.L. Scott Company. Howard Vann was seeking property that he and R. Thomas Vann could purchase in order to effect a "like-kind" exchange under the Internal Revenue Code, I.R.C. § 1031 (1994 & Supp. IV 1998).

Trimble contacted M.E. Wescom and Sally Wescom in April 1997 to discuss the possibility of selling certain land that they owned to the Vanns. On April 23, Trimble and M.E. Wescom entered into a listing agreement for the period of April 23 to May 20. During this period, R.L. Scott Company had the right to list and sell the Wescoms' property. Pursuant to the listing agreement, if a sale or exchange was made, or a buyer was found who was

ready, willing, and able to purchase or exchange the property, before the expiration of the listing agreement, Trimble would receive a commission on the sale. The listing agreement included a 4-month "protection period" that would begin May 21. Thus, if within 4 months after the expiration of the listing agreement, the Wescoms sold, exchanged, or optioned the property to any party due to Trimble's efforts or advertising during the listing period, Trimble was entitled to receive a commission on the sale.

In May 1997, the Wescoms and the Vanns signed a purchase agreement (May purchase agreement). The purchase price was to be $16,000 per surveyed acre, and a $25,000 earnest money deposit was required. Among the contingencies placed on the agreement in a subsequent addendum were the following: the sale was subject to the Vanns' ability to sell certain land for the purpose of effecting a like-kind exchange and the sale was to close no later than August 2. The commission was set at 6 percent of the purchase price.

In July 1997, the Vanns learned that they could not sell their land and effect a like-kind exchange before the August 2 closing deadline set forth in the May purchase agreement. Accordingly, the Vanns requested, through Trimble, an extension of the closing date. The Wescoms, communicating through Trimble, indicated that they would allow an extension only if the earnest money deposit was made nonrefundable. This was unacceptable to the Vanns, and the closing deadline was not extended. The sale of the Wescoms' land did not close by August 2.

On August 8, 1997, Howard Vann and Trimble each sent a notice to the title company requesting a return of the Vanns' earnest money deposit. Although Trimble made efforts to negotiate another purchase agreement between the parties, no agreement was signed by September 20, the last day of the 4-month protection period. According to the Wescoms and the Vanns, they never communicated directly with each other until October.

In October 1997, Howard Vann contacted the Wescoms directly, and on October 28, the parties signed a second purchase agreement. The purchase price was $15,500 per surveyed acre. This sale closed thereafter. In early 1998, through communications with the Wescoms, Trimble discovered that they had sold their property to the Vanns, and this action commenced.

The Vanns' demurrers, alleging that Trimble's petition failed to state a cause of action, were overruled. The Vanns filed motions for directed verdict at the close of Trimble's case in chief and at the close of all the evidence. These motions were also overruled. The jury found in favor of the Wescoms, but could not reach a verdict as to the Vanns. The Wescoms were subsequently dismissed from the action according to the verdict, and the jury was discharged as to the Vanns.

The Vanns filed a motion for judgment notwithstanding the jury's inability to reach a verdict pursuant to Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2002). At the same time, Trimble filed a motion for new trial. The district court overruled the Vanns' motion for judgment notwithstanding the verdict and granted Trimble's motion for new trial, stating that it had erred in separating the Vanns and the Wescoms in the jury instructions and verdict forms. The Vanns timely appealed.

On appeal to the Nebraska Court of Appeals, the Vanns argued that the district court erred in the following respects: (1) overruling their demurrers to Trimble's amended petition, (2) overruling their motions for directed verdict at trial, and (3) failing to grant their posttrial motion for judgment notwithstanding the jury's inability to reach a verdict.

The Court of Appeals concluded that the district court did not err in overruling the Vanns' demurrers, motions for directed verdict at trial, or posttrial motion for judgment notwithstanding the jury's inability to reach a verdict. See *Trimble v. Wescom*, Nos. A-01-168, A-01-469, 2003 WL 21057309 (Neb. App. May 13, 2003) (not designated for permanent publication). The Court of Appeals also determined that the district court did not err in granting Trimble's motion for new trial. We granted further review.

ASSIGNMENT OF ERROR

In their petition for further review, the Vanns claim, summarized and restated, that the Court of Appeals erred in its application of the law to the facts of this case.

ANALYSIS

In this appeal, we are asked to examine whether the Court of Appeals correctly relied upon *Coldwell Banker Town & Country Realty v. Johnson*, 249 Neb. 523, 544 N.W.2d 360 (1996), and

Byron Reed Co., Inc. v. Majers Market Research Co., Inc., 201 Neb. 67, 266 N.W.2d 213 (1978), in affirming the judgment of the district court. Regarding questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Martin v. Nebraska Dept. of Corr. Servs., ante* p. 33, 671 N.W.2d 613 (2003).

By its terms, the listing agreement in question expired on May 20, 1997. The relevant portion of the listing agreement provided that a commission would be payable to Trimble if, within 4 months after the expiration of the listing, the Wescoms sold, exchanged, or optioned the property to any party due to Trimble's efforts or advertising during the listing period. This 4-month period ended September 20.

The Vanns argue that since the sale of the property occurred outside both the May listing agreement period and the 4-month extension, the Court of Appeals erred in its application of *Coldwell Banker Town & Country Realty* to the facts of this case. Trimble's amended petition alleged that he was entitled to a commission because the closing of the sale occurred on terms that were substantially similar to those of the May purchase agreement and because he had "found a buyer to purchase said real estate prior to the expiration of the listing agreements."

[2,3] In determining whether a commission is due to a broker, the court must look to the terms and conditions of the listing agreement. When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Gast v. Peters, ante* p. 18, 671 N.W.2d 758 (2003). If a contract is unambiguous, the court will enforce the contract in accordance with the plain meaning of the words of the contract. See *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003). Enforcement of a contract depends upon the terms of the contract and the facts that are applicable to the contract. See *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997).

In affirming the judgment of the district court, the Court of Appeals relied upon *Coldwell Banker Town & Country Realty*, 249 Neb. at 526-27, 544 N.W.2d at 362, in which we stated:

> "[W]here a real estate broker, while his brokerage contract is in full force and effect, obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is made thereafter by the owner to the person produced by the agent, on substantially the terms that had been offered through the agent's efforts, the broker is entitled to a commission for making the sale." *Byron Reed Co., Inc. v. Majers Market Research Co., Inc.*, 201 Neb. 67, 71-72, 266 N.W.2d 213, 215 (1978). See *Marathon Realty Corp. v. Gavin*, 224 Neb. 458, 398 N.W.2d 689 (1987).

In *Coldwell Banker Town & Country Realty*, our analysis was based upon the fact that a purchaser had been obtained during the listing agreement. Therefore, the issue presented was whether the subsequent sale was upon substantially the same terms as the original offer. We concluded that it was not and that the consummation of the sale was upon different terms and was the result of actions taken by the sellers' attorney and was not due to the efforts of the realty company.

The Court of Appeals also relied on *Byron Reed Co., Inc. v. Majers Market Research Co., Inc.*, 201 Neb. 67, 266 N.W.2d 213 (1978). There, the plaintiff and the defendant entered into a real estate listing agreement which gave the plaintiff the exclusive right to sell the defendant's home until April 1, 1974. The contract further provided that if, within 6 months after expiration of the listing, a sale of the premises was made to any party due to the plaintiff's efforts or advertising, then the commission would likewise be due. The sale occurred after the expiration of the listing agreement but within the 6-month period thereafter. The issue was whether such sale occurred as a result of the efforts or advertising of the plaintiff, and this court found that the sale was due to the plaintiff's efforts.

In the instant case, the listing agreement required Trimble to produce a buyer who was ready, willing, and able to purchase the property during the listing period or sell the property within the 4-month protection period in order to receive a commission. A purchase agreement was signed before the expiration of the listing agreement. However, an addendum to the May purchase agreement conditioned the sale on the Vanns' ability to close on

the purchase of certain real estate for the purpose of effecting a like-kind exchange.

At trial, Trimble testified that Howard Vann had informed him upon their first meeting that he desired to make a purchase of real estate in order to take advantage of the like-kind exchange provision of the Internal Revenue Code. In addition, Trimble testified that because the like-kind exchange could not be completed, the Vanns were not ready, willing, and able to purchase the Wescoms' property at any time during the term of the listing agreement. Trimble's request for a return of the Vanns' earnest money deposit is further proof that he was aware that the Vanns were not ready, willing, and able to purchase the Wescoms' property until a condition precedent was satisfied.

The closing of the sale of the Wescoms' property in accordance with the May purchase agreement was subject to the closing of the sale of certain other property for the purpose of a like-kind exchange. While the Vanns appear to have been willing to buy the Wescoms' property, the failure of a condition precedent to the closing of this sale established that the Vanns were neither ready nor able to complete the sale until the condition was satisfied. As such, Trimble failed to satisfy the provision in the listing agreement that required him to find a ready, willing, and able buyer during the listing period in order to obtain a commission.

The listing agreement also provided that Trimble would receive a commission if a sale occurred during the 4-month protection period. This provision contemplated a situation in which, due to Trimble's efforts, the sale was completed within the 4-month period from the expiration of the listing agreement. Trimble was therefore protected in the event that a sale was consummated within 4 months of the expiration of the listing agreement due to his efforts or advertising during the listing period. However, the sale of the Wescoms' property to the Vanns did not occur during the 4-month period. The sale occurred in October 1997, after the 4-month period had expired.

The Vanns argue that our decision in *The Nebraskans, Inc. v. Homan*, 206 Neb. 749, 294 N.W.2d 879 (1980), is applicable to the case at bar. We agree. *The Nebraskans, Inc.*, involved a listing agreement that provided for a 6-month protection period during which the broker was allowed to receive his commission

if a sale was made due to his efforts. The buyers were unable to secure the necessary financing during the listing agreement period, and their downpayment was returned. Three days after the expiration of the 6-month period, the parties signed a purchase agreement, and the sale eventually closed. We stated that the listing agreement, which expired on February 20, 1978, with a 6-month extension for the benefit of the broker, was clear and unambiguous. We affirmed the summary judgment in favor of the defendants because it was uncontradicted that no sale was consummated through the efforts of the broker during the term of the listing agreement or the 6-month extension period.

The Nebraskans, Inc., controls our decision in this case, and the Court of Appeals erred in relying upon *Coldwell Banker Town & Country Realty v. Johnson*, 249 Neb. 523, 544 N.W.2d 360 (1996), and *Byron Reed Co., Inc. v. Majers Market Research Co., Inc.*, 201 Neb. 67, 266 N.W.2d 213 (1978).

The terms of the listing agreement were clear and unambiguous. Trimble did not obtain a ready, willing, and able buyer during the listing agreement. Thereafter, Trimble was entitled to a commission only if a sale occurred due to his efforts within 4 months of the expiration of the listing agreement. The sale was not consummated during that time.

CONCLUSION

For the reasons set forth herein, we conclude that the district court erred in failing to sustain the Vanns' motion for a directed verdict made at the close of all the evidence. Therefore, we reverse the decision of the Court of Appeals and remand the cause with directions to reverse the judgment of the district court and remand with directions that the district court dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., not participating.

IN RE INTEREST OF MAINOR T. AND ESTELA T., CHILDREN UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLEE, V. MERCEDES S., APPELLANT.

674 N.W.2d 442

Filed January 16, 2004. No. S-02-1229.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
2. **Juvenile Courts: Appeal and Error.** In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling.
3. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
4. ____. Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
5. **Constitutional Law: Parental Rights: Due Process.** The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection.
6. **Due Process: Words and Phrases.** While the concept of due process defies precise definition, it embodies and requires fundamental fairness.
7. **Parental Rights: Due Process.** State intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause.
8. **Parental Rights: Due Process: Final Orders: Appeal and Error.** A parent's failure to appeal from an adjudication order, dispositional order, or other final, appealable order leading to the termination of parental rights does not preclude an appellate court from reviewing the proceedings for a denial of due process in an appeal from a termination order.
9. **Appeal and Error.** When plain error permeates the entire proceeding, an appellate court may elect to conduct a de novo review of the entire record under both its review and supervisory powers.
10. **Juvenile Courts: Parental Rights.** Although Neb. Rev. Stat. § 43-248(3) (Reissue 1998) allows the State to take a juvenile into custody without a warrant or order of the court when it appears the juvenile is seriously endangered in his or her surroundings and immediate removal appears to be necessary for the juvenile's protection, the parent retains a liberty interest in the continuous custody of his or her child.
11. ____: ____. A detention hearing is a parent's opportunity to be heard on the need for the removal and the satisfaction of the State's obligations under Neb. Rev. Stat. § 43-283.01 (Reissue 1998), and it is not optional when a child is detained for any significant period of time.

12. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
13. **Parental Rights: Due Process.** If a parent has been afforded procedural due process at an adjudication hearing, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the adjudication is within the discretion of the trial court, whose decision will be upheld in the absence of an abuse of discretion.
14. **Juvenile Courts: Parental Rights.** Juvenile courts do not need to conduct an inquiry as to the whereabouts of every respondent parent who fails to appear for a scheduled hearing. In most situations, the burden to notify the juvenile court is properly placed on the parent or the parent's attorney.
15. ____: ____. At a disposition hearing, a juvenile court must determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained.
16. **Parental Rights.** A plan of reunification pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) must be reasonably related to the objective of reuniting the parents with the children.
17. **Parental Rights: Evidence.** Fundamental fairness, at the very least, requires the adducing of appropriate evidence as a factual foundation for a rehabilitative plan which eventually may be used as a ground or condition for termination of parental rights.
18. **Parental Rights: Juvenile Courts: Records.** The juvenile court's specific findings of fact supporting the provisions contained in the parental rehabilitative plan shall be stated in the record.
19. **Juvenile Courts: Records.** Juvenile courts are courts of record, and a verbatim record of all proceedings is required.
20. **Parental Rights: Abandonment: Intent: Words and Phrases.** Abandonment requires a finding that a parent intentionally withheld 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.
21. **Parental Rights: Abandonment: Intent.** The question of abandonment is largely one of intent, to be determined in each case from all the facts and circumstances.
22. **Parental Rights: Evidence: Proof.** Prior to terminating parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) exists and that termination is in the child's best interests.
23. **Parental Rights.** The 15-month condition set forth in Neb. Rev. Stat. § 43-292(7) (Reissue 1998) serves the purpose of providing a reasonable timetable for parents to rehabilitate themselves.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Vacated and remanded with directions.

D. Milo Mumgaard, of Nebraska Appleseed Center for Law in the Public Interest, for appellant.

Robert J. Cashoili, Deputy Hall County Attorney, for appellee.

Rachel A. Daugherty, of Lauritsen, Brownell, Brostrom, Stehlik, Thayer & Myers, guardian ad litem.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

I. INTRODUCTION

On September 17, 2002, the Hall County Court, sitting as a juvenile court, entered an order terminating the parental rights of Mercedes S. to her minor children, Mainor T. and Estela T., pursuant to Neb. Rev. Stat. § 43-292(1) and (7) (Reissue 1998). The father of the children left the family shortly after Estela was born and is not a party to this action. Mercedes appeals the termination of her parental rights.

II. BACKGROUND

Mercedes is the natural mother of Mainor and Estela, who are both U.S. citizens. In her brief, Mercedes states that she is a native Guatemalan. Mercedes claims she came to the United States in 1992 seeking asylum and moved to Grand Island in 2000, where she lived in a Guatemalan community and spoke a Mayan Indian dialect with fellow Guatemalans. Mercedes also states in her brief that she is illiterate and speaks no English and very little Spanish. The record indicates Mercedes does not understand English.

On March 22, 2001, Mercedes was arrested for striking Mainor. On the same day, both children were taken into protective custody. On March 23, the State filed a juvenile petition in the Hall County Court, alleging that Mainor and Estela, ages 6 and 4 respectively, were minors within the ambit of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998). The petition alleged the children were (1) homeless or destitute, or without proper support through no fault of their parents; (2) lacking proper parental care by reason of the fault or habits of their parents; and (3) in a

situation that was dangerous to life and limb or injurious to their health or morals.

An affidavit from Lisa Kluck, a Child Protective Services worker, was filed with the court on March 23, 2001. Kluck averred that she had reviewed police reports showing that on March 22, the school psychologist had contacted the Grand Island Police Department concerning red line markings on Mainor's face. In response to questioning from the police, Mainor stated that Mercedes had hit him, which he described as "hit, hit, and hit," and that he had cried and then later watched television. Kluck averred that Mercedes had been arrested and had admitted to the police that she had hit Mainor for being rough with Estela, but had denied hitting him more than once.

Kluck further averred that a similar incident had occurred on November 11, 2000, also resulting in "markings" on Mainor's face, which a police investigation determined were the result of his mother's striking him. Kluck averred that although Mercedes was not arrested in November 2000, the police "did discuss the proper ways of discipline" with her. Finally, Kluck averred that a second child, Estela, also lived with Mercedes and that both children had been removed "at the time or prior to" Mercedes' arrest. On March 23, 2001, an ex parte order signed by the clerk magistrate found that continuation of the children in the home would be contrary to their welfare, that reasonable efforts were made to prevent their removal, and that it was in the best interests of the children to be placed in the temporary custody of the Department of Health and Human Services (DHHS). The children were placed in foster care on March 22.

The record indicates that after Mercedes was arrested and incarcerated for "child abuse," the then Immigration and Naturalization Service (INS) placed a hold on her through the Hall County jail because she was an illegal alien. In her brief, Mercedes states that because she had failed to appear at an asylum hearing several years earlier, a default order for her removal had been entered. Mercedes asserts she was aware of neither her status nor the deportation order because she had been granted temporary protected legal status and had continued to receive work permits each year. Mercedes was ultimately deported to Guatemala on May 15. The record further indicates that although

the children had asked to see Mercedes during the period of time in which she was held in the Hall County jail, Mercedes had no visitation with them.

On March 27, 2001, the court issued a juvenile summons ordering personal service on Mercedes in the Hall County jail, which service was perfected on March 28. The summons commanded Mercedes to appear in court for a hearing on April 9 regarding the allegations set forth in the juvenile petition. Both the summons and petition were written in English.

The adjudication hearing was conducted on April 9, 2001. Mercedes was not present. The bill of exceptions pertaining to the adjudication hearing contains an "introductory recitation" by the court transcriber, stating that Todd Elsbernd appeared as counsel for Mercedes.

The only evidence offered at the adjudication hearing was Kluck's affidavit, which had been filed with the court on March 23, 2001, in support of the ex parte order of the clerk magistrate removing the children from their home and placing them in the temporary custody of DHHS. Near the conclusion of the adjudication hearing, the court stated:

> Count one [homeless or destitute] is proven by the fact that the mother simply fails to appear and apparently no one's really too sure of her whereabouts at the current moment. And counts two [lacking proper parental care] and three [being placed in a situation dangerous to life and limb] are proven by the affidavit.

At this juncture in the adjudication hearing, the record indicates that an unidentified person in the courtroom, in referring to Mercedes, informed the court, "She's being held in jail. That's why she — she isn't here . . . ." Despite the juvenile summons signed by the judge presiding at the adjudication hearing, which summons directed that Mercedes be personally served in the Hall County jail, and the return showing that Mercedes was personally served as directed, the court responded that "she's in custody somewhere and unable to provide a home for the children." The court then stated that

> reunification of the juveniles in their home would be contrary to their health, safety or welfare. Reasonable efforts were not required to be made to preserve and reunify the

> family because the juveniles were submitted to aggravated circumstances, an assault, and the parent committed a pr[o]scribed criminal act, being an assault.

Temporary custody with DHHS was continued, and a disposition hearing was subsequently scheduled for June 20, 2001. The court's written adjudication order repeated the finding that "[r]easonable efforts [are] not required to preserve and reunify the family because . . . the parent has subjected [the] juvenile(s) to aggravated circumstances, to wit: assault" and that the "parent has committed [a] proscribed criminal act, to wit: assault."

There is no evidentiary record of the June 20, 2001, disposition hearing other than a preprinted disposition/permanency hearing "checklist" signed by the presiding judge. The form contains a notation showing that Elsbernd appeared as counsel for Mercedes, as well as checkmarks noting that the disposition hearing was conducted and completed on June 20, 2001.

Notwithstanding the court's April 9, 2001, written order stating that reasonable efforts to preserve and reunify the family were not required due to aggravating circumstances, the court's June 20 written order contains checkmarks which indicate that the permanency objective of reunification set forth in DHHS' case plan and progress report was in the children's best interests. The order directs the case plan to be implemented, despite the case manager's statement in the court report, apparently submitted with the case plan, that "[r]easonable efforts are not necessary because on 04-09-2001 the court found reasonable efforts were not required."

Although the case plan's stated permanency objective was reunification, DHHS' only stated goal was to locate appropriate long-term placement for the children by December 14, 2001, noting in the court report that Mercedes' brother in Alabama had requested that the children be placed with him. The only stated tasks were to conduct a home study on relatives interested in obtaining long-term placement and to find a "fos-adopt" home for the children if placement with relatives was inappropriate. There were no goals or tasks related to reunification, including attempts to establish contact with Mercedes. The absence of any hearing conducted on the record leaves this court to speculate as to the apparent inconsistency between the order of April 9,

2001, finding that reunification would be contrary to the children's welfare, and the June 20 order apparently adopting a permanency objective of reunification.

The State Foster Care Review Board (FCRB) reviewed the case documents and submitted a recommendation to the court on September 18, 2001. See Neb. Rev. Stat. § 43-1308 (Reissue 1998) (requiring FCRB to review foster care cases every 6 months and submit its findings and recommendations to court with jurisdiction). FCRB found that the children were inappropriately removed from the home and that reasonable efforts were not made to prevent their removal, such as providing parenting classes, a family support worker, or therapy. FCRB concluded that a "slap on the face" was insufficient evidence to support a finding that Mainor was in imminent danger and that no evidence supported a finding that Estela was at risk.

FCRB further concluded that these mistakes led to a "domino effect," in which Mercedes had been deported and could not now reenter the United States without fear of a lengthy jail sentence. FCRB recommended that placement with Mercedes' brother in Alabama be explored immediately and that DHHS contact the INS to request a waiver or special visa for Mercedes to reenter the United States, based on the needs of her children. FCRB also recognized the deficiency in the case plan, concluding that the case plan was incomplete, as it failed to outline proposals for achieving reunification. The report further noted that "[t]he children have no contact with their mother, yet their mother is writing to people in the States providing her address in Guatemala, and asking how her children are doing." Finally, the report stated that a review hearing was scheduled for December 20, 2001.

There is no evidentiary record of the December 2001 review hearing. See Neb. Rev. Stat. § 43-1313 (Reissue 1998) (requiring review hearing of dispositional order to be conducted on record at least once every 6 months). The record does contain a preprinted review disposition/permanency hearing form, which references December 20, 2001. However, that same form also references January 31, 2002, and contains a file-stamped date of March 11, 2002.

The record also contains a case plan dated December 17, 2001, and bearing a December 19, 2001, file stamp of the Hall

County Court, as well as an exhibit sticker identifying it as "Exhibit # 3," upon which is written "12-20-01." This plan continues to call for reunification, but includes adoption as the alternative plan. The only stated goal again was finding long-term placement for the children. Given the existence of exhibit 3, the review disposition/permanency hearing form, and the reference to a December hearing in the FCRB report, this court can only conclude that despite the statutory directive that review hearings "shall be conducted on the record," no record of the hearing was made. See § 43-1313. As a result, this court is again left to speculate as to what evidence, if any, was offered and received at the December review hearing and the basis for the court's findings with respect to that proceeding.

In March 2002, the court conducted a review hearing on the record. Again, this court is not entirely certain of the date in March, given that the preprinted review disposition/permanency hearing form includes a file-stamp date of March 11, 2002, yet the "introductory recitation" of the proceedings by the court transcriber indicates it occurred on March 8. In any event, at this hearing, an affidavit was offered by Elsbernd and received into evidence without objection. In that affidavit, an "immigration attorney" located in Omaha, Nebraska, averred that she had been retained by Mercedes to help her find a way to participate in the proceedings. Elsbernd also advised the court that another agency was attempting to help Mercedes return to the United States and that Mercedes was not simply ignoring the proceedings.

Recognizing that 15 months in out-of-home placement was fast approaching, Elsbernd stated to the court that he was offering the affidavit "so at least we'd have the argument that we don't need to abide by the 15 months. That there is a — a reason. We've got a mother here who wants to fight for her children but because of the laws the way they are [she] cannot." See, Neb. Rev. Stat. § 43-292.02(3)(c) (Reissue 1998) (excusing State's requirement to file termination petition for enumerated exceptions, one of which is parents' lack of opportunity to avail themselves of services deemed necessary if reasonable efforts are required); Neb. Rev. Stat. § 43-292.03(1) (Reissue 1998) (requiring juvenile court to conduct exceptions hearing on record within 30 days of child's

reaching 15 months in out-of-home placement). Finally, Elsbernd further advised the court that he had not spoken with Mercedes.

The court then stated that reunification with Mercedes would be contrary to the children's health, safety, and welfare and that reasonable efforts were not made to reunite the family because reasonable efforts were not possible. Although the guardian ad litem indicated there were problems with placing the children with Mercedes' brother in Alabama, the court made no findings of fact regarding that potential placement. The court thereafter stated that it was advising Mercedes, "through her attorney," that failure to accomplish reunification within 15 months of the preceding 22 months could be a ground for termination of her parental rights and that the State was required to request termination of those rights unless the court found a compelling reason to excuse the requirement.

Once again, despite the court's April 9, 2001, oral statement and written order that reasonable efforts to reunify were not required, as well as the statement at the March 2002 review hearing that reasonable efforts were not possible, the court's written order ultimately determined that reunification, with a concurrent plan of adoption, was the most appropriate permanency objective, and it approved a new case plan to that effect. The case plan, however, continued to omit rehabilitative goals or tasks related to reunification or to contacting Mercedes, but stated that such goals would be added if Mercedes were able to return to the United States.

The record next contains a court order dated June 3, 2002, adopting a case plan dated May 29, 2002. The order recites that a review hearing was held on June 3, but again, there is no transcription of the hearing in the bill of exceptions. In its written order, the court again found that reunification remained the primary permanency objective, with a concurrent goal of adoption. The target date in the case plan for this goal was June 22. Again, no rehabilitative goals were included in the case plan, based on DHHS' reasoning that Mercedes had been unable to return to the United States. Notwithstanding the court order that reunification remained the primary permanency objective, the court report, presumably offered at the June 3 review hearing, reiterates that DHHS' position is that reasonable efforts toward reunification

were not required under the court's adjudication order of April 9, 2001. Again, the absence of any evidentiary record makes it difficult for this court to understand exactly what occurred at the June 3 hearing and to subsequently conduct a de novo review of the proceeding.

On May 30, 2002, the State filed a motion to terminate Mercedes' parental rights to her children, alleging as its sole basis for termination of those rights that the children had been in out-of-home placement for 15 or more months of the most recent 22 months.

A termination hearing on the record was conducted on June 27, 2002. Immediately prior to the time the hearing commenced, Elsbernd requested permission to withdraw as counsel for Mercedes, stating as his basis the absence of any contact with Mercedes since his appointment as her attorney. In sustaining Elsbernd's motion, the court stated that because Elsbernd did not know how his client wished to proceed, there was not "any purpose in requiring you to try to slap together some sort of defense or explanation." Elsbernd was allowed to withdraw, and the hearing proceeded without Mercedes' presence or representation.

The county attorney offered into evidence the notice of the termination hearing which had been published in the Grand Island newspaper and resubmitted the earlier case plans and court reports. Kluck's prior affidavit was also resubmitted. The case manager testified that the children had been in continuous custody since March 2001 and had never gone back to Mercedes' home. She testified that Mercedes had not contacted her children since their removal, had not provided financial support for them, and had not completed any "parts of" the case plan. The case manager stated that termination was in the children's best interests because, inter alia, Mercedes had not made an effort to contact DHHS to check on her children or to send them gifts.

The court, recognizing that the 15-month requirement under § 43-292 was "[b]arely" satisfied as of the day of the hearing, appeared to express concern that this was the only allegation upon which the State sought termination of Mercedes' parental rights. The court then suggested that the evidence supported an additional finding of abandonment. The court, noting that the published notice contained "no notice of what the motion to terminate

specifically says," stated that it would include in its termination order a finding that the children had been abandoned. Presumably, the court reasoned that so long as Mercedes had no notice of any specific basis for termination of her parental rights, she would not be prejudiced by an additional finding not originally alleged by the State. The court then entered a handwritten order dated June 27, 2002, terminating Mercedes' parental rights to her children.

New counsel for Mercedes filed an appeal from the June 27, 2002, order. The appeal, however, was dismissed by the Nebraska Court of Appeals on August 28 because the June 27 order was illegible "to the point that the Court concludes that it is not a final judgment from which an appeal may be taken, but is only a finding which forms the basis for which judgment may be subsequently rendered." *In re Interest of Mainer T. & Estella T.*, 11 Neb. App. lviii (No. A-02-886, Aug. 28, 2002).

On September 17, 2002, the court entered a typewritten order based on its June 27 findings. The court's order found that Mercedes had failed to appear, that the State had proved by clear and convincing evidence that the children had been in out-of-home placement for the requisite period pursuant to § 43-292(7), and that the children had been abandoned pursuant to § 43-292(1). The order further found that it was in the best interests of the children to terminate Mercedes' parental rights and the parental rights of any person claiming paternity. Mercedes timely appealed from the September 17 order terminating her parental rights.

III. ASSIGNMENTS OF ERROR

Mercedes assigns, restated and reordered, that the juvenile court erred in (1) finding that reasonable efforts to prevent removal or to preserve and reunify the family were not required, (2) failing to make findings of fact that Mercedes should not have contact with her children, (3) dismissing Mercedes' appointed counsel at the termination hearing, (4) failing to continue the termination hearing until new counsel was appointed, (5) holding the termination hearing without Mercedes' presence or representation, (6) relying on hearsay evidence to support termination findings, (7) failing to give Mercedes timely and adequate notice that an allegation of abandonment would be a basis for termination, (8) failing to make findings of fact that the State had proved abandonment by clear

and convincing evidence, (9) failing to make findings of fact that the State had proved by clear and convincing evidence that it was in the children's best interests to have Mercedes' parental rights terminated, and (10) allowing Mercedes' appointed counsel to deliver ineffective assistance of counsel.

IV. STANDARD OF REVIEW

[1,2] In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling. *Id.*

[3,4] 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. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997).

V. ANALYSIS

[5] The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child. *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999). The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

[6-8] While the concept of due process defies precise definition, it embodies and requires fundamental fairness. *Id.* State intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause. *In re Interest of Ty M. & Devon M., supra.* See

Zadvydas v. Davis, 533 U.S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) ("Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). This right is of such importance that a parent's failure to appeal from an adjudication order, dispositional order, or other final, appealable order leading to the termination of parental rights will not preclude this court from reviewing the entire proceeding for a denial of due process in an appeal from a termination order. See, *In re Interest of Ty M. & Devon M., supra* (reviewing adjudication to determine whether parents were denied due process in appeal from order terminating parental rights while recognizing that parent may not question existence of facts upon which juvenile court asserts jurisdiction absent direct appeal from adjudication); *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992) (vacating adjudication order in appeal from termination of parental rights based, in part, upon finding of plain error in juvenile court's failure to recite factual basis for assuming jurisdiction and allowing mother's counsel to waive recitation, concluding that such actions denied mother fair adjudication hearing and procedural due process); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987) (reversing termination order when record was devoid of evidence supporting rehabilitation plan entered at disposition hearing); *In re Interest of Amanda H.*, 4 Neb. App. 293, 304, 542 N.W.2d 79, 87 (1996) (recognizing that "a parent who is deprived of due process is entitled to litigate his rights anew without prejudice from the adjudication proceedings from which he was excluded"). Compare *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992) (vacating termination order based, in part, upon denial of due process in three review hearings when father was unrepresented by counsel), with *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000) (recognizing that order entered at review hearing which does not merely extend terms of prior disposition and affects substantial right is final, appealable order).

The importance of this court's reserving the right to review the entire proceeding leading to termination for due process deprivations is illustrated by this case where our de novo review of the

record shows that (1) despite the court's acknowledgment at the adjudication hearing that Mercedes was in custody, and the record indicating that such custody was in the Hall County jail next door to where the hearing was being conducted, the court proceeded with the hearing without Mercedes' presence and did not otherwise afford Mercedes due process; (2) there is nothing in the record to support a finding that Mercedes' failure to appear at the adjudication hearing was intentional or the result of indifference; (3) Mercedes was not informed of her rights as required by Neb. Rev. Stat. § 43-279.01 (Reissue 1998), which includes, inter alia, the right to appeal; (4) Mercedes never waived her rights set forth in § 43-279.01; (5) Mercedes was not represented at the adjudication and it was not until May 7, 2001, 28 days after the adjudication, that counsel was appointed for Mercedes (as will be discussed in greater detail below); (6) appointed counsel had no contact with Mercedes from the date counsel was appointed to the date of Mercedes' deportation; and (7) appointed counsel had no contact with Mercedes from the date of Mercedes' deportation until appointed counsel was allowed to withdraw immediately prior to the termination hearing on June 27, 2002. Under these circumstances, to hold that Mercedes' failure to appeal from the adjudication, the disposition order, or review hearings precludes this court from reviewing those proceedings for deprivations of due process would be to abdicate this court's responsibility to ensure that proceedings which lead to the termination of a familial relationship are fundamentally fair. This we will not do.

[9] Further, when plain error permeates the entire proceedings, this court may elect to conduct a de novo review of the entire record under both its review and supervisory powers. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). "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." *In re Interest of D.W.*, 249 Neb. 133, 134, 542 N.W.2d 407, 408 (1996). "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.* As we determine that plain error permeates the entire proceedings and that such error denied fundamental fairness to Mercedes, we will not

limit our de novo review to only the termination hearing or the assigned errors. Because we determine that deprivations of due process commenced at the initial stages of these proceedings, we will begin our review at that point.

1. FAILURE TO HOLD DETENTION HEARING

[10] Mercedes' children were taken into custody on March 22, 2001, and on March 23, in accordance with Neb. Rev. Stat. § 43-250(4) (Reissue 1998), the court issued an ex parte order granting DHHS temporary custody of the children. The record, however, fails to show that the juvenile court conducted a detention hearing in this case. Neb. Rev. Stat. § 43-248(3) (Reissue 1998) allows the State to take a juvenile into custody without a warrant or order of the court when it appears the juvenile "is seriously endangered in his or her surroundings and immediate removal appears to be necessary for the juvenile's protection." However, the parent retains a liberty interest in the continuous custody of his or her child. An ex parte order subsequently authorizing temporary custody with DHHS is permitted because of its short duration and the requirement of further action by the State before custody can be continued. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991) (analyzing interests involved at removal stage and requirements of Due Process Clause), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). But "the State may not, in exercising its parens patriae interest, unreasonably delay in notifying a parent that the State has taken emergency action regarding that parent's child nor unreasonably delay in providing the parent a meaningful hearing." *In re Interest of R.G.*, 238 Neb. at 419, 470 N.W.2d at 790.

[11] A prompt detention hearing is required in order to protect the parent against the risk of an erroneous deprivation of his or her parental interests. See *id.* "[C]ontinued detention pending adjudication is not permitted under the Nebraska Juvenile Code unless the State can establish by a preponderance of the evidence at an adversarial hearing that such detention is necessary for the welfare of the juvenile." *In re Interest of Anthony G.*, 255 Neb. 442, 446, 586 N.W.2d 427, 429-30 (1998). Accord, *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997); *In re*

Interest of R.G., supra. That evidence includes proof that reasonable efforts were made to preserve and reunify the family when required under Neb. Rev. Stat. § 43-283.01 (Reissue 1998). See Neb. Rev. Stat. § 43-254 (Reissue 1998). This hearing is a parent's opportunity to be heard on the need for the removal and the satisfaction of the State's obligations under § 43-283.01, and it is not optional when a child is detained for any significant period of time. Although the juvenile court's preprinted form order entitled "Adjudication Hearing" contained a checkmark beside a standard finding that "reasonable efforts were made to preserve and reunify the family as required under Sec. 43-283.01," there is no record of any evidentiary hearing to support such determination.

In *In re Interest of R.G., supra*, we concluded that the mother's due process rights were not violated by a 14-day delay between the entry of an ex parte order and a detention order when she was given an opportunity to be heard at the detention hearing and was allowed to visit her children in the interim. We cautioned, however, that "the 14 days elapsing between the entry of the ex parte order and the hearing poise the procedures employed in this case on the brink of unreasonableness." 238 Neb. at 423, 470 N.W.2d 792.

In this case, the record contains no indication that the State ever notified Mercedes of what emergency action had been taken regarding her children or how she could contact DHHS. Nor does the record contain any evidence that the State provided a meaningful opportunity for Mercedes to be heard on the issue of whether emergency removal was necessary. Furthermore, 18 days elapsed between the entry of the ex parte order and the adjudication hearing without the State ever showing that the requirements of § 43-254 were satisfied. These procedures denied Mercedes due process and are plain error.

2. Adjudication Hearing

[12] In the context of both adjudication and termination hearings, this court has stated that

> "[p]rocedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine

> adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker."

In re Interest of Ty M. & Devon M., 265 Neb. 150, 158, 655 N.W.2d 672, 681 (2003), quoting *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999) (analyzing due process claims regarding adjudication hearing). Under § 43-279.01(1)(b), this court has also held that "a parent in a juvenile court case has the right to appointed counsel if unable to hire a lawyer." *In re Interest of N.M. and J.M.*, 240 Neb. 690, 697, 484 N.W.2d 77, 82 (1992).

Mercedes was not present at the adjudication hearing. Our de novo review of the record indicates that at the time the adjudication proceeding was occurring, Mercedes was incarcerated in the Hall County jail next door to the courthouse where the proceeding was conducted.

[13] In the context of a termination hearing, this court has held:

> [P]arental physical presence is unnecessary for a hearing to terminate parental rights, *provided* that the parent has been afforded procedural due process for the hearing to terminate parental rights.
>
> If a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion. In deciding whether to allow a parent's attendance at a hearing to terminate parental rights, notwithstanding the parent's incarceration or other confinement, a court may consider the delay resulting from prospective parental attendance, the need for disposition of the proceeding within the immediate future, the elapsed time during which the proceeding has been pending before the juvenile court, the expense to the State if the State will be required to provide transportation for the parent, the inconvenience or detriment to parties or witnesses, the potential danger or security risk which may occur as a result of the parent's release from custody

> or confinement to attend the hearing, the reasonable availability of the parent's testimony through a means other than parental attendance at the hearing, and the best interests of the parent's child or children in reference to the parent's prospective physical attendance at the termination hearing.

(Emphasis supplied.) *In re Interest L.V.*, 240 Neb. 404, 416, 482 N.W.2d 250, 258-59 (1992). For the reason discussed below, we now extend the holding in *In re Interest of L.V.* to a parent who cannot appear at an adjudication hearing because of the parent's incarceration or confinement. See *In re Stephen Tyler R.*, 213 W. Va. 725, 584 S.E.2d 581 (2003) (extending rule adopted from *In re Interest of L.V.* to case involving adjudication of incarcerated parent's child). See, also, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000) (adopting Nebraska's factors for determining whether to allow incarcerated parent to attend termination hearing).

An adjudication hearing is the trial stage of a juvenile proceeding, in which the State must prove its allegations in the petition by a preponderance of the evidence. Neb. Rev. Stat. § 43-279(1) (Reissue 1998). "[C]ases brought under § 43-247(3)(a) can, and sometimes do, end in drastic measures such as termination of parental rights." *In re Interest of Billie B.*, 8 Neb. App. 791, 796, 601 N.W.2d 799, 803 (1999). Under § 43-279.01(1)(a), "adequate notice of the possibility of the termination of parental rights must be given in adjudication hearings." *In re Interest of N.M. and J.M.*, 240 Neb. 690, 696, 484 N.W.2d 77, 81 (1992).

Based upon the facts adduced at an adjudication hearing, the State may file a motion for termination of parental rights. See *In re Interest of Hollenbeck*, 212 Neb. 253, 322 N.W.2d 635 (1982). Similarly, the court may implement a rehabilitation plan as a condition of reunification, deny a parent the opportunity for rehabilitation, or place the children with a permanent guardian based upon the facts adduced at this hearing. See, e.g., Neb. Rev. Stat. § 43-1312(2) (Reissue 1998) (requiring DHHS to adopt case plan calling for adoption, guardianship, et cetera, when return of child to parents is unlikely based on investigation); *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998) (court did not abuse its discretion in determining that it was not in child's best interests to order rehabilitation plan); *In re Interest of J.S.*,

A.C., and C.S., 227 Neb. 251, 417 N.W.2d 147 (1987) (requiring juvenile courts to inform parents that they may order rehabilitation plan).

Thus, adjudication is a crucial step in proceedings possibly leading to the termination of parental rights. Cf. *State v. Norwood*, 203 Neb. 201, 204, 277 N.W.2d 709, 711 (1979) (noting that hearing on motion to terminate was "a continuation of the same proceeding"). Furthermore, parents have a fundamental liberty interest at stake, and the State cannot adjudicate a child except by procedures which meet the requisites of the Due Process Clause. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). " 'For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard . . . ." ' " *In re Interest of L.V.*, 240 Neb. 404, 413, 482 N.W.2d 250, 257 (1992), quoting *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

[14] We do not intend by this holding to require juvenile courts "to conduct an inquiry as to the whereabouts of every respondent parent who fails to appear for a scheduled hearing in order to ascertain whether their absence is attributable to incarceration." *In re Stephen Tyler R.*, 213 W. Va. at 733, 584 S.E.2d at 589. In most situations, in order to trigger the requirements of *In re Interest of L.V.*, the burden is properly placed on the parent or the parent's attorney to notify the court of the parent's incarceration and to request attendance. See *In re Stephen Tyler R., supra*. In this case, however, the court acknowledged at the adjudication that Mercedes was "in custody somewhere," and our de novo review of the record indicates that "somewhere" was in the Hall County jail. Under these circumstances, it is superfluous to require Mercedes to notify the court of her incarceration when the court was already aware that she was in custody and the record indicated that such incarceration was in the Hall County jail. See, *Purbaugh v. Jurgensmeier*, 240 Neb. 679, 483 N.W.2d 757 (1992) (noting general rule that notice of personal representative's status in contract transaction is unnecessary if facts demonstrate that third party was aware of status); *Melling v. Mattley*, 10 Neb. App. 745, 637 N.W.2d 661 (2002) (concluding that failure of Internal Revenue Service to comply with notice statutes did not void sale where property owners had actual

knowledge of seizure and sale and failed to raise lack of notice as defense); *Snowden Farms v. Jones*, 8 Neb. App. 445, 595 N.W.2d 270 (1999) (purchaser was not obligated to notify seller of title defects in sale of real property when sellers learned of defects on their own). Cf. *State v. Hudson and Maeberry*, 208 Neb. 649, 654, 305 N.W.2d 359, 362 (1981) (trial court need not initiate inquiry into defense counsel's possible conflict of interest when defendant fails to raise objection " '[u]nless the trial court knows or reasonably should know that a particular conflict exists' "). In addition, expecting Mercedes to have contacted the court to request attendance when the notice of the hearing was provided by a summons in a language she could not read, and when, as discussed below, she was not represented by counsel at the adjudication hearing, would not comport with fundamental fairness. We therefore turn to a determination of whether the juvenile court afforded Mercedes due process and, if so, whether the court abused its discretion in not having Mercedes present during the adjudication proceeding.

Although the court transcriber's "introductory recitation" of the adjudication hearing states that "Todd Elsbernd appear[s] as counsel for the natural mother," Elsbernd is not noted as being present when the court stated the appearances for the record prior to commencing the adjudication hearing. No reference is made to Elsbernd during the adjudication hearing, and likewise, no participation is attributable to Elsbernd. Furthermore, neither the court's "First Appearance" checklist, nor the "Adjudication Hearing" checklist, both dated April 9, 2001, contain a checkmark affirmatively noting the presence of counsel for Mercedes, or that counsel had been waived. See *State v. Orduna*, 250 Neb. 602, 610, 550 N.W.2d 356, 362 (1996) ("checklist or other such docket entry which is made by one authorized to make it imports verity, and unless contradicted, it stands as a true record of the event"). To the contrary, the "First Appearance" checklist has written upon it, "5-7-01 Elsbernd appt," and there is a separate order signed by the clerk magistrate showing Elsbernd's appointment to have occurred on May 7, 2001, 28 days after the adjudication hearing.

We determine from our de novo review of the record that despite Mercedes' statutory right to counsel, she was neither

represented by counsel at the adjudication hearing nor had she waived this right. See, § 43-279.01; *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992). We further determine from our de novo review of the record that the juvenile court otherwise failed to afford Mercedes due process in that (1) no procedure was utilized by the court to provide Mercedes with any opportunity to refute or defend against the allegations of the petition and (2) no procedures were implemented to afford Mercedes an opportunity to participate in the hearing, to confront or cross-examine adverse witnesses, or to present evidence on her behalf. See *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

We determine that such lack of procedures denied Mercedes due process. Having so determined, we need not reach the issue of whether the juvenile court abused its discretion in not allowing Mercedes to be physically present.

3. Disposition and Review Hearings

The proceeding at which evidence is adduced to determine if a rehabilitative plan is necessary is the disposition hearing. *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993).

[15,16] At a disposition hearing, a juvenile court must determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained. *Id.* But see *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998) (discussing exception to this requirement when court determines that reunification is not in child's best interests). "Once a plan of reunification has been ordered to correct the conditions underlying the adjudication under § 43-247(3)(a), the plan must be reasonably related to the objective of reuniting the parents with the children." See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 163-64, 655 N.W.2d 672, 685 (2003). Furthermore, "[t]he record of proceedings before a juvenile court shall contain the evidence presented at the dispositional hearing held for the purpose of the parental rehabilitative plan." *In re Interest of J.H.*, 242 Neb. at 911, 497 N.W.2d at 352. See *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987) (pronouncing procedural rule requiring evidentiary hearing on record before court adopts rehabilitative plan, and

reversing judgment and remanding matter for juvenile court to determine whether custody would be returned to parent, whether supervision of parental custody was warranted, and whether rehabilitation plan was necessary).

[17-19] Although the record includes a disposition order dated June 20, 2001, our de novo review leads us to conclude that no evidentiary hearing was held on the record prior to its entry. See *In re Interest of J.S., A.C., and C.S., supra*. "Fundamental fairness, at the very least, requires the adducing of appropriate evidence as a factual foundation for a rehabilitative plan which eventually may be used as a ground or condition for termination of parental rights." *In re Interest of J.H.*, 242 Neb. at 912, 497 N.W.2d at 352. In addition, the juvenile court's specific findings of fact supporting the provisions contained in the parental rehabilitative plan shall be stated in the record. *Id.* Although it appears that a rehabilitative plan was adopted on June 20, no findings of fact supporting its provisions are discernible from our de novo review of this record. We once again reiterate that juvenile courts are courts of record and that a verbatim record of all proceedings is required. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992) (concluding that juvenile court's failure to find facts supporting rehabilitative plan it ordered was plain error).

The absence of any evidentiary record of the disposition proceeding leaves this court unable to reconcile what appear to be inconsistent findings. Contrary to the court's adjudication order of April 9, 2001, that reasonable efforts to preserve and unify the family were not required, the case plan approved by the court in its written disposition order dated June 20, 2001, included reunification as its only permanency objective. However, the only stated goal in the case plan was to find long-term placement for the children. Although the June 20 disposition order includes a checkmark indicating that the provisions of the case plan were "reasonably material to the rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained," the case plan does not include any rehabilitative goals or tasks directed toward that objective.

The only exhibit in the record that "appears" to have been submitted to the court at the disposition proceeding is the case

manager's court report which accompanied the case plan. That report stated that *reasonable efforts were not required because of the court's adjudication order* and that adoption would be pursued if placement of the children with Mercedes' brother in Alabama were inappropriate due to Mercedes' deportation.

We are left to speculate as to why the court's adjudication order found that reasonable efforts were not required, yet the disposition order adopts a permanency objective of reunification. No evidentiary record or factual findings exist to help explain these orders or support an order calling for reunification without an accompanying rehabilitation plan with goals or tasks to achieve that objective. Unless the provisions in a case plan "tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained," a court-ordered plan "is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 268, 417 N.W.2d 147, 158 (1987).

These apparent inconsistencies continue throughout every review hearing in this case. Each case plan called for reunification without requiring DHHS to make any effort toward that objective. Although the record indicates that at a March 2002 review hearing, the court stated that "[r]easonable efforts were not made to reunify the family" and that reunification "wasn't possible," the FCRB report suggests that DHHS knew the identity of people in possession of Mercedes' address. In any event, the court reports and case plans prepared by DHHS are devoid of any showing that DHHS attempted to contact Mercedes, determine what rehabilitative steps could be taken in spite of her deportation, or determine whether visitation of some sort was possible. Although the guardian ad litem stated at oral argument that the first goal was to find Mercedes, none of the case plans stated that contact with Mercedes was a goal, nor did the case manager discuss in the court reports any efforts to contact Mercedes.

The inadequacy of this record is not due to the failure of Mercedes to provide a record in support of claimed errors. See *In re Interest of R.R.*, 239 Neb. 250, 253, 475 N.W.2d 518, 520 (1991) ("[i]t is incumbent upon the party appealing to present a record which supports the errors assigned"). The praecipe for the bill of exceptions filed by Mercedes requests "all evidence,

including testimony and exhibits offered at the hearings conducted in this matter on or about March 23, 2001 through June 27th, 2002." Rather, this appeal presents us with an inadequate record due to the court's failure to conduct evidentiary hearings when such were required by due process and statute. See, § 43-1313; *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991); *In re Interest of J.S., A.C., and C.S., supra.*

We conclude upon our de novo review of the record that the court's approval of a permanency objective of reunification without any means by which Mercedes could achieve that goal, without any requirement that DHHS make reasonable efforts to provide services toward that objective, and without conducting disposition and review hearings on the record, was fundamentally unfair, denied Mercedes due process in these proceedings, and is plain error. Cf. *In re Interest of J.S., A.C., and C.S., supra* (reversing termination of parental rights based on failure to comply with provisions of rehabilitative plan that were not material to plan's objective of correcting conditions that led to adjudication); *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985) (concluding that case plan was not reasonable when mother was financially and physically unable to comply).

4. Termination Hearing

(a) Abandonment

[20,21] Abandonment requires a finding that a parent intentionally withheld 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. The question of abandonment is largely one of intent, to be determined in each case from all the facts and circumstances. *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999).

The record contains no specific findings of fact upon which the juvenile court determined that Mercedes abandoned her children. Our de novo review of the record discloses only two circumstances upon which the court could have based its abandonment determination: Mercedes' deportation and the absence of contact between Mercedes and her children subsequent to the deportation.

There is nothing in the record to show that Mercedes left the United States voluntarily and, by so doing, intentionally withheld from her children her presence, care, love, protection, or maintenance. Cf. *Guardianship of and Custody of Charlene D.*, 121 Misc. 2d 168, 467 N.Y.S.2d 336 (1983). To the contrary, there is evidence in the record in the form of an affidavit from an "immigration attorney" averring that Mercedes had retained the attorney to "investigate [Mercedes'] immigration options" and that Mercedes' priority in retaining such attorney "was to find a way to participate in the family law process regarding custody of her children." In offering the affidavit into evidence, Elsbernd advised the court that he was offering the affidavit to "show [Mercedes] is interested, that she wants to be here[;] however she cannot be here."

Although the record shows that Mercedes has had no contact with the children since her arrest and incarceration on March 22, 2001, such is not dispositive. While the case manager testified that Mercedes had not contacted the agency or her children, DHHS never made a showing that Mercedes had been given any information as to how contact with her children could be accomplished. Furthermore, the record contains information that despite Mercedes' living a substantial distance from a telephone, she had called a crisis center in Grand Island and another relative in Alabama, inquiring about her children.

In our de novo review of the record, we determine that the evidence does not clearly and convincingly support the juvenile court's finding that Mercedes abandoned her children, and such finding is reversed.

(b) Best Interests

[22] Prior to terminating parental rights, the State must prove by 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 Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). Although the record supports the court's finding that the children were in continuous, out-of-home placement for 15 months and 5 days on the day of the termination hearing, it does not support a finding that termination on this ground was in the children's best interests.

The foremost purpose and objective of the Nebraska Juvenile Code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights. *In re Interest of Ty M. & Devon M., supra.*

[23] The 15-month condition set forth in § 43-292(7) serves the purpose of providing a reasonable timetable for parents to rehabilitate themselves. See *In re Interest of Ty M. & Devon M., supra.* But termination based on the ground that a child has been in out-of-home placement for 15 of the preceding 22 months is not in a child's best interests when the record demonstrates that a parent is making efforts toward reunification and has not been given a sufficient opportunity for compliance with a reunification plan. *In re Interest of Rebecka P., supra.* See, also, §§ 43-292.02(3)(c) and 43-292.03(1).

In *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985), this court reversed the termination of a mother's parental rights, in part, because the case plan called for her to make support payments that she could not afford and to make long-distance visitations to see her children in separate places on the same day. Because the mother was poor and could not physically comply with the visitations, this court considered the plan to be "designed for failure" and patently unreasonable. *Id.* at 112, 368 N.W.2d at 481.

Similarly, the State has not shown that termination of Mercedes' parental rights is in the children's best interests when the case plan that was adopted by the court provided Mercedes with no means of achieving the permanency objective of reunification. Nor has the State shown by clear and convincing evidence that Mercedes has failed to make any efforts toward reunification. The uncontroverted evidence presented at the March 2002 review hearing showed that Mercedes was working with an "immigration attorney" to return to the United States in order to participate in the proceedings. The State cannot prove that termination of parental rights is in a child's best interests by implementing a case

plan that precludes a parent's compliance. *In re Interest of L.J., J.J., and J.N.J., supra.* Based upon our de novo review of the record, we determine that the State has failed to prove by clear and convincing evidence that termination of Mercedes' parental rights based upon § 43-292(7) is in the children's best interests.

Having determined that the juvenile court denied Mercedes due process in the proceedings and that its bases for termination of her parental rights were not supported by the record, we find it unnecessary to reach Mercedes' remaining assignments of error.

VI. CONCLUSION

Our de novo review of the record demonstrates that during these proceedings, Mercedes was denied due process.

Upon our de novo review, we further determine that the court's findings that Mercedes had abandoned her children and that it was in the best interests of her children to terminate Mercedes' parental rights were error.

We therefore vacate the juvenile court's adjudication order and disposition order, as well as its order terminating Mercedes' parental rights, and remand the matter to the juvenile court with directions to conduct a detention hearing and a new adjudication hearing and to provide Mercedes due process in the proceedings consistent with this opinion.

VACATED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF JEDIDIAH P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JEDIDIAH P., APPELLANT.

673 N.W.2d 553

Filed January 23, 2004. No. S-02-695.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** A separate juvenile court continues to exercise supervision of the juvenile during an appeal until the appellate court enters an order making other disposition.
3. **Courts: Jurisdiction: Appeal and Error.** Once an appeal is perfected to an appellate court, the trial court is divested of jurisdiction to hear a case involving the same matter between the same parties.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and CARLSON and MOORE, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, TONI THORSON, Judge. Judgment of Court of Appeals affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Margene M. Timm for appellant.

Gary E. Lacey, Lancaster County Attorney, Thomas W. Fox, and Brandy L. Elliss, Senior Certified Law Student, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

We granted a petition for further review filed by Jedidiah P. to consider whether the Lancaster County Separate Juvenile Court had jurisdiction to enter a dispositional order despite the pendency of an appeal from an adjudication order. The Nebraska Court of Appeals concluded that the separate juvenile court had jurisdiction and that the adjudication order was supported by sufficient evidence. See *In re Interest of Jedidiah P.*, Nos. A-02-429, A-02-695, 2003 WL 21647681 (Neb. App. July 15, 2003) (not designated for permanent publication).

SCOPE OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Ponseigo v. Mary W., ante* p. 72, 672 N.W.2d 36 (2003).

BACKGROUND

In *In re Interest of Jedidiah P.*, the Court of Appeals addressed two appeals filed by Jedidiah. The first appeal sought review of an adjudication order entered by the separate juvenile court under Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2002). The second appeal challenged the separate juvenile court's jurisdiction

to enter a dispositional order placing Jedidiah in the temporary legal custody of the Department of Health and Human Services, Office of Juvenile Services (OJS), while the appeal from the adjudication order was still pending. Jedidiah filed a petition for further review with respect to the second appeal only, and that appeal is the subject of this opinion.

On April 11, 2002, the separate juvenile court adjudicated Jedidiah to be a child meeting the definition of § 43-247(1) because he had allegedly received stolen property, a vehicle. Disposition was continued to May 29, and Jedidiah was conditionally released to his parents. Jedidiah filed an appeal from the adjudication order on April 16.

On May 23, 2002, the separate juvenile court entered an order which found that the appropriate level of care and custody for Jedidiah was a residential treatment center. OJS was willing to immediately arrange for such a placement, and the court found that it was in Jedidiah's best interests for his custody to be placed with OJS for a residential treatment center placement. Temporary legal custody was then placed with OJS.

The issue before the Court of Appeals was whether the separate juvenile court had jurisdiction to enter the May 23, 2002, order while Jedidiah's appeal from the adjudication order was still pending. The Court of Appeals concluded that the May 23 order of the separate juvenile court was authorized by Neb. Rev. Stat. § 43-295 (Reissue 1998) because the order changed the custody or care of Jedidiah after it was shown that the change was in his best interests. The Court of Appeals held that the separate juvenile court had jurisdiction to enter the May 23 order and that the separate juvenile court did not exceed its limited authority to enter orders pending an appeal.

ASSIGNMENTS OF ERROR

In his petition for further review, Jedidiah assigns as error (1) the Court of Appeals' finding that the separate juvenile court had jurisdiction under § 43-295 to enter a dispositional order while an appeal from the adjudication order was pending and (2) the Court of Appeals' finding that § 43-295 grants continuing jurisdiction to proceed with disposition while an appeal from an adjudication order is pending.

ANALYSIS

Jedidiah argues that the Court of Appeals erred in interpreting § 43-295 to permit a separate juvenile court to proceed with disposition while an appeal from an adjudication order is pending. He claims that the May 23, 2002, order was a dispositional order, despite attempts by the separate juvenile court and the Court of Appeals to characterize it as merely changing custody or placement. Jedidiah asserts that the order was made pursuant to Neb. Rev. Stat. §§ 43-286(1) and 43-408(2) (Cum. Supp. 2002) and that if he did not comply with his commitment to a residential treatment center, he could be transferred to a more restrictive placement.

Thus, we must determine whether the separate juvenile court had jurisdiction to enter its order of May 23, 2002. Section 43-295 states:

> Except when the juvenile has been legally adopted, the jurisdiction of the court shall continue over any juvenile brought before the court or committed under the Nebraska Juvenile Code and the court shall have power to order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change.

We note that there is no statutory provision defining the extent of a separate juvenile court's jurisdiction while appeals are pending from its final orders. See *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 548 N.W.2d 348 (1996), *reversed in part on other grounds* 251 Neb. 614, 558 N.W.2d 548 (1997). However, Neb. Rev. Stat. § 43-2,106 (Reissue 1998) provides:

> When a juvenile court proceeding has been instituted before a *county court sitting as a juvenile court*, the original jurisdiction of the county court shall continue until the final disposition thereof and no appeal shall stay the enforcement of any order entered in the county court. After appeal has been filed, the appellate court, upon application and hearing, may stay any order, judgment, or decree on appeal if suitable arrangement is made for the care and custody of the juvenile. The county court shall continue to exercise supervision over the juvenile until a hearing is had in the appellate court and the appellate court enters an order

> making other disposition. If the appellate court adjudges the juvenile to be a juvenile meeting the criteria established in subdivision (1), (2), (3), or (4) of section 43-247, the appellate court shall affirm the disposition made by the county court unless it is shown by clear and convincing evidence that the disposition of the county court is not in the best interest of such juvenile. Upon determination of the appeal, the appellate court shall remand the case to the county court for further proceedings consistent with the determination of the appellate court.

(Emphasis supplied.)

In the present case, the separate juvenile court adjudicated Jedidiah to be a child meeting the definition of § 43-247(1) and continued disposition until a report could be prepared by the juvenile probation office. Jedidiah appealed the adjudication, and after the notice of appeal was filed, the separate juvenile court conducted what it described as a "dispositional hearing" on May 21, 2002.

At the hearing, Jedidiah asked that he be returned to his parents' home "on home detention with a monitor" until an opening was available at the Lincoln Regional Center. The separate juvenile court noted that Jedidiah might be required to wait 2 to 4 weeks for placement at the Lincoln Regional Center, but could be placed immediately at a facility in Omaha. The court also observed that if Jedidiah chose to wait for an opening at the Lincoln Regional Center and he was not released to his parents, he would be required to stay at a juvenile detention center, where he had already been detained for 3 months.

Jedidiah's counsel raised the question of whether the separate juvenile court could proceed with disposition, since the appeal of the adjudication was pending. The court concluded that it had jurisdiction to make orders relating to custody and placement. The court then placed temporary legal custody of Jedidiah with OJS for placement at a residential treatment center because the court found such placement to be in Jedidiah's best interests.

[2] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Ponseigo v. Mary W., ante* p. 72,

672 N.W.2d 36 (2003). In this case, the order changing the custody of Jedidiah was entered by a separate juvenile court. State law provides that in counties where there is no separate juvenile court, pursuant to § 43-2,106, the county court sitting as a juvenile court shall continue to exercise supervision of the juvenile until a hearing is had in the appellate court and the appellate court enters an order making other disposition. Although similar language is absent from Neb. Rev. Stat. § 43-2,106.01 (Reissue 1998), which addresses appeals from separate juvenile courts, we can discern no reason for a juvenile court not to retain such authority, regardless of whether it is a county court sitting as a juvenile court or a separate juvenile court. The courts serve the same function. Therefore, we hold that a separate juvenile court continues to exercise supervision of the juvenile during an appeal until the appellate court enters an order making other disposition. Pursuant to § 43-295, a separate juvenile court retains jurisdiction to order a temporary change in custody if it is in the child's best interests.

[3] We have held that once an appeal is perfected to an appellate court, the trial court is divested of jurisdiction to hear a case involving the same matter between the same parties. *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998); *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). However, this does not mean that a separate juvenile court cannot continue to exercise jurisdiction or supervision of a juvenile pending final determination of an appeal from an adjudication. The question is the level of supervision the separate juvenile court may properly exercise during the pendency of the appeal. We believe this question is answered by the language of §§ 43-295 and 43-2,106. As noted earlier, these statutes provide that the jurisdiction of a juvenile court continues over the juvenile, and the court shall have power to order a change in the juvenile's custody if it is in his or her best interests, see § 43-295. Section 43-2,106 provides that the court shall continue to exercise supervision over the juvenile.

The exercise of this jurisdiction is not without limits. The extent of the court's jurisdiction must be determined by the facts of each case. The continuing jurisdiction of a juvenile court pending an appeal does not include the power to terminate a juvenile's

relationship with his or her parents. See *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 548 N.W.2d 348 (1996), *reversed in part on other grounds* 251 Neb. 614, 558 N.W.2d 548 (1997). Similarly, pending an appeal from an adjudication, the juvenile court does not have the power to enter a permanent dispositional order. See *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997) (dispositional order entered while appeal regarding juvenile adjudication was pending, in which county court adopted case plan, denied parents' application for immediate return of children, and ordered continued custody of children with Department of Social Services, went beyond exercise of supervision permitted by county court). Any order regarding the disposition of a juvenile pending the resolution of an appeal of the adjudication can only be made on a temporary basis upon a finding by the court that such disposition would be in the best interests of the juvenile. See § 43-295. In addition, § 43-2,106 provides that "the appellate court, upon application and hearing, may stay any order . . . on appeal if suitable arrangement is made for the care and custody of the juvenile."

At the time of the dispositional hearing, Jedidiah had been residing at a juvenile detention center for approximately 3 months. It was then determined that the appropriate level of care for Jedidiah was a residential treatment center, and all involved generally agreed that it was not in Jedidiah's best interests to remain at the juvenile detention center. There was a waiting period of 2 to 4 weeks for placement at the Lincoln Regional Center, and the guardian ad litem opposed returning Jedidiah to his parents' home. Thus, the separate juvenile court concluded that Jedidiah's best interests required that his custody be transferred to OJS for placement in a residential treatment center.

The separate juvenile court's May 23, 2002, order changed Jedidiah's placement from a juvenile detention center to a residential treatment center and granted temporary legal custody of Jedidiah to OJS. The Court of Appeals correctly determined that the separate juvenile court did not exceed its authority in entering such an order while an appeal from the adjudication was pending.

CONCLUSION

For the reasons set forth herein, we affirm the decision of the Court of Appeals.

AFFIRMED.

MARLOWE RATH, A RESIDENT TAXPAYER OF SUTTON, CLAY COUNTY, NEBRASKA, APPELLANT, V. CITY OF SUTTON, A CITY OF THE SECOND CLASS, ET AL., APPELLEES.

673 N.W.2d 869

Filed January 23, 2004. No. S-02-1174.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
4. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Injunction.** Injunctive relief is preventative, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done.
6. ____. Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction.
7. **Declaratory Judgments: Moot Question.** A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
8. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
9. **Moot Question: Damages.** A suit that seeks damages for harm caused by past practices is not rendered moot by the cessation of the challenged conduct.

10. **Declaratory Judgments.** Declaratory relief cannot be used to obtain a judgment which is merely advisory.
11. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
12. **Moot Question: Appeal and Error.** The public interest exception to the mootness doctrine requires the consideration of (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for guidance of public officials, and (3) the likelihood of recurrence of the same or a similar problem.
13. **Injunction.** As an injunction is an extraordinary remedy, it ordinarily should not be granted except in a clear case where there is actual and substantial injury. Stated otherwise, injunctive relief should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
14. ____. As an injunction is an extraordinary remedy, it is available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury.
15. **Public Officers and Employees: Actions.** A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.
16. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
17. **Injunction: Damages: Words and Phrases.** An injury is irreparable when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard.
18. **Actions: Municipal Corporations: Contracts: Liability.** Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was unenforceable because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received.
19. **Actions: Taxation: Damages: Proof.** A taxpayer seeking to enjoin an alleged illegal expenditure of public funds needs to prove only that the funds are being spent contrarily to law in order to establish an irreparable injury.
20. **Political Subdivisions: Contracts: Statutes: Words and Phrases.** Competitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money. Competitive bid statutes exist to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price. Such statutes are enacted for the benefit of taxpayers.
21. **Political Subdivisions: Contracts.** Determining the lowest responsible bidder is a two-step process. The first step is for the public body to determine which bidders are responsible to perform the contract. The second step focuses on which of the responsible bidders has submitted the lowest bid.
22. **Political Subdivisions: Contracts: Words and Phrases.** In the context of competitive bidding, the term "responsibility" pertains to a bidder's pecuniary ability, as well as the bidder's ability and capacity to carry on the work, the bidder's equipment and facilities, the bidder's promptness and the quality of his or her previous work, the bidder's suitability to the particular task, and such other qualities as are found necessary

to consider in order to determine whether or not, if awarded the contract, the bidder could perform it strictly in accordance with its terms.

23. **Public Officers and Employees: Contracts.** Public officials do not act ministerially only, but exercise an official discretion when passing upon the question of the responsibility of bidders.
24. ____: ____. Public bodies retain an official discretion to determine which bid offers the best value to their constituents.
25. **Municipal Corporations: Fraud: Courts.** Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts, and as it believes for the best interests of its municipality, and where there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body.
26. **Political Subdivisions: Contracts.** When the only difference in bids is price, no discretion exists on the part of a public body in awarding the contract; the responsible bidder with the lowest bid must be awarded the contract.
27. **Public Officers and Employees: Contracts: Fraud: Courts.** Determining the responsibility of bidders is a job for elected officials, and a court's only role is to review those decisions to make sure the public officials did not act arbitrarily, or from favoritism, ill will, or fraud.
28. **Contracts: Parties.** A party cannot, by contractual agreement with another party, obtain the power to do something that state law forbids.

Appeal from the District Court for Clay County: STEPHEN ILLINGWORTH, Judge. Appeal dismissed.

Craig C. Dirrim and Kerry L. Kester, of Woods & Aitken, L.L.P., for appellant.

Kevin J. Schneider and Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, P.C., and, of Counsel, Don C. Bottorf, of Bottorf & Maser, for appellees City of Sutton, mayor of City of Sutton, and members of Sutton City Council.

David A. Hecker and Richard P. Jeffries, of Kutak Rock, L.L.P., for appellee Van Kirk Sand & Gravel, Inc.

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

The City of Sutton, Nebraska (City), sought to make improvements to its wastewater treatment facility. The City received bids from a number of construction companies, including JJ Westhoff Construction Company, Inc. (Westhoff), and Van Kirk Sand &

Gravel, Inc. (Van Kirk). The Sutton City Council (City Council) awarded the contract for the project to Van Kirk, a local contractor, despite the fact that Westhoff's bid was $16,000 lower. The question presented on appeal is whether the City impermissibly awarded the contract to someone other than the lowest responsible bidder in contravention of Neb. Rev. Stat. §§ 17-918 and 18-507 (Reissue 1997).

FACTUAL AND PROCEDURAL BACKGROUND

In September 2001, the City advertised an invitation for bids for the construction of certain improvements to its wastewater treatment facility. The City's invitation for bids stated that the City would receive bids until October 3, 2001, at 1:30 p.m., at which time all bids would be publicly opened and read aloud. The invitation stated that each prospective bidder would be required to certify, by submitting "EPA Form 5700-49," that it was not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or agency. Additionally, the bidders were notified they would have to comply with certain rules regarding nondiscrimination in employment and the U.S. Environmental Protection Agency's Disadvantaged Business Enterprise (DBE) requirements.

The invitation for bids also stated that the City reserved "the right to reject any and all bids and to waive informalities in bids submitted and to accept whichever bid that is in the best interest of the City, at its sole discretion." Likewise, article 19 of the "Instructions to Bidders" purported to give the City, as the "Owner," nearly unbounded discretion in the bidding process.

> OWNER reserves the right to reject any or all Bids, including without limitation, nonconforming, nonresponsive, unbalanced, or conditional Bids. OWNER further reserves the right to reject the Bid of any Bidder whom it finds, after reasonable inquiry and evaluation, to be non-responsible. OWNER may also reject the Bid of any Bidder if OWNER believes that it would not be in the best interest of the Project to make an award to that Bidder. OWNER also reserves the right to waive all informalities not involving price, time, or changes in the Work and to negotiate contract terms with the Successful Bidder.

Van Kirk, a contractor located in Sutton, and Westhoff, a contractor located in Lincoln, Nebraska, submitted bids on the project. On October 3, 2001, the bids were opened and Westhoff's bid ($1,274,000) was lower than Van Kirk's bid ($1,290,000) by $16,000. Per the bid specifications, both Westhoff and Van Kirk listed August 15, 2002, as the substantial completion date and September 15 for the project's final completion date. Van Kirk's bid did not include the DBE requirements or form 5700-49. A public meeting to award the project was scheduled for October 9, 2001.

After the bids were unsealed, but before the October 9, 2001, meeting of the City Council, the president of Van Kirk sent a letter to the City urging the City Council to award the project to Van Kirk. The letter noted the amount of personal property taxes Van Kirk had paid in 2000 and the amount Van Kirk estimated it would pay in 2001. In addition, the letter stated the amount of money Van Kirk spent annually within the City and estimated the amount Van Kirk contributed to the City's economy each year. Van Kirk recognized that it was not the low bidder, but argued that the $16,000 difference in bids would be more than made up in overall economic benefits to the City if the project were awarded to a local contractor.

During the public meeting on October 9, 2001, the City Council noted the $16,000 difference in bids. The minutes of the meeting show that one council member stated that the difference in bids was not substantial and that by choosing Van Kirk, the wages would stay in the City. All four members of the City Council voted in favor of awarding the contract to Van Kirk, and the motion carried.

Westhoff protested this decision through a letter to the clerk of the City. In the letter, dated October 11, 2001, Westhoff argued that it was the lowest responsible bidder and threatened to pursue legal action if it were not awarded the contract. On October 23, Marlowe Rath, a taxpayer and resident of the City, instituted this action, at the request and with the funding of Westhoff, against the City, the City Council, the mayor, and Van Kirk (collectively the appellees). Essentially, Rath's petition claimed that the City failed to award the contract to the lowest responsible bidder.

After the lawsuit was filed, the City Council called a "special meeting" for October 31, 2001, to reconsider their decision. At the beginning of the special meeting, the mayor of the City, Virgil Ulmer, disclosed that he was a salaried employee of Van Kirk. He also stated that in the event the vote on awarding the contract resulted in a tie, he would not vote to break the tie. The record shows that Ulmer worked sporadically for Van Kirk between 1991 and 1996, when he became a permanent employee of Van Kirk. He was elected as the City's mayor in 1998. We note that Ulmer did not vote at the prior meeting, held on October 9, nor did he disclose his potential conflict of interest.

Westhoff presented no supporting evidence at the special meeting. Rather, it merely reminded the City Council that a lawsuit had been filed over the matter and restated its position that the award to Van Kirk was inappropriate and contrary to law. In response, the president of Van Kirk reiterated Van Kirk's status as a local contractor and argued that by selecting Van Kirk, the City would reap a variety of savings and economic benefits. Additionally, various persons presented oral testimony in favor of awarding the bid to Van Kirk, specifically emphasizing the positive economic impact its selection would have on the community.

The City Council then voted in favor of reconsidering the original award of the contract. During the subsequent discussion, each of the three present members of the City Council stated their support for awarding the contract to a local business. Generally speaking, they argued that awarding the contract to a local business would offset the $16,000 difference in bids and contribute positive economic benefits to the community. The City Council then voted 3 to 0 to award the contract to Van Kirk.

Rath's operative amended petition, filed December 3, 2001, sought to temporarily and permanently enjoin the City from (1) awarding the project to Van Kirk and (2) spending any public funds on the project until it was awarded to the lowest responsible bidder. In addition, the amended petition sought an order declaring the contract between Van Kirk and the City null and void.

On February 7, 2002, the district court issued an order on Rath's motion for a temporary injunction. The court found, inter

alia, that (1) both Westhoff and Van Kirk were deemed to be responsible bidders by the City, (2) Westhoff was the low bidder by $16,000, and (3) the only reason Westhoff did not receive the contract was that the City thought it would be best to award the project to a local bidder. Nonetheless, the court denied Rath's motion because it determined that Rath failed to show he would suffer irreparable injury if the injunction were not granted.

The parties submitted the case on a stipulated record. The court issued its order on October 2, 2002, and made findings nearly identical to those in its order of February 7. Specifically, the court determined that the evidence failed to show Rath would suffer irreparable injury if injunctive relief were not granted. The court denied Rath's request for permanent injunctive and declaratory relief on this basis.

Rath filed a timely notice of appeal, but did not request a stay or supersedeas bond. Therefore, because there was no court order prohibiting Van Kirk from proceeding with construction, Van Kirk began the work and, on September 30, 2003, completed the improvements to the wastewater treatment facility. The City remitted final payment to Van Kirk on July 23. On October 6, 1 day prior to oral argument in this court, the appellees, by way of separate motions, moved to dismiss Rath's appeal as moot. Rath opposed these motions, and we granted the parties additional time to brief the issue of mootness.

ASSIGNMENTS OF ERROR

Rath claims, renumbered and restated, that the district court erred in (1) finding that a resident taxpayer claiming the illegal expenditure of public funds is required to prove more than the illegality of the expenditure in order to show irreparable harm; (2) construing the bidding statutes, §§ 17-918 and 18-507, to allow a city of the second class to have discretion in awarding a contract for the construction of a wastewater treatment facility or the improvement thereof; and (3) finding that Van Kirk's initial bid, which did not include the DBE requirements or form 5700-49, was responsive.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law,

which requires the appellate court to reach a conclusion independent of the lower court's decision. *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003).

[2] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003). See *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

ANALYSIS

MOOTNESS

Essentially, the appellees argue that because construction of the wastewater treatment facility has been completed and Van Kirk has been paid in full, there is nothing left for this court to enjoin. Thus, according to the appellees, there is no live case or controversy, and an opinion passing on the propriety of the award to Van Kirk would be advisory. On the other hand, Rath argues that because he is seeking a declaration that the contract is null and void and because taxpayers have a right to recover all funds paid under an illegal contract, he is still entitled to a remedy, and that his appeal is not moot.

[3,4] The contours of the doctrine of mootness are well established. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Stoetzel & Sons, supra*; *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Stoetzel & Sons, supra.*

[5,6] Recently, we have addressed similar situations where the action a party was seeking to enjoin had been completed prior to our review of the lower court's decision. See, generally, *Stoetzel & Sons, supra*; *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000); *Putnam, supra*; *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989). In these cases, we have emphasized the nature of injunctive relief, stating that "injunctive relief is preventative, prohibitory, or protective, and

equity usually will not issue an injunction when the act complained of has been committed and the injury has been done." See *Putnam*, 256 Neb. at 270, 589 N.W.2d at 842-43. Moreover,

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

Id. at 271, 589 N.W.2d at 843, quoting *Conrad v. Kaup*, 137 Neb. 900, 291 N.W. 687 (1940).

Much like the aforementioned cases, the actions that Rath is seeking to enjoin—the execution of the contract with Van Kirk and the expenditure of public funds for the project—have been completed. Thus, any opinion on the court's denial of injunctive relief would be "worthless." See *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 646, 658 N.W.2d 636, 643 (2003). Simply put, we lack the power, "once a bell has been rung, to unring it." See *CMM Cable Rep. v. Ocean Coast Properties, Inc.*, 48 F.3d 618, 621 (1st Cir. 1995). See, also, *Stoetzel & Sons, supra*. Rath's request for injunctive relief is moot.

[7,8] We must, however, determine whether the declaratory judgment prayer has also been rendered moot, as the inability of the court to grant the injunction does not, by itself, render the declaratory action moot as well. See *Koenig, supra.*

> A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action. . . . At the time that the declaration is sought, there must be an actual justiciable issue. . . . A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.

(Citations omitted.) *Putnam*, 256 Neb. at 272-73, 589 N.W.2d at 844. See, also, *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000); *Koenig, supra.*

The actions Rath is seeking to enjoin are predicated on an alleged illegal expenditure of public funds. Rath argues that

notwithstanding completion of the project and payment of all funds, relief is still available because a taxpayer has a right to recover the funds expended under an illegal contract. See *Cathers v. Moores*, 78 Neb. 17, 113 N.W. 119 (1907). According to Rath, a declaration of the contract's illegality maintains the action because he can then seek to recover the illegally expended funds. In other words, Rath is arguing that the City could not divest this court of jurisdiction by paying out the money on an illegal contract. See, *Faden, Aplnt. v. Phila. Housing Auth.*, 424 Pa. 273, 227 A.2d 619 (1967); *Egidi v. Town of Libertyville*, 218 Ill. App. 3d 596, 578 N.E.2d 1300, 161 Ill. Dec. 654 (1991).

[9] To a certain extent, Rath is correct. Obviously, petitions that seek restitution damages, refund damages, lost profits, or other types of monetary relief do not become moot upon completion of the project. As noted elsewhere, a "suit that seeks damages for harm caused by past practices is not rendered moot by the cessation of the challenged conduct." *CMM Cable Rep.*, 48 F.3d at 621. See, also, *Curtis Indus., Inc. v. Livingston*, 30 F.3d 96 (8th Cir. 1994).

[10] Here, however, Rath did not seek to recover the funds that may have been illegally expended under the City's contract with Van Kirk. His petition sought only injunctive and declaratory relief, plus such other relief that the court deemed proper. In order to be entitled to recoup the illegally expended funds, Rath was required to specifically request such relief in his petition. See, *Alexander v. School Dist. No. 17*, 197 Neb. 251, 248 N.W.2d 335 (1976); *National Fire Ins. Co. v. Evertson*, 153 Neb. 854, 46 N.W.2d 489 (1951). Therefore, a declaration by this court on the legality of the contract between Van Kirk and the City would be advisory because it would have no effect on the parties *in this case*. And, as we have said before, " 'declaratory relief cannot be used to obtain a judgment which is merely advisory.' " See *Putnam v. Fortenberry*, 256 Neb. 266, 273, 589 N.W.2d 838, 844 (1999), quoting *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). Rath's request for declaratory relief is also moot.

Public Interest Exception

[11,12] As a general rule, a moot case is subject to summary dismissal. *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637,

658 N.W.2d 636 (2003). Nebraska, however, recognizes a public interest exception to the mootness doctrine, and we must consider whether it is applicable in this case. The exception requires the consideration of (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for guidance of public officials, and (3) the likelihood of recurrence of the same or a similar problem. *Id.* Two questions presented in Rath's appeal meet the aforementioned test and merit review.

First, Rath's appeal raises the issue of what a party alleging the illegal expenditure of public funds needs to show in order to establish irreparable harm. Obviously, the proof required to enjoin an illegal expenditure of public funds is of paramount importance to the taxpayers in this state. Moreover, this issue, if adjudicated, will provide needed guidance because it is an issue of first impression in this state. Furthermore, the issue is likely to recur because taxpayer suits seeking to enjoin alleged illegal expenditures of public funds are frequently filed. The public interest exception is applicable.

Second, Rath's appeal also raises the issue of the appropriate interpretation of an oft-used phrase in our statutes, "lowest responsible bidder," and its proper application within the context of Nebraska's competitive bidding statutes. Again, the public nature of this question is not in doubt. We have repeatedly held that competitive bidding statutes exist solely for the protection of the public, see *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985), and Rath, as a taxpayer, instituted this action on the public's behalf.

In addition, an authoritative decision on this issue will provide guidance to every municipality and state official entrusted with procuring products and services. The term "lowest responsible bidder" is found in numerous statutory provisions, and to the extent we can bring clarity to its proper scope, interpretation, and interplay within the competitive bidding framework, tax-paying citizens of this state will benefit. See, e.g., Neb. Rev. Stat. §§ 13-1414, 14-361, 14-363, 14-365.08, 14-3,111, 14-1710, 14-2121, 15-228, 15-734, 15-753, 16-249, 16-649, 16-672.05, 17-533, 17-918, 18-507, 23-342, 23-366, 23-3615 (Reissue 1997); Neb. Rev. Stat. §§ 31-118, 31-120, 31-355, 31-512,

31-748, 31-912, 39-810, 39-1407, 39-1620, 46-145 (Reissue 1998); Neb. Rev. Stat. §§ 31-741, 39-1349, and 81-161 (Cum. Supp. 2002); Neb. Rev. Stat. §§ 72-803, 73-101.01, 73-103 (Reissue 1996); Neb. Rev. Stat. §§ 81-1108.55, 81-1201.13, 83-134, 83-916 (Reissue 1999).

Lastly, this issue is likely to recur because of the frequency of public contracting and the corresponding disputes over the fairness of those contracts. A short review of our case law shows that we have been faced with a number of cases challenging awards to the lowest responsible bidder. See, generally, *Day v. City of Beatrice*, 169 Neb. 858, 101 N.W.2d 481 (1960); *Philson v. City of Omaha*, 167 Neb. 360, 93 N.W.2d 13 (1958); *Niklaus v. Miller*, 159 Neb. 301, 66 N.W.2d 824 (1954); *Best v. City of Omaha*, 138 Neb. 325, 293 N.W. 116 (1940). However, we have not had the opportunity to properly determine the procedural framework of competitive bidding.

The appellees suggest that our analysis of the public interest exception should be controlled by *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003); *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000); and *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999), where we concluded that the public interest exception was inapplicable. By and large, the appellees are correct in asserting that, much like the aforementioned cases, the current posture of Rath's appeal is due to the relief sought and the procedural and strategic choices made along the way. However, this is not enough, by itself, to preclude review. For if, as the appellees suggest, Rath forfeited any chance of review under the public interest exception because of past strategic or procedural choices, a party advancing mootness would need only to point a court's attention to the mistake that caused the appeal to be moot and review would be precluded. Such a rule would nearly eviscerate the public interest exception.

Additionally, unlike the cases cited by the appellees, the issue facing this court is not unique to the factual situation of the parties. Instead of an inquiry into specific bidding proposals, contracts, or bequests, the overarching issues in this case are generic and statutorily based. In sum, this issue is susceptible to and proper for review under the public interest exception.

The final issue on appeal, whether Van Kirk's bid was responsive, does not meet the public interest exception. Much like *Stoetzel & Sons, supra*; *Greater Omaha Realty Co., supra*; and *Putnam, supra*, it entails a detailed examination into the specific factual circumstances of the case. Specifically, we would be required to examine the bid requirements, the authority retained by the City to waive informalities in the bidding process, and the specific bid submissions of the parties. Furthermore, paramount concern over this issue resides wholly with the parties, and no guidance is needed on an issue that, due to its unique facts, is unlikely to recur.

Thus, prior case law, including *Stoetzel & Sons, supra*; *Greater Omaha Realty Co., supra*; *Putnam, supra*; and *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989), compels a finding that Rath's appeal is moot. However, two of the aforementioned issues presented by Rath's appeal meet the public interest exception to the mootness doctrine and, although moot, merit review to provide guidance to public officials and future litigants in the competitive bidding arena.

IRREPARABLE HARM

[13,14] Rath's amended petition requested temporary and permanent injunctive relief to prevent the City from (1) awarding the project to Van Kirk and (2) spending any public funds on the project until it was awarded to the lowest responsible bidder. In its order, the district court quoted *Central Neb. Broadcasting v. Heartland Radio*, 251 Neb. 929, 931, 560 N.W.2d 770, 771-72 (1997), for the standard for granting an injunction.

> As an injunction is an extraordinary remedy, it ordinarily should not be granted except in a clear case where there is actual and substantial injury. . . . Stated otherwise, injunctive relief should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. . . . As an injunction is an extraordinary remedy, it is available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury.

(Citations omitted.) Initially, the court determined that Rath "failed to produce any evidence of substantial or irreparable

injury" and denied his request for a temporary injunction. Nearly 8 months later, the court made the same determination and denied Rath's request for permanent injunctive relief. The court explained:

> The evidence to date is that money to pay off the debt on this project will come from rate payers. There was no additional evidence presented at final hearing as to whether the rates would increase or if so how much, by a $16,000.00 difference in bid price. The evidence could conceivably be that it will not increase rates due to certain economies of having a local contractor. There was no showing of irreparable injury to rate pay[e]rs or Mr. Rath as a taxpayer. The request for permanent injunction and other relief should therefore be denied.

[15,16] On appeal, Rath argues the district court erred in holding that a taxpayer has to prove more than an illegal expenditure of public funds in order to establish irreparable injury. According to Rath, taxpayers have the right to enjoin the government's illegal expenditure of funds without any showing of individual financial loss. Rath relies exclusively on the following oft-cited rules of standing:

> " ' "[A] person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public *unless it involves an illegal expenditure of public funds* or an increase in the burden of taxation." ' " . . .
>
> . . . A resident taxpayer, *without showing any interest or injury peculiar to itself*, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.

(Emphasis supplied.) *Chambers v. Lautenbaugh*, 263 Neb. 920, 928, 644 N.W.2d 540, 547-48 (2002). See, also, *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002); *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002); *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001); *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999); *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998); *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993); *Rexroad,*

Inc. v. S.I.D. No. 66, 222 Neb. 618, 386 N.W.2d 433 (1986); *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985); *Haschke v. School Dist. of Humphrey*, 184 Neb. 298, 167 N.W.2d 79 (1969); *Martin v. City of Lincoln*, 155 Neb. 845, 53 N.W.2d 923 (1952). Essentially, Rath argues that his right to injunctive relief is established by proof that (1) he is a resident taxpayer and (2) taxpayer funds are being expended contrary to law.

The appellees agree that the rule quoted in *Chambers, supra*, gives Rath standing. However, the appellees argue that the district court's ruling was based on Rath's failure to meet the standard for granting a permanent injunction in *Central Neb. Broadcasting v. Heartland Radio*, 251 Neb. 929, 560 N.W.2d 770 (1997), and that Rath's *standing is not relevant to this determination*. According to the appellees, the aforementioned cases are confined to the issue of standing and are irrelevant to the propriety of granting an injunction. The appellees argue that in addition to satisfying the standing requirement, Rath had to make a separate showing of irreparable harm. On that account, the appellees argue that the court correctly found that Rath offered no evidence of irreparable harm and that therefore, Rath's petition was properly dismissed.

It is clear, and no one argues otherwise, that Rath has standing to maintain the action. See, *Wasikowski, supra*; *Chambers, supra*. Likewise, it is clear that taxpayers have an equitable interest in public funds and their proper application. See, *Niklaus v. Miller*, 159 Neb. 301, 303, 66 N.W.2d 824, 826 (1954) ("each taxpayer has such an individual and common interest in public funds as to entitle him to maintain an action to prevent their unauthorized appropriation"); *Rein v. Johnson*, 149 Neb. 67, 70, 30 N.W.2d 548, 552 (1947) ("resident taxpayers of the state have an equitable interest in the public funds of the state and in their proper application"). In fact, the public's interest in the proper appropriation of public funds is the main impetus behind the relaxation of standing requirements in this area. See, *Niklaus, supra*; *Rein, supra*; *Woodruff v. Welton*, 70 Neb. 665, 97 N.W. 1037 (1904). It is not clear, however, what a resident taxpayer alleging the illegal expenditure of public funds needs to show in order to establish irreparable harm.

[17] We conclude that the injury that flows from an illegal expenditure of public funds is inherently irreparable. An injury is irreparable "when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard." *Central Neb. Broadcasting*, 251 Neb. at 933, 560 N.W.2d at 772, citing *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 60 N.W. 717 (1894). See, also, *World Realty Co. v. City of Omaha*, 113 Neb. 396, 404, 203 N.W. 574, 577 (1925) ("'[i]rreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great . . .'").

[18] Obviously, plaintiff taxpayers have no problem determining the amount of money that was illegally expended. However, an eventual declaration of illegality does not void the obligations a municipal corporation has incurred for services expended on its behalf under the illegal contract. Thus, the taxpayer will not be made whole, i.e., the public coffer will not return to its original level. "Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was unenforceable because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received." *Gee v. City of Sutton*, 149 Neb. 603, 609, 31 N.W.2d 747, 751 (1948). In other words, if an action is "void not because of a lack of power but because of a failure to properly exercise existing power[,] the organization is bound to the extent that it has received the benefits of the action." *Fulk v. School District*, 155 Neb. 630, 643, 53 N.W.2d 56, 63 (1952). See, also, *Lanphier v. OPPD*, 227 Neb. 241, 417 N.W.2d 17 (1987).

For example, if a city acts within its power to enter into a contract for a construction project, as soon as a contractor expends efforts on behalf of the city, the contractor becomes entitled to compensation for those efforts, even if the contract is eventually declared null and void for failure to follow the applicable bidding statutes. This leaves the taxpayer with unavoidable and unrecoverable obligations and establishes the existence of irreparable harm.

Moreover, the district court's ruling suggests that before taxpayers are able to obtain an injunction to prevent an illegal expenditure of public funds, they have to quantify the amount the expenditure will increase their rates or taxes. Yet, even if we assume a taxpayer action gives rise to a private claim for damages, it would be nearly impossible for an aggrieved taxpayer to quantify his or her pro rata share of damages. For example, an illegal expenditure of $500 would have almost no budgetary or tax consequences for a city with a multimillion-dollar budget. In fact, while it may be easy to determine the amount of the illegal expenditure, the true fiscal impact of the expenditure will often be indeterminable because of the myriad of fiscal and political choices that follow an expenditure of public funds.

Finally, if an absence of irreparable harm (beyond the illegality of the expenditure itself) prevents a court from deciding if an illegal expenditure of public funds has occurred, following the law becomes irrelevant to those entrusted to uphold it. This cannot be the case. If the inscription on the State Capitol Building is true and "[t]he salvation of the state is watchfulness in the citizen" (inscribed by Hartley Burr Alexander), legitimate taxpayer suits should not be unduly hindered and empty formalism should not prevent a determination on the merits.

[19] In sum, we hold that a taxpayer seeking to enjoin an alleged illegal expenditure of public funds needs to prove only that the funds are being spent contrarily to law in order to establish an irreparable injury. Stated otherwise, irreparable harm should be assumed whenever a plaintiff proves an expenditure of public funds is contrary to law. See, *White v. Davis*, 30 Cal. 4th 528, 556, 68 P.3d 74, 93, 133 Cal. Rptr. 2d 648, 671 (2003) ("a taxpayer's general interest in not having public funds spent unlawfully" is "sufficient to afford standing to bring a taxpayer's action . . . and to obtain a permanent injunction after a full adjudication on the merits"); *Kendall Appraisal Dist. v. Cordillera Ranch, Ltd.*, No. 04-03-00150-CV, 2003 WL 21696901 at *2 n.2 (Tex. App. July 23, 2003) (standing is "conferred on the taxpayer, despite the absence of a distinct injury, precisely because imminent and irreparable harm will likely befall the taxpayer in the absence of equitable intervention").

LOWEST RESPONSIBLE BIDDER

Rath's second assignment of error asserts that the City was required to award the contract to Westhoff because it was the lowest responsible bidder. Even though this assignment is moot with respect to the present parties, we review this issue under the public interest exception for guidance to public officials and future litigants. Section 18-507 governs contracting for the construction of improvements to the wastewater treatment facilities for all cities and villages in Nebraska. Among other things, § 18-507 requires that the "lowest responsible bidder" be awarded the contract.

> Upon approval of such plans, the governing body shall thereupon advertise for sealed bids for the construction of said improvements once a week for three weeks in a legal paper published in or of general circulation within said municipality, and the contract *shall be awarded to the lowest responsible bidder.*

(Emphasis supplied.) *Id.* Cities of the second class, such as Sutton, are also required to follow Neb. Rev. Stat. § 17-913 et seq. (Reissue 1997) when contracting for the construction of sewerage systems, including wastewater treatment facilities. These provisions also require that the contract be granted to the "lowest responsible bidder." See § 17-918.

[20] On a number of occasions, we have discussed the policy behind competitive bidding. We have said:

> [C]ompetitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money. . . . Competitive bid statutes exist to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price. Such statutes are enacted for the benefit of taxpayers.

(Citation omitted.) *Anderson v. Peterson*, 221 Neb. 149, 153, 375 N.W.2d 901, 904 (1985). By mandating that contracts be awarded to the lowest responsible bidder, the Nebraska Legislature is seeking to protect taxpayers, prevent favoritism and fraud, and increase competition in bidding by placing bidders on equal footing. See, generally, *Philson v. City of Omaha*, 167 Neb. 360, 93 N.W.2d 13 (1958); *Fairbanks, Morse & Co. v. City of North Bend*, 68 Neb. 560, 94 N.W. 537 (1903); *State, ex rel. Whedon, v. York*

County, 13 Neb. 57, 12 N.W. 816 (1882); *Merrick County v. Batty*, 10 Neb. 176, 4 N.W. 959 (1880).

At its heart, this dispute is about the role public officials should play in the awarding of contracts. A review of our cases makes it clear that public officials are granted discretion under the competitive bidding statutes. The real question, however, is determining when, if at all, their freedom of action is curtailed. As noted elsewhere, it is a delicate balancing act:

> These provisions should not be so strictly construed as to reduce the authorities to mere ministerial agents, since this would often defeat the purpose for which they are designed, by allowing unscrupulous contractors to defraud the city. On the other hand, if the authorities are vested with too broad discretionary powers, the way for fraudulent practices is again left open.

10 Eugene McQuillin, The Law of Municipal Corporations § 29.72 at 482 (3d ed. 1999).

[21,22] Determining the lowest responsible bidder is a two-step process. The first step is for the public body to determine which bidders are responsible to perform the contract. Responsibility, however, is not merely a synonym for a bidder's pecuniary ability. Rather, responsibility also pertains to a bidder's

> ability and capacity to carry on the work, his equipment and facilities, his promptness, and the quality of work previously done by him, his suitability to the particular task, and such other qualities as are found necessary to consider in order to determine whether or not, if awarded the contract, he could perform it strictly in accordance with its terms.

State, ex rel. Nebraska B. & I. Co., v. Board of Commissioners, 105 Neb. 570, 572-73, 181 N.W. 530, 532 (1921). See, also, *Day v. City of Beatrice*, 169 Neb. 858, 101 N.W.2d 481 (1960); *Best v. City of Omaha*, 138 Neb. 325, 293 N.W. 116 (1940).

[23] Because many of the aforementioned qualities and characteristics are subjective in nature, we have recognized that public officials "do not act ministerially only, but exercise an official discretion" when "passing upon the question of the responsibility of bidders." See *State, ex rel. Nebraska B. & I. Co.*, 105 Neb. at 573, 181 N.W. at 532. See, also, *Best, supra*; 64 Am. Jur. 2d *Public Works and Contracts* § 69 at 704 (2001) ("public bodies

have discretion to determine that bidders are responsible"). Only bidders that are deemed responsible are proper for further consideration and ultimate approval.

[24] The second step in determining the lowest responsible bidder focuses on which of the responsible bidders has submitted the lowest bid. The lowest total price is not always dispositive of this question because public bodies retain an official discretion to determine which bid offers the best value to their constituents. See *Best*, 138 Neb. at 328, 293 N.W. at 118 ("[p]ublic administrative bodies possess a discretionary power in awarding contracts . . . and in determining questions of public advantage and welfare"). Stated otherwise, the public body has discretion to award the contract to one other than the lowest of the responsible bidders whenever a submitted bid contains a relevant advantage. See, *Day, supra*; *Niklaus v. Miller*, 159 Neb. 301, 66 N.W.2d 824 (1954); *Best, supra*. For example, a bid that promises an early completion date or construction with higher quality materials could justify a public body's award of a construction contract to one other than the lowest of the responsible bidders. See, *Niklaus, supra* (earlier completion date justified city council's decision to award construction contract to higher cost bidder); *Best, supra* (noting importance of completion dates); *Worth James Const. v. Jacksonville Water Com'n*, 267 Ark. 214, 590 S.W.2d 256 (1979) (better quality pipe justified award of construction contract to higher cost bidder). Cf., *State v. City of Lincoln*, 68 Neb. 597, 94 N.W. 719 (1903) (difference in quality of coal justified award of contract to one other than lowest bidder); *Austin v. Housing Authority*, 143 Conn. 338, 122 A.2d 399 (1956) (difference in bids for insurance coverage justified award of contract to higher cost bidder).

[25] Recognizing that public bodies exercise an official discretion when awarding bids, we have stated that courts will show deference when reviewing challenges to a public body's responsibility determinations and award decisions.

> Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts, and as it believes for the best interests of its municipality, and where there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of a court to

> interfere and substitute its judgment for that of the administrative body.

Best v. City of Omaha, 138 Neb. 325, 328, 293 N.W. 116, 118 (1940). In other words, whenever a public body has discretion to make a decision during the bidding process, a court is essentially limited to reviewing that decision for bad faith. See, *Day v. City of Beatrice*, 169 Neb. 858, 101 N.W.2d 481 (1960); *Best, supra*; *State, ex rel. Nebraska B. & I. Co., v. Board of Commissioners*, 105 Neb. 570, 181 N.W. 530 (1921).

The appellees argue that this case falls under the analysis of *Best, supra*, and *Day, supra*, and that the City Council's decision should be reviewed deferentially. Rath, on the other hand, argues that public bodies have no discretion when two responsible bidders submit identical bids except for price. In such cases, Rath argues, the public body can only award the project to the lowest of the responsible bidders.

[26] Rath is correct. In *Day, supra*, we reaffirmed the validity of *State v. Cornell*, 52 Neb. 25, 71 N.W. 961 (1897), where we held that when the only difference in bids is price, no discretion exists on the part of a public body in awarding the contract; the responsible bidder with the lowest bid must be awarded the contract. In essence, if the bids for the improvements to the wastewater treatment facility are identical, they become bids to sell the same commodity. Thus, the actual value/cost of the bids can be objectively compared, and the public body has no discretion to award the bid to anyone other than the lowest of the responsible bidders. Cf., *Austin, supra*; *Otter Tail Power Co. v. Village of Elbow Lake*, 234 Minn. 419, 49 N.W.2d 197 (1951).

The policy behind this rule is simple: If responsible bidders submit identical bids—except on price—the public body is without a valid reason to award the project to anyone other than the lowest of the responsible bidders. Stated otherwise, if all factors are equal except price, only price should be considered. While courts should normally ignore mere assertions of favoritism and waste, absent evidence to the contrary, questions abound when public officials choose the costlier of two identical bids from responsible contractors. This is aptly demonstrated in the instant case when concerns were expressed that Van Kirk was awarded the bid only because it may have been a local, favored business.

[27] With reference to the facts in the present appeal, the district court, in its order, stated that both Westhoff and Van Kirk were deemed responsible bidders by the City Council. However, our review of the record shows that the City Council failed to make this determination. This failure would usually be fatal to the award, as a court cannot make an independent determination of responsibility. See *State, ex rel. Nebraska B. & I. Co., v. Board of Commissioners*, 105 Neb. 570, 181 N.W. 530 (1921). Determining the responsibility of bidders is a job for elected officials, and a court's only role is to review those decisions to make sure the public officials "did not act arbitrarily, or from favoritism, ill will, or fraud." *Id.* at 573, 181 N.W. at 532.

However, because review under the public interest exception to the doctrine of mootness is designed to provide guidance to public officials and future litigants, we must assume that Westhoff and Van Kirk were deemed responsible bidders. The next determination to be properly made is whether the City Council had discretion to award the bid to someone other than the lowest of the responsible bidders, i.e., it must be determined if the bids contained relevant differences. The appellees argue that the City Council highlighted the relevant differences in the bids. Specifically, they argue that Van Kirk's bid was superior because (1) Van Kirk is a local contractor and, therefore, familiar with the varied soil types in the area; (2) Van Kirk is a local contractor that would be immediately available for future repairs and maintenance; and (3) Van Kirk has past experience working with the project engineer.

Initially, even if we were to assume that some of these alleged advantages would favor one contractor over another in either of the bidding stages, there was no evidence before the City Council to support the first two claims. Moreover, all of the alleged advantages rest on factors outside of the bid and the bidding specifications. Therefore, while some of these factors might have been relevant to determine the bidders' responsibility, they are irrelevant when determining the similarity of the bids. If the City were truly concerned about a contractor's familiarity with the soil types in the geographical area, it could have included appropriate requirements in the invitation to bid or the bidding instructions. Furthermore, future maintenance or

repairs to the treatment facility is wholly separate from the proposed improvements, and the record contains no contractual provision preventing the City from using any contractor, including local contractors, for future repairs. Lastly, to the extent experience with the project engineer is relevant, the evidence illustrates that Westhoff had worked with the project engineer at least 11 times previously.

Our review of the bids shows that they were identical in every respect but price. The bids, per the project engineer's instructions, contain the exact same specifications and dates of completion. Because the bids were identical except for price, the City Council would have had no discretion to award the contract to anyone other than Westhoff, the lowest of the responsible bidders.

[28] Lastly, Van Kirk argues the City retained the discretion to award the bid to one other than the lowest responsible bidder because the invitation to bid purported to give the City the right to accept whatever bid was in the best interests of the City in its sole discretion. This argument is without merit. A party cannot, by contractual agreement with another party, obtain the power to do something that state law forbids. See *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 406, 562 N.W.2d 534, 542 (1997) ("[i]f an act is prohibited by statute, an agreement in violation of the statute is void").

In sum, a public body has broad discretion in the awarding of public contracts. Initially, that discretion allows a public body to determine whether a bidder is responsible. It also allows a public body to look beyond a bid's stated price to determine the true value of the bid. Stated otherwise, a public body has the authority to determine which of the responsible bidders has submitted the bid that offers the best value to its constituents. However, when responsible bidders submit identical bids, the public body's freedom of action is curtailed and it must award the contract to the lowest of the responsible bidders. Contracts let in contravention of this rule, i.e., in contravention of §§ 17-918 and 18-507, are illegal and can be enjoined.

CONCLUSION

For the foregoing reasons, we conclude that a resident taxpayer seeking to enjoin an illegal expenditure of public funds

establishes the requisite irreparable harm by proving that the funds are being spent contrarily to law. In addition, we determine that a public body has no discretion to award a bid to any entity other than the lowest bidder when two or more responsible bidders *submit identical bids* except for price. However, because we have concluded that the instant appeal is moot and that the above-stated determinations are made based on the public interest exception to the mootness doctrine, we dismiss the present appeal.

APPEAL DISMISSED.

HENDRY, C.J., and WRIGHT, J., not participating.

PENNFIELD OIL COMPANY, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. W.L. WINSTROM, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF R.W. WINSTROM, APPELLEE AND CROSS-APPELLANT, AND ANDREW L. WINSTROM, APPELLEE.

673 N.W.2d 558

Filed January 23, 2004. No. S-02-1284.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Injunction: Final Orders: Appeal and Error.** A temporary injunction is not a final, appealable order.
6. **Summary Judgment: Final Orders: Appeal and Error.** Denial of a motion for summary judgment is not a final order and is not therefore appealable.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Appeal dismissed.

William R. Johnson, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden for appellant.

Bruce D. Vosburg, Gerald L. Friedrichsen, and Susan E. Hager, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., and Russell S. Daub also filing briefs and arguing on behalf of Pennfield Oil Company.

Brien M. Welch and Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee W.L.Winstrom.

David A. Domina and James F. Cann, of Domina Law P.C., for appellee Andrew L. Winstrom.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

STEPHAN, J.

This is an appeal from an interlocutory order of the district court for Douglas County denying a motion filed by the law firm of Lamson, Dugan & Murray, L.L.P. (Lamson firm), which sought leave to appear on behalf of Pennfield Oil Company, and disqualification of the law firm of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O. (Fitzgerald firm), which has served as counsel for Pennfield Oil since the inception of this action.

BACKGROUND

The pleadings and exhibits received in evidence at various hearings conducted by the district court reflect the following facts: Pennfield Oil is a closely held Nebraska corporation controlled by members of the Winstrom family, with its principal place of business in Omaha, Nebraska. W.L. Winstrom (W.L.) is currently the chief executive officer of Pennfield Oil and chairman of its three-member board of directors. W.L.'s wife, Sydney Winstrom (Sydney), is also a director, and Andrew L. Winstrom (Andrew), their son, is president and the third director.

The "Articles of Agreement of the Pennfield Oil Company Stockholders," executed in 1948 and 1960, provided, inter alia,

that upon the death of any stockholder, Pennfield Oil would buy his or her stock at book value within 30 days of the date of the stockholder's death. R.W. Winstrom (R.W.), W.L.'s father and Andrew's grandfather, died on November 8, 1987. At the time of his death, R.W. owned 24.73 of the 50 outstanding shares of common capital stock of Pennfield Oil. W.L. owned the remaining 25.27 shares. W.L. was appointed as personal representative of R.W.'s estate, which was filed in Douglas County Court.

On December 14, 1987, shortly after R.W.'s death, Pennfield Oil's board of directors resolved that "the repurchase agreement relating to R.W. Winstrom's stock be enacted due to his untimely death" and that to "[e]nsure the smooth continuation of operations so as not to cause undue financial hardship[,] arrangements will be made to pay for this stock over an extended time period." An agreement entitled "Restated Stock Repurchase Agreement" was subsequently entered into between Pennfield Oil and all of its shareholders to "confirm restate, formalize and clarify the existing Pennfield stock repurchase agreement." The restated stock agreement was signed by W.L., both individually and in his role as personal representative for R.W.'s estate, as well as by Andrew. In January 1990, 16.24 shares of the stock which had been held by R.W. at the time of his death were redeemed by Pennfield Oil. Andrew purchased 15.89 shares of this stock. On December 31, 1992, W.L. and Sydney made a gift of 8.43 shares of Pennfield Oil stock to Andrew. At that point, there were 49.65 shares of Pennfield Oil stock outstanding, with Andrew holding 24.32 shares (48.983 percent) and W.L. holding 16.84 shares (33.917 percent). The remaining 8.49 shares, representing 17.1 percent of the shares outstanding, are the subject of this litigation. Those shares were initially retained by the estate to allow payment of estate taxes over an extended period of time pursuant to the Internal Revenue Code, see I.R.C. § 6166 (2000), and to reduce the burden on Pennfield Oil of redeeming all of R.W.'s stock at once. The last installment on the estate taxes was paid in August 2000, and W.L. filed an informal closing of the estate on August 8.

On February 7, 2001, Pennfield Oil filed this action against W.L., individually and in his capacity as personal representative of the estate of R.W. In its petition, Pennfield Oil alleged that it had given W.L. a notice of redemption with respect to the 8.49

shares on January 23, 2001, but that W.L. had refused to surrender the stock for redemption and had notified Pennfield Oil that he intended to transfer the stock to himself in his individual capacity. Pennfield Oil sought declaratory relief with respect to its claim that W.L. was obligated to surrender the 8.49 shares of Pennfield Oil stock for redemption. Based upon allegations of breach of contract and breach of fiduciary duty on the part of W.L., Pennfield Oil also sought orders temporarily and permanently enjoining W.L. from voting the disputed stock, from taking any action to waive rights or obligations with respect to its redemption, or from issuing additional shares of Pennfield Oil stock. Pennfield Oil subsequently filed an amended petition in which Andrew was added as a party defendant, based upon an allegation that as a stockholder, director, and president of Pennfield Oil, he "may be a necessary and indispensable party." The petition and amended petition were filed by the Fitzgerald firm as counsel for Pennfield Oil.

W.L. filed an answer denying any obligation to surrender the stock for redemption and alleging that it was his intention and that of Pennfield Oil to waive its right of redemption as to the 8.49 shares. W.L. further alleged that

> to continue to allow the defendant Andrew L. Winstrom to prevent a legitimate meeting of the directors of Pennfield to meet and consider the corporation's waiver of its right of redemption to the R.W. Winstrom Estate shares of stock would be unjust and inequitable, contrary to the rights of the directors to act on behalf of the corporation and adverse to the interests of the corporation.

In its reply, Pennfield Oil alleged that by virtue of the actions it had taken to exercise its right of redemption, "W.L. Winstrom is no longer the majority shareholder of plaintiff Pennfield Oil Company."

On February 15, 2001, the district court issued a temporary injunction reflecting that "[a]ll parties are in further agreement to the entry of a Temporary Injunction as set forth herein." This order temporarily enjoined W.L., both personally and as personal representative of the estate of R.W., Andrew, and Pennfield Oil from taking any action to (1) transfer the 8.49 shares to any party other than Pennfield Oil, (2) vote the 8.49 shares, (3) waive any

rights or obligations of redemption with respect to the 8.49 shares, or (4) issue additional shares of Pennfield Oil stock or in any way change the status quo of Pennfield Oil, "including, but not limited to, changing the present number or membership of the Board of Directors or officers of the corporation or amending any By-Laws or Article affecting the issues involved herein."

On September 27, 2002, W.L. filed a motion with the district court asking the court to allow a meeting of Pennfield Oil's board of directors and attaching a proposed agenda. W.L.'s proposed agenda asked the court's approval to address the following:

> 1. Which action is an authorized action brought in the name of and on behalf of Pennfield Oil Company in the District Court of Douglas County, Nebraska.
>
> 2. Whether Pennfield Oil Company should indemnify, hold harmless, and pay attorneys' fees and costs for the defense of Andrew L. Winstrom to the action *Pennfield Oil Company v. Andrew L. Winstrom*, Doc. 1017, No. 149.
>
> 3. Ratify and approve corporate capital expenditures.
>
> 4. Hire auditors to perform financial audits for 2002.
>
> 5. Accept financial statements which have been prepared but not yet completed by the auditors for 2001.
>
> 6. Declare dividends and distributions or determine that Pennfield Oil Company needs to retain equity in the best interests of Pennfield Oil Company concerning 2002 earnings.
>
> 7. Negotiate and continue existing line of credit with its bank.
>
> 8. Appointment of legal counsel to represent Pennfield Oil Company in various matters, including current actions filed in the District Court of Douglas County, Nebraska.
>
> 9. Determine compensation for officers of the corporation.
>
> 10. Determination of officer job duties and the granting of authority to speak on behalf of Pennfield Oil Company with outside third parties.
>
> 11. Determine whether Andrew L. Winstrom had authority to enter into contracts with third parties. Also review and approve, if necessary, contracts which have already been entered into by Andrew L. Winstrom representing that the corporation's Board of Directors approved these contracts.

After a hearing, the district court entered an order on October 15, 2002, granting permission for Pennfield Oil's board of directors to meet and consider those matters listed in the "Proposed amended Agenda Ex. 155." On the proposed amended agenda referred to in this order, items Nos. 1, 2, and 8 on the original proposed agenda were lined out, and the following items were added: "12. Report on Sales," "13. Report on Procurement," and "14. Report on Government Relations." In its order approving a board of directors meeting, the district court expressly admonished all parties not to "vote, discuss or consider" the 8.49 shares and reminded the parties that the temporary injunction was still in effect.

The board, consisting of W.L., Sydney, and Andrew, met on October 16, 2002, and passed five resolutions. Resolution No. 4 describes the duties of each of the officers and provides in relevant part that W.L., as chief executive officer, "has complete control, authority and management responsibilities concerning all matters of litigation, legal, taxation and regulatory matters as they relate to and concern Pennfield Oil Company." Resolution No. 5 elaborated more fully on W.L.'s authority, stating:

> **RESOLVED**, that the Board of Directors further determines, that the full and exclusive authority to speak on behalf of Pennfield Oil Company on all matters concerning litigation, past, present or future, or communication with outside parties as it relates to litigation, is solely vested in W.L. Winstrom as the Chief Executive Officer, Chairman of the Board of Pennfield Oil Company. It is the Board of Directors' intent and its specific instruction to W.L. Winstrom that he has the sole authority from the Board of Directors to bind Pennfield Oil Company in all matters involving litigation, past, present or future, on behalf of Pennfield Oil Company.

Andrew abstained from voting on these resolutions, and they were passed 2 to 0.

On October 18, 2002, W.L. sent a letter to the Lamson firm requesting that it represent Pennfield Oil in this action and attaching a copy of resolution No. 5 as proof of his authority to do so. On October 23, the Lamson firm filed a motion for leave to appear as counsel on behalf of Pennfield Oil and a motion to disqualify the Fitzgerald firm.

At the October 25, 2002, hearing on the motions, the district court stated from the bench:

> From my reading of the attachments to [the Lamson firm's] motion, certainly things were undertaken by the board of directors — things that I would never have expected them to undertake and things that were far beyond the order that was entered here previously. So I'm not going to have this hearing go on any longer.

The court denied the two motions filed by the Lamson firm purportedly on behalf of Pennfield Oil. During that same proceeding, the attorney representing W.L. informed the district court that he had filed with this court an original action for a writ of prohibition and a writ of mandamus contesting the district court's jurisdiction to hear the case. On October 29, the Lamson firm, on behalf of Pennfield Oil, filed an original action for a writ of mandamus with this court seeking review of the district court's October 25 denial of leave to appear as Pennfield Oil's counsel. Without comment, this court declined to accept jurisdiction over these original actions on October 30 and November 1, 2002, respectively.

On November 4, 2002, the day on which trial was to commence, the Lamson firm filed in the district court a notice of appeal which provided:

> COMES NOW the Plaintiff, PennField [sic] Oil Company, by and through its attorney, and gives notice to the Court of its intent to appeal to the Nebraska Supreme Court or the Court of Appeals this Court's Order of October 25, 2002, which denied the Plaintiff's Motions to be represented by counsel of its choosing, and denying the disqualification of plaintiff's current attorney.

We moved the appeal to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). During the pendency of the appeal, we denied motions for summary disposition, deferring a determination of appellate jurisdiction until final disposition. We ordered supplemental briefing on jurisdictional issues and granted a motion to advance the case for oral argument.

ASSIGNMENTS OF ERROR

On behalf of Pennfield Oil, the Lamson firm assigns, restated, that the trial court erred in (1) overruling its motion for leave to allow the Lamson firm to appear as counsel for Pennfield Oil and (2) overruling its motion to disqualify the Fitzgerald firm from continuing to appear as Pennfield Oil's counsel.

On cross-appeal, W.L. argues that the Douglas County district court lacks jurisdiction to hear the underlying suit and that therefore this court lacks jurisdiction to hear this appeal.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002); *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002).

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003); *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999). We are presented with two distinct jurisdictional arguments in this case. First, Andrew and the Fitzgerald firm, on behalf of Pennfield Oil, argue that this court lacks jurisdiction because the district court never entered a final, appealable order. Second, the Lamson firm, on behalf of W.L., contends on cross-appeal that this court lacks jurisdiction based on the principle that when a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. See *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

[3,4] The first step in determining the existence of appellate jurisdiction is to ascertain whether the October 25, 2002, order of the district court is appealable. Generally, for an appellate court to acquire jurisdiction of an appeal, there must be a final order

entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. See, *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003); *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003). The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. See, Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

The Lamson firm does not contend that the October 25, 2002, order of the district court is "final," but, rather, argues that it is an appealable interlocutory order under the exception to the final order requirement recognized in *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997). In that case, the district court entered a pretrial order granting the plaintiff's motion to disqualify the defendant's attorneys on the ground that the plaintiff had consulted members of the firm representing the defendant about the case before employing another firm to represent her. On the defendant's appeal from the disqualification order, we noted our prior holding in *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995). *CenTra, Inc.* held that when an order *denying* disqualification of counsel involves issues collateral to the basic controversy, and when an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, the party should seek mandamus or other interlocutory review. We reasoned in *Richardson*, however, that because mandamus is not a preventive remedy but essentially a coercive writ, the defendant could not bring an original action for a peremptory writ of mandamus to compel the district court to vacate its order of disqualification. Noting the unfairness of depriving the defendant in this circumstance of interlocutory review of the disqualification order, *Richardson* adopted an exception to the final order requirement which was premised upon a determination that (1) the disqualification order "involve[d] issues collateral to the underlying action" and (2) "[d]elaying the appeal until a dispositive judgment on the

underlying controversy has been rendered would not likely protect the [defendants'] interests in the counsel of their own choosing and in the time and expense associated with hiring new counsel." *Richardson v. Griffiths*, 251 Neb. at 831, 560 N.W.2d at 435.

Richardson was subsequently distinguished by our decision in *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002). In that case, a defendant moved to disqualify two law firms representing the plaintiff on the ground that a lawyer in one of the firms had previously provided legal services to the defendant with respect to the lawsuit. The district court denied the motion as to one of the firms, and the defendant appealed. In addressing the jurisdictional issue of whether the order denying the motion to disqualify was appealable, we noted that the exception in *Richardson* had been "necessary" because mandamus was not available to compel the court to vacate its order granting disqualification, and that "to allow the district court's disqualification order to stand, without allowing an immediate avenue for appellate review, would have prejudiced the rights of the party whose counsel had been disqualified." *Trainum v. Sutherland Assocs.*, 263 Neb. at 783, 642 N.W.2d at 820. In *Trainum*, we declined to extend the *Richardson* exception to the final order requirement to orders *denying* disqualification based in part on our prior cases holding original actions for mandamus, and not interlocutory appeals, to be the appropriate method of review for denials of motions to disqualify counsel. See, *CenTra, Inc. v. Chandler Ins. Co., supra*; *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990). We reasoned that in the case of an order denying a motion to disqualify, "a mandamus action brought as an original action in the Supreme Court would offer the parties a more expedient method of review and would prevent use of a meritless motion to disqualify to bring the proceedings to a halt." *Trainum v. Sutherland Assocs.*, 263 Neb. at 784, 642 N.W.2d at 820.

In its jurisdictional statement, the Lamson firm contends that the interlocutory order of the district court is appealable under the exception in *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), because denying its request for leave to appear as counsel for Pennfield Oil had "the same effect as an

order granting a motion for disqualification of counsel who already has appeared on behalf of a party." Implicit in this argument is that our refusal to accept original jurisdiction of the previous mandamus action directed to the same order means that *Richardson*, and not *Trainum*, controls on the issue of appellate jurisdiction. However, we conclude that this case is distinguishable from both *Richardson* and *Trainum* in that the issue of legal representation does not rest upon issues collateral to the underlying action.

Both *Richardson v. Griffiths, supra*, and *Trainum v. Sutherland Assocs., supra*, dealt with the issue of whether an attorney should be disqualified under ethical rules which prohibit an attorney from representing a party whose interests are directly adverse to those of a former client and where the subject matter involved is the same as that for which the attorney represented the former client. See Canons 4, 5, and 9 of the Code of Professional Responsibility. In *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. at 993, 458 N.W.2d at 253, this court held that under ethical rules then in effect,

> when an attorney who was intimately involved with the particular litigation, and who has obtained confidential information pertinent to that litigation, terminates the relationship and becomes associated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation.

Under this rule, where facts existed which triggered the irrebuttable presumption, the court had a "clear and absolute" duty to grant a motion to disqualify the attorney in question. *Id.* at 996, 458 N.W.2d at 254.

Richardson v. Griffiths, supra, was an action to rescind a purchase agreement for a house. *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002), involved claims based upon alleged limited liability company improprieties and violations of securities laws. In each case, the issue "collateral to the underlying action" was whether a lawyer for a party should be disqualified on the basis of prior representation of an adverse party. In this case, however, there is no claim that the Fitzgerald

firm should be disqualified and replaced by the Lamson firm on ethical grounds. Rather, the issue is whether substitution of counsel should be ordered based upon the resolutions passed by the board of directors of Pennfield Oil on October 16, 2002, as set forth above. That issue turns on whether the resolutions were lawfully adopted, which is related to the central issue in this case: Which of the two stockholders has a controlling interest in Pennfield Oil? If the disputed 8.49 shares are redeemed by Pennfield Oil, Andrew will hold more than 50 percent of the outstanding stock. If the shares are not redeemed by Pennfield Oil and are held by W.L. in his name, W.L. will possess a controlling interest in Pennfield Oil. Thus, the issue of who has authority to select counsel to represent Pennfield Oil with respect to its claimed right of redemption is not collateral to the merits of the action; it is directly related to the disputed central issues of corporate ownership and control.

[5] As noted, the district court had entered a temporary injunction which prohibited all parties from taking certain actions with respect to the disputed 8.49 shares of stock, thereby preserving the status quo pending further order of the court. A temporary injunction is not a final, appealable order. *Guaranty Fund Commission v. Teichmeier*, 119 Neb. 387, 229 N.W.2d 121 (1930); *Einspahr v. Smith*, 46 Neb. 138, 64 N.W. 698 (1895). The district court also entered a subsequent order permitting Pennfield Oil's board of directors to act on specified matters, subject to an admonition that the temporary injunction remained in effect as to all other matters. It is clear from the record that the district court denied the motions of the Lamson firm seeking to be substituted for the Fitzgerald firm as counsel for Pennfield Oil at least in part because the court considered the resolutions passed by the board of directors authorizing such action to be in violation of its temporary injunction and subsequent order regarding the board of directors meeting. To determine whether this decision was erroneous, as the Lamson firm contends, we would necessarily be required to consider issues which are not merely collateral but directly related to the merits of the action and the nonappealable temporary injunction. For this reason, the order denying the motions filed by the Lamson firm, regardless of how it is characterized, does not fall within the exception in

Richardson v. Griffiths, 251 Neb. 825, 560 N.W.2d 430 (1997), to the final order requirement, nor is it reviewable in a mandamus action under *Trainum v. Sutherland Assocs., supra.* It is simply an interlocutory order which is not ripe for appellate review until a final order has been entered.

[6] Because there has been no appealable order entered by the district court, this court does not have appellate jurisdiction and must dismiss the appeal. We therefore cannot reach the issue raised by the cross-appeal as to whether the district court has subject matter jurisdiction. Although the record reflects that the district court has resolved that issue in the affirmative by denying a motion for summary judgment filed on behalf of W.L., denial of a motion for summary judgment is not a final order and is not therefore appealable. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003); *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003). Having concluded that we have no jurisdiction over the appeal and are therefore unable to reach its merits, we likewise conclude that we lack any independent jurisdictional basis to resolve the issues raised by the cross-appeal. We therefore express no opinion and make no determination with respect to the issue of whether the district court has subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, we conclude that because no appealable order has been entered by the district court, we lack appellate jurisdiction over the appeal and cross-appeal, and we therefore dismiss.

APPEAL DISMISSED.

McCORMACK, J., not participating.

BRIAN HEISTAND, APPELLEE, V.
LORI HEISTAND, APPELLANT.

673 N.W.2d 541

Filed January 23, 2004. No. S-02-1412.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law

which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.

2. **Expert Witnesses: Appeal and Error.** An appellate court's review of the trial court's admission or exclusion of expert testimony which is otherwise relevant will be for an abuse of discretion.
3. **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.
4. **Expert Witnesses.** An expert's opinion is ordinarily admissible if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
5. **Child Custody: Guardians Ad Litem: Rules of Evidence: Hearsay.** The duties of a guardian ad litem in a case involving a child custody dispute are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court. Such reports to the court, whether in written form or testimony by the guardian ad litem, including hearsay, are subject to the Nebraska rules of evidence.
6. **Expert Witnesses.** Expert testimony concerning a question of law is generally not admissible.
7. **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.
8. **Modification of Decree: Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a change in circumstances. Evidence of a material change in circumstances warranting modification of a dissolution decree must be proved at trial and contained in the record on appeal.
9. **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.
10. **Modification of Decree: Child Custody: Evidence: Time.** In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed and remanded with direction.

Kelly T. Shattuck, of Cohen, Vacanti, Higgins & Shattuck, for appellant.

T.J. Pattermann, of Smith Peterson Law Firm, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Lori Heistand appeals from an order of modification entered by the district court for Douglas County in which physical custody of the parties' minor child was transferred from Lori to Brian Heistand. We conclude, based upon our de novo review, that the district court abused its discretion in so holding.

BACKGROUND

On January 17, 1991, the marriage of Lori and Brian was dissolved by a court in Missouri, where both had resided for more than 90 days prior to the commencement of the dissolution proceeding. At the time of the decree, the parties had one minor child, Abby, who was born on April 1, 1990. The decree provided for the parties to have joint legal custody of Abby and for Lori to have physical custody of Abby with reasonable rights of visitation for Brian.

In July 2000, Brian resided in Council Bluffs, Iowa, and Lori and Abby resided in Omaha, Nebraska. On July 3, Brian filed a petition for modification of child custody in the district court for Douglas County, alleging generally that there had been a material change in circumstances subsequent to the decree which necessitated a change in custody. Brian alleged that Lori's anticipated move out of the State of Nebraska was intended in part to deprive him of visitation rights and was not in Abby's best interests. Brian also alleged that Lori was "keeping company with persons of a questionable nature at this time." Lori filed an answer and cross-petition on July 17, generally denying Brian's allegations regarding custody and requesting an increase in child support.

Brian filed an amended petition on August 3, 2000, alleging that the district court continued to have jurisdiction over the modification proceeding despite the fact that Lori and Abby had moved to Kansas, because Nebraska had been Abby's home state at the time the action was commenced. On August 10, Lori filed an answer and cross-petition affirmatively alleging that Brian had failed to state facts sufficient to support modification of custody and that Nebraska lacked jurisdiction to determine custody because none of the parties were currently residing in Nebraska. After a hearing in October, Lori moved back to Omaha. The parties participated in court-ordered mediation and

agreed to a parenting plan which was subsequently filed with the district court on March 19, 2001.

In the summer of 2001, Lori moved to the Kansas City, Missouri, area. The parties arranged for Abby to stay with Brian and attend school in Council Bluffs. The parties agreed that Lori would receive liberal visitation. Abby moved in with Brian on August 11 and started school in Council Bluffs on August 23. The parties arranged for Abby to visit Lori the weekend of September 14 to 17. When Brian called Lori on September 16 to make arrangements for Abby's return, Lori refused to return Abby and told Brian that Abby would be remaining with her.

On September 20, 2001, Brian filed a motion for injunctive relief seeking an emergency restraining order and enforcement of the settlement, with a hearing to be held on October 2. The petition prayed for an order enforcing the parties' settlement agreement and for Lori to return Abby to the court's jurisdiction. On September 26, the court entered an ex parte custody order ordering Lori to return Abby to Brian. Abby, however, remained with Lori.

On October 1, 2001, Lori filed a motion asking the court to conduct an in camera interview of Abby and requesting attorney fees. Lori alleged that Abby had informed her that she would not live with Brian or speak to him because of certain conduct on his part. An in camera review was held on October 2, at which time Abby clearly expressed her preference to stay with Lori. The district court ordered Abby to remain with Lori, vacated and set aside its ex parte custody order, and set trial for November 7.

Following trial, the district court entered an order on November 26, 2001, in which it first determined that it had properly assumed jurisdiction pursuant to Neb. Rev. Stat. § 43-1203 (Reissue 1998). The court declined to address Lori's cross-petition for an increase in child support, finding that the issue was not properly before the court because the Missouri decree had not been registered in Nebraska as required by Neb. Rev. Stat. § 42-746 (Reissue 1998). Regarding custody of Abby, the court stated:

> Given all of the facts in this case, this Court finds that no change should be made in Abby's primary residence at this time. She has moved too many times already, including the move in September, 2001. It would not be in her

> best interests to further disrupt her school year. There are too many pressures put on Abby. The situation should be stabilized with a detailed visitation plan, the appointment of a guardian ad litem, and counseling for all concerned. There are simply too many uncertain elements in this case for this Court to say that material changes have occurred such as to justify placing sole custody in Brian Heistand.

The court further stated in its order that a guardian ad litem would be appointed and that "either party, or the guardian, may after the conclusion of Abby's spring school term in 2002 apply for further hearing. Such further hearing shall expressly extend to all the issues raised in the previous hearings on this matter before this Court."

A guardian ad litem was appointed by separate order entered November 26, 2001. On August 8, 2002, Brian filed an application for hearing to determine custody, visitation, and child support. Trial on the application was held on November 1. Brian and Lori both testified, as did Lori's neighbor and coworker. The guardian ad litem testified in that capacity and as a court-appointed "expert witness."

On November 20, 2002, the district court entered an order of modification finding that "[i]t is in the best interests of Abby Leigh Heistand that her care, custody, control and possession be placed solely in petitioner Brian Heistand." Lori filed this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

Additional evidentiary facts and procedural history will be incorporated in our analysis of the issues presented for appellate review.

ASSIGNMENTS OF ERROR

Lori assigns, restated and reordered, that the district court erred in (1) failing to determine that the State of Nebraska was an inconvenient forum to make a custody determination in this matter; (2) allowing opinion testimony of the guardian ad litem as an improperly designated expert, pursuant to Neb. Evid. R. 706, Neb. Rev. Stat. § 27-706(1) (Reissue 1995); (3) failing to

sustain objections to hearsay testimony offered by the guardian ad litem; and (4) finding that a material change in circumstances which was in the best interests of Abby existed, warranting a modification of the parties' decree of dissolution of marriage.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003).

[2] An appellate court's review of the trial court's admission or exclusion of expert testimony which is otherwise relevant will be for an abuse of discretion. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

[3] 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. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

ANALYSIS

INCONVENIENT FORUM

Lori argues that the district court erred in failing to determine that the State of Nebraska was an inconvenient forum. Section § 43-1203(1) provides in relevant part that a Nebraska court has jurisdiction to decide child custody matters by initial or modification decree if:

> (a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) 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[.]

"Home state" is defined by Neb. Rev. Stat. § 43-1202(5) (Reissue 1998) 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, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons shall be counted as part of the six-month or other period[.]

Section 43-1203(3) provides that although physical presence of the child is desirable, it is not a prerequisite for jurisdiction to determine his or her custody.

Neb. Rev. Stat. § 43-1207(2) (Reissue 1998) provides that "[a] finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child." Section 43-1207(3) lists the following nonexclusive factors that a court is to consider in determining if it is in the best interests of the child that another state assume jurisdiction:

> (a) If another state is or recently was the child's home state;
>
> (b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;
>
> (c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
>
> (d) If the parties have agreed on another forum which is no less appropriate; and
>
> (e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in [Neb. Rev. Stat. §] 43-1201 [(Reissue 1998)].

Lori concedes that Nebraska was Abby's home state as defined by § 43-1202(5) at the time Brian filed his petition for modification of custody in July 2000. The district court therefore had jurisdiction over this matter pursuant to § 43-1203(1)(a)(i). Lori contends, however, that the district court erred in not declining jurisdiction under § 43-1207. In determining that Nebraska was

an appropriate forum, the district court stated: "It is in the best interests of Abby Heistand that the State of Nebraska assume jurisdiction because at least Brian Heistand has a significant connection with this state and there is available in this state substantial evidence regarding Abby's future care, protection, training, and personal relationships." The record demonstrates that the court's factual findings on this issue are not clearly incorrect, and thus we must uphold the court's determination. See *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). Lori's first assigned error is without merit.

Testimony of Guardian Ad Litem

Lori argues that the district court erred in permitting the guardian ad litem to give opinion testimony as a court-appointed expert. She also contends that the court erred in overruling certain hearsay objections to the guardian ad litem's testimony. Some additional background is pertinent to our consideration of these issues.

In its November 26, 2001, order the district court determined on its own motion that a guardian ad litem should be appointed, "instructed to assess the resources available for counseling for Abby and the parties," and "report to the Court whatever counseling the guardian recommends." On the same day, the court entered a separate order appointing a guardian ad litem with "all powers, privileges and responsibilities necessary or desirable for the full and effective performance of her duties and obligations to [Abby]." The guardian ad litem in this case is a practicing attorney who also holds a master's degree in maternal-child nursing. The order of appointment instructed the guardian ad litem to provide the court and attorneys for the parties with a "final written report advising the Court of such matters as the Guardian Ad Litem deems necessary," but did not specifically designate the guardian ad litem as a court-appointed expert pursuant to § 27-706(1).

The guardian ad litem served the parties with her report on July 18, 2002. The report was based upon correspondence from the parties' counselors, Abby's school records, interviews with Brian and his fiance, and interviews with Abby and Lori. Brian's counsel offered the report at the November 1 hearing, and the court

sustained Lori's hearsay objection, stating: "It is hearsay. It will be made part of the record of the Court, but the witness ought to testify to the contents so there will be firsthand information." The judge stated on the record that he had not read the report.

Brian called the guardian ad litem to testify at the November 1, 2002, hearing as an expert witness. The guardian ad litem testified that she had been appointed a "706 expert" at a meeting held in the judge's chambers shortly before the hearing. There is no verbatim record of this meeting, although counsel for the parties seems to agree that it transpired. During direct examination, the guardian ad litem was asked her opinion "as to where the Court should place Abby Heistand for permanent care and custody." Lori's counsel objected on grounds that such an opinion was not the product of any recognized methodology and invaded the province of the court. The court overruled the objection, stating:

> [I]t seems to me that a person who is an attorney is much more likely to be familiar with the state of the law as it pertains to custody matters, what is to guide a court in determining what is or is not in the best interests of the children. This, after all, is why we appoint attorneys usually as 706 experts.

Lori's counsel subsequently moved to strike opinion testimony of the guardian ad litem on essentially the same grounds. The court deferred a ruling on the motion. During her testimony, the guardian ad litem acknowledged that her opinions were based in part upon hearsay.

In its order of modification, the court overruled the motion to strike, characterizing the guardian ad litem as "one skilled and knowledgeable in the law" who knew "what constitutes a material change of circumstance and . . . how the law looks at such changes to determine the best interests of the child." While acknowledging that the guardian ad litem's opinions or "concerns" about certain facts affecting custody "could have become speculative in some particulars and in others may have merely reflected the guardian's personal value judgments," the court concluded that it was "perfectly capable of disregarding the chaff" and did not look to the guardian ad litem for "some sort of binding opinion," but, rather, "insight and enlightenment from

someone trained in law who has made herself familiar with the facts of this particular case."

We conclude that the district court erred in receiving the opinion testimony of the guardian ad litem for two reasons. Initially, we note procedural deficiencies in the manner in which the guardian ad litem was apparently appointed as an expert witness. Section 27-706(1) provides in relevant part that a judge

> may appoint witnesses of his own selection. An expert witness shall not be appointed by the judge unless he consents to act. A witness so appointed shall be informed of his duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the judge or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

The record in this case does not include a written appointment filed with the court. The appointment was apparently made verbally during a pretrial conference in chambers of which there is no verbatim record. Thus, we have no way to determine what "duties" the guardian ad litem was appointed to perform as a rule 706 expert. When asked during her testimony if she had any specialized training upon which to form an opinion, she replied: "If your question is did I do a custody evaluation as a trained psychologist, no, I did not, but I wasn't asked to do a custody evaluation."

[4] In addition to these procedural shortcomings, the record does not reflect that the guardian ad litem was ever properly qualified as an expert with respect to the subject matter of her opinion testimony. Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Pursuant to Neb. Rev. Stat. § 27-705 (Reissue 1995), "an expert's opinion is ordinarily admissible if the witness (1) qualifies as an expert, (2) has

an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination." *Gittins v. Scholl*, 258 Neb. 18, 23, 601 N.W.2d 765, 768 (1999). It appears that in this case, the district court considered the guardian ad litem as an expert on the law as it pertained to modification of child custody by virtue of the facts that she was (1) an experienced lawyer and (2) the duly appointed guardian ad litem with access to certain factual information.

[5] The duties of a guardian ad litem in a case involving a child custody dispute "are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court." *Betz v. Betz*, 254 Neb. 341, 345, 575 N.W.2d 406, 409 (1998). Such reports to the court, whether in written form or testimony by the guardian ad litem, including hearsay, are subject to the Nebraska rules of evidence. *Id.* In *Joyce S. v. Frank S.*, 6 Neb. App. 23, 571 N.W.2d 801 (1997), *disapproved in part on other grounds, Betz, supra*, the Nebraska Court of Appeals held that a trial court erred in considering the opinion testimony of a guardian ad litem in a case involving termination of parental rights. The court noted that while "a guardian ad litem may be a legal expert, . . . a person appointed a guardian ad litem is not necessarily an expert on child welfare." *Id.* at 32, 571 N.W.2d at 808. After noting the requirements of § 27-702, the court concluded:

> Bearing in mind that guardians ad litem and judges are invariably lawyers and that most, if not all, trial judges are at least as experienced in the area of child welfare as practicing lawyers, it is doubtful that an opinion of a guardian ad litem, as an expert, would truly assist the judge in understanding the evidence or in determining any issues of fact in litigation involving the welfare of children.

Joyce S., 6 Neb. App. at 32, 571 N.W.2d at 809. One commentary addressing the issue of whether a guardian ad litem can be qualified as an expert witness has expressed a similar view:

> Qualification cannot occur in guardian ad litem situations because no recognized area of general expertise with regard to "custody" or "child placement" exists. The legal standard for determining child placement is the best interests of the child. While there are many factors that may be

> considered in making that decision, no widespread scientific standard has evolved that can be applied in assessing all those factors.
>
> . . . .
>
> In custody cases, courts often ask those performing the role of guardian ad litem to render expert opinions even though they do not have the requisite training to do so. It is assumed that they can make such a recommendation merely because they have done an investigation at the request of the court. In effect they are imbued with expertise, merely by virtue of having been placed in that role, irrespective of their actual background. This fictional qualification as a child custody expert then becomes self-perpetuating. The more often a particular individual performs that role, the more likely that the trial court will rely on him as if he were an expert.
>
> The judiciary and the general public assume lawyers are competent to render such an opinion in the role of a guardian ad litem simply because of their experience representing dissolution clients. This logic is akin to assuming that an attorney who has handled a number of soft tissue injury suits would be qualifiable as an expert on soft tissue injuries.

Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 Geo. Mason L. Rev. 255, 275-76 (1998).

[6] On this record, we find no showing that the guardian ad litem possessed any scientific, technical, or other specialized knowledge which would assist the trier of fact to understand the evidence or to determine a fact in issue. Moreover, to the extent that the district court invited or considered the opinions of the guardian ad litem on issues of law, we have held in another context that expert testimony concerning a question of law is generally not admissible. *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998). Thus, we conclude that the opinion testimony of the guardian ad litem, and the hearsay incorporated therein, was erroneously admitted. We disregard such evidence in our de novo review, and consider only that evidence which is

relevant and admissible. See *Stecker v. Stecker*, 197 Neb. 164, 247 N.W.2d 622 (1976).

MATERIAL CHANGE IN CIRCUMSTANCES

[7-9] The central issue before the district court was whether the custody determination in the original decree should be modified so as to remove Abby from the physical custody of Lori and place her in the custody of Brian. 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. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). The party seeking modification of child custody bears the burden of showing a change in circumstances. *Id.* Evidence of a material change in circumstances warranting modification of a dissolution decree must be proved at trial and contained in the record on appeal. *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). 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. *Tremain, supra.*

[10] In our de novo review, we must first determine the timeframe to be examined in determining whether there has been a material change in circumstances affecting custody. The Missouri decree which awarded the parties joint legal custody and awarded physical custody to Lori subject to Brian's right of reasonable visitation was entered on January 17, 1991. On November 26, 2001, the district court overruled Brian's initial petition for modification of custody without prejudice, stating that at the time there were "too many uncertain elements . . . to state material changes have occurred," and authorized either party or the guardian ad litem to "apply for further hearing" after Abby's spring 2002 school term. Brian applied for further hearing in August 2002. At the commencement of the 2002 hearing, the trial court stated that it did not intend to "[go] back to anything before November 7th," the date of the 2001 hearing. The judge further stated: "I want to hear the facts in this case. I want to hear if there's any change in the situation that justifies the change in custody or if it doesn't. Just that simple." Thus, we

start from the premise that as of November 7, 2001, there was no material change in circumstances which would justify modification of custody, and we therefore focus primarily upon subsequent events to determine whether such a change had occurred at the time of the November 1, 2002, hearing. This is consistent with our general rule that in determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986); *Riddle v. Riddle*, 221 Neb. 109, 375 N.W.2d 143 (1985).

We look first to the pleadings, which frame the issues. See, e.g., *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002); *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). In his application for hearing to determine custody, visitation, and child support, filed on August 8, 2002, Brian alleged that Lori "has an unstable lifestyle" and that she had moved again since November 2001. He further alleged that Lori "has been in and out of several relationships with men having ended a relationship with the man who was the basis for her move to Pittsburgh, Kansas and Kansas City, Missouri, thereby removing the minor child from the close proximity of her father and extended family." Brian also alleged that Lori "maintains employment that call[s] for her to work evenings and overnight, leaving the minor child without proper parental supervision."

At the November 1, 2002, hearing, Lori testified that she had moved once since November 2001, because a school restructuring resulted in Abby's attending a different junior high school, and she wanted to live closer to the new school so that Abby would not be required to board a bus at 6:30 a.m. Lori further testified that she had been involved with only one man since November 2001, that she had been with that same man for 5 years, and that they were no longer living together. Lori testified that her work shift usually begins at about 8:30 p.m. She is home and awake when Abby and another child residing with Lori leave for school and when they return. She denied ever leaving her children alone. If she is required to work during the weekend, she leaves the children with a daycare provider or with her mother, who resides with the family. This testimony was not

controverted. Lori's neighbor and coworker testified that she was unaware of Lori ever leaving her children alone and that Lori is an active participant in the lives of her children.

Brian also expressed other "concerns" about Abby which he believed warranted a change in custody. These included Abby's school attendance, attire, grades, and "bossy" attitude. The record reflects, however, that Abby's grades in school are above average and that during the current term, she had missed only 2½ days of school, which were excused absences related to an illness in Lori's extended family. Brian expressed concern over a school photograph of Abby which revealed a partially exposed midriff, but he acknowledged that she had recently been dressing more conservatively. In regard to Abby's attitude, Brian would not be the first father to have detected changes in the attitude of an adolescent child. When Brian was asked specifically why he was asking the court to grant him physical custody of Abby, he replied that "for several years, many years everybody else has taken care of my child, and I think it's my turn to take care of her."

The evidence in this case is similar in nature to that in *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996). In that case, a noncustodial father sought a change in custody based upon various perceived shortcomings of his former spouse, including her choice of male companions, her working hours, the fact that a houseguest often cared for the child, and problems with visitation. Reversing the trial court's modification order awarding custody to the father, we concluded that such findings did not constitute a material change in circumstances indicating that a change in custody was in the child's best interests. Similarly, in *Hoins v. Hoins*, 7 Neb. App. 564, 584 N.W.2d 480 (1998), the Court of Appeals held that a material change in circumstances was not established by evidence that the mother, who was the custodial parent, had lived with three different men in the 7 years between the divorce and the modification hearing, that the child had changed schools "on a couple of occasions," and that the mother had become disabled due to an automobile accident. *Id.* at 568, 584 N.W.2d at 483. Reversing an order that modified the decree and awarded custody to the father, the Court of Appeals reasoned that there was no showing that any of the changes in the mother's life had any adverse effect on the child or the mother's ability to care for her.

In this case, the district court concluded that Brian would provide Abby with more "stability and direction" than would Lori. We agree with the basic premise that stability is vitally important for a child, but we find no admissible evidence in the record to support the district court's conclusion that there has been a material change in Lori's ability to provide stability for Abby. The record reflects that Abby lived with Lori for her entire life prior to the modification order, except for the few weeks during the late summer of 2001 when the parties agreed that she would live with Brian. There is no evidence that Lori has become an unfit parent or that she has been unable to provide for Abby's physical or emotional needs as a result of any change in circumstances. Based upon our review of this modification proceeding, which has now spanned more than 3 years, we conclude that the district court abused its discretion in modifying custody.

CONCLUSION

The district court did not err in exercising its jurisdiction over this modification proceeding. However, based upon our de novo review of the admissible evidence in the record, we conclude that the court abused its discretion in finding that there was a material change in circumstances which justified a modification of the original decree to remove Abby from the physical custody of Lori and award custody to Brian. Accordingly, the order of modification is reversed, and we order that Abby be restored to the custody of Lori, subject to Brian's right of reasonable visitation. Because we lack knowledge of the parties' current circumstances but perceive their need for a highly detailed and specific visitation order, we remand the cause to the district court with direction to fashion such an order.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. PEIRCE D. HUBBARD, APPELLANT.

673 N.W.2d 567

Filed January 23, 2004. No. S-03-215.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Judges: Recusal.** A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.
3. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
4. **Theft: Intent: Indictments and Informations: Proof.** A lack of intent to restore stolen property to its owner is an element of the crime of theft by receiving stolen property and must be charged in the information and proved by the prosecution.
5. **Indictments and Informations.** Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.
6. **Indictments and Informations: Complaints.** An information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
7. **Criminal Law: Convictions: Evidence: Appeal and Error.** 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.
8. **Judges: Trial.** A judge must be impartial, his or her official conduct must be free from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action.
9. **Judges: Recusal.** A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.
10. ____: ____. That a judge knows most of the attorneys practicing in his or her district is common, and the fact that a judge knows attorneys through professional practices and organizations does not, by itself, create the appearance of impropriety.
11. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
12. **Trial: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is,

counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

13. **Effectiveness of Counsel: Proof: Words and Phrases.** To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
14. **Effectiveness of Counsel: Proof.** If it is more appropriate to dispose of an ineffectiveness claim because of the lack of sufficient prejudice, that course should be followed.
15. **Constitutional Law: Criminal Law: Right to Counsel.** The right to effective assistance of counsel entitles the accused to the undivided loyalty of an attorney, free from any conflict of interest.
16. **Constitutional Law: Effectiveness of Counsel: Conflict of Interest.** The right to effective assistance of counsel may be impaired when one attorney represents multiple defendants, but the fact of multiple representation alone is not a per se violation of the Sixth Amendment.
17. **Preliminary Hearings: Probable Cause: Waiver: Verdicts.** Any defect in the waiver of a preliminary hearing to determine probable cause is cured by a jury's later verdict finding the defendant guilty beyond a reasonable doubt.
18. **Sentences.** In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
19. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Matthew K. Kosmicki for appellant.

Jon Bruning, Attorney General, Mark D. Raffety, and Jeffrey J. Lux for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Peirce D. Hubbard appeals his conviction and sentence on charges of theft by receiving stolen property and being a habitual criminal. On appeal, he contends that the State must charge in the information and prove that there was no intent to restore the property to the owner. He also contends that there was insufficient

evidence, that he was denied effective assistance of counsel, that the judge should have recused herself, and that the sentence was excessive. We affirm.

BACKGROUND

Hubbard was charged with one count of burglary and being a habitual criminal and another count of theft by receiving stolen property valued at between $500 and $1,500. For the charge of theft by receiving stolen property, the information charged that Hubbard, "with the intent to deprive the owner thereof, did receive, retain, or dispose of stolen movable property."

The record shows that on December 26, 2000, Jane Burke, a Lincoln, Nebraska, attorney, left her home and closed the garage door. When she returned, she found the garage door open and discovered that Christmas presents and other items, including a pair of binoculars and a digital camera, were missing; the camera was valued at about $872 to $900. Burke called the police and also her husband, Andrew Strotman, who is also a Lincoln attorney.

The record shows that on the morning of December 26, 2000, Strotman went to work at the U.S. Bank building in downtown Lincoln and parked in the parking garage; he did not lock the car. When Strotman left work to return home, he found his garage door opener was missing. A receipt from an oil change bearing his address was found on the floor of the car.

Burke and Strotman provided the police with information about the missing items, including information about a Lladro figurine worth about $372 and other items worth at least $720. A detective contacted the store where the figurine was purchased and learned that it had been returned by a person named "Aariqa Allen." Allen later learned that the police were looking for her, and she voluntarily turned herself in. Allen told the police that the Lladro figurine was included in Christmas presents opened at Hubbard's mother's home with Hubbard and a woman named "Dawn Shade." Allen suggested returning the figurine for cash, and she, Hubbard, and Shade went together to return it; Shade and Allen made the exchange, while Hubbard waited in the car.

Shade was later located by the police and interviewed. During the first interview, Shade told police that she was responsible for

the burglary and that Hubbard was not involved. The police later searched Shade's home and found the pair of binoculars that had been stolen; other items stolen, including the digital camera, were never recovered.

Shade gave a second interview to police and changed her story to implicate Hubbard. At trial, Shade explained that she initially lied to the police because she did not have a prior record and would get in less trouble than Hubbard. She stated that Hubbard coached her extensively about what to say during the first interview. She said she decided to tell the truth because it was the right thing to do and she did not want to take the blame. She admitted that she had reached a plea agreement in exchange for testimony and that she had been involved sexually with Hubbard but had also been sexually involved with Allen which caused some tension between Shade and Hubbard.

Shade testified that on December 26, 2000, she and Hubbard went to the U.S. Bank building and walked through the parking garage. According to Shade, Hubbard opened a car door and removed a garage door opener and a receipt. After they left the parking garage, Hubbard drove to the Burke-Strotman residence, opened the garage door, and pulled into the garage. Hubbard got out of the car and entered the house, while Shade stayed in the car. Shade testified that Hubbard made several trips from the house to the car to remove items. They then left and went to Hubbard's mother's home. Shade testified that they opened some of the presents and that Hubbard then left to pick up Allen. When Hubbard and Allen returned, more presents were opened, although no one clearly remembered Hubbard's opening presents at that time. After the items were unwrapped, Hubbard, Shade, and Allen placed them in Allen's car.

No one specifically testified about Hubbard's receiving specific stolen items or cash from the return of the figurine. There was testimony, however, that after the figurine was returned, Hubbard, Shade, Allen, and another individual stayed in a hotel room that was paid for with money from the return of the figurine. Shade also testified that she thought Hubbard gave a stolen item of clothing to a person. Shade further testified that Hubbard told her he had "got rid of" the remaining stolen items; the digital camera was never found or accounted for. Shade

stated that she did not believe that Hubbard intended to return the property to Burke or Strotman.

At the end of the State's case, Hubbard moved to dismiss because of insufficient evidence and the failure of the State to charge or prove that he did not intend to return the property to the owners; the motion was denied, and the defense rested.

Before trial, Hubbard's counsel disclosed that he had previously represented a person named "Dwayne Hill." Hubbard had testified against Hill about 12 years earlier when Hubbard was 15 years old. Hubbard's counsel also disclosed that he knew Burke and Strotman because they were also members of the bar. He later also stated that "at one time or another," he had worked with them, but that he did not know them socially. There was evidence that the public defender's office originally represented Hubbard but withdrew because it represented a codefendant. Another attorney was then appointed, but withdrew because he knew Burke and Strotman and had some pending litigation directly involving them. Hubbard's counsel felt that neither circumstance affected his ability to fairly represent Hubbard. Hubbard moved to discharge his counsel. He told the court that his counsel had "ridiculed" him when he was previously on the stand in the Hill case and that counsel was not answering his current letters and questions. The court denied the motion to dismiss Hubbard's counsel.

Hubbard also asked the judge to recuse herself; the motion was denied.

During trial, Shade mentioned, without objection, that Hubbard told her it was "three strikes for him." Shade also testified that in reference to how she knew a particular individual, "[s]he was — I met her. I didn't have conversation with her, but [Hubbard] showed me who she was out at the penitentiary." Also during trial, Hubbard complained that his attorney was not asking the questions that he had requested to be asked. For example, the attorney did not question a police investigator about inconsistencies in his testimony and the dates that he interviewed witnesses.

The court instructed the jury on the elements of theft by receiving stolen property, using the term "intent to deprive." The jury acquitted Hubbard on the burglary charge but found him

guilty of theft by receiving stolen property. The court found Hubbard to be a habitual criminal and sentenced him to 10 to 20 years' imprisonment, with credit for 554 days served.

ASSIGNMENTS OF ERROR

Hubbard assigns that the district court erred by (1) failing to sustain his motion to dismiss because the State failed to charge and prove an element of the crime, (2) failing to dismiss when there was insufficient evidence, (3) failing to recuse itself, and (4) imposing an excessive sentence. Hubbard also assigns that he was denied effective assistance of counsel.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003).

[2] A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed. *Kramer v. Miskell*, 249 Neb. 662, 544 N.W.2d 863 (1996).

[3] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

ANALYSIS

INTENT TO RESTORE PROPERTY AS ELEMENT OF THEFT BY RECEIVING STOLEN PROPERTY AND SUFFICIENCY OF EVIDENCE

Hubbard contends that under the theft statute, Neb. Rev. Stat. § 28-517 (Reissue 1995), a lack of intent to restore property to the owner is an essential element that must be charged in the information and proved by the prosecution. He argues that the element was not charged and that there was insufficient evidence to convict him. The State contends that the intent to restore the property is a defense.

Section 28-517 provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with the intention to restore it to the owner." This court has never

addressed whether a lack of intent to restore the property to the owner is an element of theft by receiving stolen property.

Section 28-517 is the same as A.L.I., Model Penal Code and Commentaries § 223.6 (1980), with the exception that additional definitions in the Model Penal Code were not adopted. The Model Penal Code comments to § 223.6 make clear that a lack of intent to restore property to the owner is intended to be an element of the crime of theft by receiving stolen property. In particular, comment 4(a) at 237 states:

> Theft convictions generally require a purpose to deprive another of his property. In terms, Section 223.6 does not require such a purpose for criminal receiving, but the net effect of its provisions is the same. First, the actor either must know that the property has been stolen or must believe that it probably has been stolen. Second, the actor's receipt, retention, or disposition of the property is criminal, unless his conduct is undertaken "with purpose to restore it [the property] to the owner." Since a purpose to restore defeats conviction, and since the prosecution must establish beyond a reasonable doubt that the actor did not have such a purpose, the culpability required under Section 223.6 can properly be assimilated to a purpose to deprive the victim of his property. As a practical matter, the absence of a purpose to restore will be proved by showing that it was part of the receiver's plan to avoid detection and to realize for himself the benefits of the property.

[4] We determine that the adoption of a theft statute that is based on the Model Penal Code, along with the traditional elements of common-law theft, establishes that a lack of intent to restore the property is an element of the crime. Thus, it must be charged in the information and proved by the prosecution.

Hubbard next argues that the lack of intent to restore the property was not charged or proved. The information alleged in part that Hubbard, "with the intent to deprive the owner thereof, did receive, retain, or dispose of stolen movable property." Although the information did not charge the crime using the terms of the statute, it did include the allegation that Hubbard intended to deprive the owners of their property.

[5,6] We have stated that where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993). But we have not required that a crime be charged using the exact statutory language. Instead, an information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. *Id.*; *State v. Laymon*, 239 Neb. 80, 474 N.W.2d 458 (1991).

Here, an equivalent term was used: The use of the term "deprive" encompassed a lack of intent to restore the property to the owners.

[7] The lack of intent to restore the property was also proved at trial through evidence that Hubbard planned to avoid detection and realize benefits of the property. 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. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

Here, there was testimony that Hubbard did not intend to restore the stolen property, that he "got rid of" some of the property, and that he benefited from the property, such as staying in a hotel room paid for with proceeds from the return of the figurine. There was also evidence that Hubbard received property by assisting with the unwrapping of gifts. Finally, because the digital camera was never located, there was circumstantial evidence that Hubbard disposed of it. The record supports a finding that the property was worth over $500. Under these circumstances, the absence of a purpose to restore the property was not only sufficiently charged, but there was sufficient evidence for the jury to find Hubbard guilty beyond a reasonable doubt of theft by receiving stolen property.

Motion to Recuse

Hubbard next contends that the district court erred when the judge did not recuse herself from the case. He argues that the

judge had a conflict of interest because she knew the victims in the case and had attended professional functions where they were present.

[8,9] A judge must be impartial, his or her official conduct must be free from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action. *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. *Gibilisco, supra.*

[10] Here, the judge knew the victims in their professional capacities. However, nothing in the record indicates that the victims were close personal friends of the judge or that the judge had a personal interest in their case. That the victims are attorneys, known by the judge in her professional capacity, is not enough to require recusal. That a judge knows most of the attorneys practicing in his or her district is common, and the fact that a judge knows attorneys through professional practices and organizations does not, by itself, create the appearance of impropriety. See *State v. Whitlow*, 988 S.W.2d 121 (Mo. App. 1999). We determine that the judge did not err by refusing to recuse herself.

Ineffective Assistance of Counsel

Hubbard argues that he was denied effective assistance when trial counsel failed to (1) withdraw because a conflict of interest existed, (2) challenge probable cause for arrest through a motion to quash or a plea in abatement, (3) object to comments that it was "three strikes" for Hubbard and that Hubbard showed Shade a person at the penitentiary, and (4) cross-examine a police investigator about the dates he interviewed witnesses.

[11] Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised

or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999).

[12] To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003).

[13,14] To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003). If it is more appropriate to dispose of an ineffectiveness claim because of the lack of sufficient prejudice, that course should be followed. *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002).

We are able to address three of Hubbard's contentions on direct appeal. First, we determine that Hubbard was not denied effective assistance of counsel when his counsel failed to withdraw.

[15,16] The right to effective assistance of counsel entitles the accused to the undivided loyalty of an attorney, free from any conflict of interest. *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000). The right to effective assistance of counsel may be impaired when one attorney represents multiple defendants. *Id.* But the fact of multiple representation alone is not a per se violation of the Sixth Amendment. *Id.*

Here, Hubbard's counsel properly informed the court that he had previously represented a person that Hubbard had testified against about 12 years earlier when Hubbard was 15 years old. Counsel also informed the court that he knew the victims professionally. The court refused to allow counsel to withdraw. Hubbard does not raise the failure of the court to allow counsel to withdraw as a separate assignment of error. We determine that

Hubbard was not denied effective assistance of counsel when his counsel properly brought the issue before the court.

[17] Second, Hubbard was not denied effective assistance of counsel when his counsel failed to bring a motion to quash or file a plea in abatement to challenge the State's probable cause to arrest him. The record shows that Hubbard had a preliminary hearing, but it is unclear whether the issue of probable cause was raised. Regardless, we have stated that any defect in the waiver of a preliminary hearing to determine probable cause is cured by a jury's later verdict finding the defendant guilty beyond a reasonable doubt. See *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). We apply that same principle here. Even if Hubbard's counsel failed to properly raise probable cause, an issue we do not decide, Hubbard was not prejudiced because he was found guilty. Thus, he was not denied effective assistance of counsel.

Third, we determine that Hubbard was not prejudiced by statements that he told Shade it was "three strikes for him" and that he identified a person that was in prison. Assuming without deciding that it was error for Hubbard's counsel to fail to object to this testimony, we conclude that there was no prejudice. The testimony was brief, was not the focus of the questions asked, and did not specifically state that Hubbard had committed previous felonies. Because of the brief nature of the statements, we are unable to find a reasonable probability that but for any error in not objecting to the testimony, the result of the proceeding would have been different. Accordingly, Hubbard was not denied effective assistance of counsel.

Finally, we are unable to determine on direct appeal whether the failure to cross-examine a police investigator about the dates of certain interviews denied Hubbard effective assistance of counsel. The record is insufficient to show why the questions were not asked or what the testimony would be if they were asked. Thus, from the record, we cannot say whether an evidentiary hearing on these issues is necessary, and thus, we do not address this argument on direct appeal. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

SENTENCING

Hubbard contends that his sentence was excessive. He argues that the judge sentenced him without considering various factors.

[18,19] We have said that in imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). But sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

Hubbard was sentenced to the mandatory minimum term under the habitual criminal statutes. See Neb. Rev. Stat. § 29-2221 (Reissue 1995). We find this assignment of error to be without merit.

CONCLUSION

We determine that the lack of intent to restore stolen property to the owner is an element of the crime of theft by receiving stolen property. We also determine that the elements were sufficiently charged in the information and proved. We further determine that the trial judge did not err when she refused to recuse herself and that Hubbard did not receive an excessive sentence. Hubbard was not denied effective assistance of counsel on three of his four arguments. We do not review on direct appeal his argument that he was denied effective assistance of counsel because certain questions were not asked of an investigator on cross-examination.

AFFIRMED.

STEPHAN, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DONALD R. JANOUSEK, RESPONDENT.

674 N.W.2d 464

Filed January 30, 2004. No. S-02-920.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.
2. ____: ____. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive.
3. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
5. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
6. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
7. **Attorneys at Law.** Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability and adversely reflects on one's fitness to practice law.
8. **Disciplinary Proceedings.** Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.
9. **Attorneys at Law: Disciplinary Proceedings.** An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal.
10. **Disciplinary Proceedings.** The Nebraska Supreme Court imposes disciplinary sanctions to deter others from misconduct in order to protect the public and to maintain the reputation of the bar as a whole.
11. ____. The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.
12. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

Donald R. Janousek, pro se.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

Donald R. Janousek, the respondent, engaged in several instances of stalking and harassing his former girl friend. The sole issue presented in this appeal is the appropriate sanction to be imposed for Janousek's conduct.

SCOPE OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee. *State ex rel. Counsel for Dis. v. James, ante* p. 186, 673 N.W.2d 214 (2004). However, Janousek did not file an exception to the referee's report, and the sole exception filed by the Counsel for Discipline is that the 2-year sanction recommended by the referee is too lenient. Therefore, the scope of our review is limited to the determination of appropriate discipline.

FACTUAL BACKGROUND

Janousek was admitted to the practice of law in Nebraska in 1977, and he practiced law in Loup City and Ord before moving to Omaha in 2001. Janousek has been the subject of previous disciplinary actions and was privately reprimanded in 1990, 1994, and 1997, although the circumstances in those cases are not similar to the allegations made by the complainant in this case.

The complainant, an African-American mother of two boys, met Janousek socially in 1998, and the complainant and Janousek began dating. In 2000, Janousek represented the complainant briefly in a legal dispute between the complainant and her ex-husband, but when the complainant's ex-husband objected to Janousek's representing the complainant at the same time he was dating her, Janousek withdrew from the case and recommended another attorney to the complainant. The complainant ended her relationship with Janousek in July 2001.

The complainant had lent Janousek money to pay his bar association dues and asked Janousek to repay the money. Janousek responded by denying the debt, using racial slurs, and threatening, in the complainant's words, to "bombard my mailbox with unpleasant things every day and he would drag me to court and he would keep me poor by having me go to court and use my [medical] leave that I needed."

Janousek sent the complainant a letter, dated July 31, 2001, in which he expressed affection for the complainant and apologized for his prior behavior. Janousek acknowledged the debt and promised to pay it back by October 1 at the latest. However, the complainant eventually had to take Janousek to small claims court to recover the debt.

Janousek continued to try to contact the complainant after the July 31, 2001, letter. The complainant received numerous telephone calls, and Janousek also called the complainant's sisters. Janousek came to the complainant's place of work and "boxed [her car] in [with] his car" in the parking lot for "at least half an hour" before some workmen leaving the building prompted Janousek to leave. The complainant obtained a protection order, which Janousek violated. On August 14, Janousek stood outside the complainant's home, pounding and yelling for "at least 45 minutes" before police arrived. Janousek was convicted, pursuant to a no contest plea, of violation of the protection order.

The complainant testified that the day after the protection order issued, she received notice of a lawsuit filed by Janousek, purportedly to recover $10,000 in unpaid legal fees. Janousek asserts this was a counterclaim, not a separate lawsuit. The complainant testified that Janousek's claim was "bogus," because Janousek always demanded to be paid in advance for legal work and the complainant had retained her receipts. The claim was eventually dismissed by Janousek.

The record contains four letters that are particularly important to our disposition of this case, three signed with the complainant's name, and the fourth addressed to the complainant purportedly from the "White Aryan Resistance." The complainant denied writing any of the letters that were signed with her name. All four letters were found by the referee to have been authored and sent by Janousek, and Janousek, appearing pro se,

admitted at oral argument that he was responsible for sending the letters.

The letter sent to the complainant from the "White Aryan Resistance" was postmarked September 4, 2001. Because the appalling racist content and threatening overtones of this letter are important to our determination in this case, it is set forth below in its entirety, except that the name of the complainant is omitted:

> Dear Mrs. Negro . . . .
>
> In case you're too dumb to notice by now, you ARE being watched. We see it as our duty to keep watch on undesirables in our neighborhoods. You must know why you would be an undesirable.
>
> We keep an eye on where you live, where you work and the college you go to a couple of nights a week. We are hoping that you will just pack up and move back to wherever you came from. Go back and get some of that big jungle cock you colored women crave so much and leave our White men alone.
>
> You might be trying to live White, but you never will be.
>
> Our neighborhood will be much better after you move out. We have not seen those two young thugs of yours around for awhile. Good.
>
> Remember — you are being watched. Every car in back of you could be one of us. Every phone call could be one of us. By the way — your bed looked better with the curved wood headboard. Wear less when you're typing in the basement. Why aren't you sleeping much in your bedroom — that big black ass of yours really is something in the moonlight. It should make some jungle bunny real happy.
>
> We'll see you around. Did you know the lock on your patio screen door needs fixin'?

The complainant testified that the details of her home mentioned in the letter, such as the broken patio door, were accurate and were known to Janousek. The complainant testified that Janousek was aware that her sons had previously lived with her, but had moved in with their father. The complainant also testified that

> one of the phone calls I'd gotten from [Janousek] was that he knew where I slept and that, you know, he could shoot

> through the window. Something — the gist of it was that, yeah, you know, be careful where you sleep. He knew where the bedroom was, and I was really frightened because he had been in Vietnam, he knew how to work a gun. And yeah, my head was right — you could shoot through the window and hit me.

Attached to the letter was a photocopied pornographic picture, depicting a man ejaculating in the mouth of a black woman. Underneath the picture was the handwritten caption, "Bet this makes you hungry!" The complainant testified that although the woman in the picture was not the complainant, the woman resembled the complainant.

The next letter, also postmarked September 4, 2001, was sent to Janousek's former attorney and was signed with the complainant's name. That attorney had represented Janousek in the protection order case, and the complainant had been upset by some of the attorney's cross-examination of the complainant when she testified on the matter. The letter accused the attorney of being "mentally disturbed." The letter also contained vaguely threatening language, telling the attorney that she would "need to watch your step from here on" and stating that "[Janousek] found out what happens when people mess with me and you will, too."

The third letter, dated September 3, 2001, was sent to the complainant's attorney and was signed with the complainant's name. The complainant's attorney had been recommended to the complainant by Janousek after he withdrew from representing the complainant. The letter told the complainant's attorney that she should conclude the complainant's case immediately, that "I have paid you more than enough for what little work I have seen," and that the complainant would no longer pay her attorney fees. The complainant found out about the letter when her attorney attempted to withdraw from representing her.

The final letter was postmarked September 4, 2001, and was sent to the registrar's office of the complainant's graduate school. The letter, again signed with the complainant's name, informed the registrar that the complainant wanted to immediately withdraw from her master's degree program and all her classes because she was moving out of town and getting married. The complainant found out about the letter only when the

director of the program congratulated the complainant on her upcoming wedding.

The complainant also described an incident that occurred on September 11, 2001, for which she believed Janousek was responsible. The complainant's sister lived in New York, and Janousek was aware of that fact. On September 11, the complainant received a message at work that a public relations person from a New York hospital was trying to reach the complainant and that the complainant needed to return the call right away. The complainant tried to call the hospital but was unable to get through for some time. When the complainant finally reached the hospital, she found that no one had called her workplace and that the message she had received was a hoax.

PROCEDURAL HISTORY

The complainant filed a grievance with the office of the Counsel for Discipline on September 26, 2001. Janousek did not respond to inquiries from the Counsel for Discipline that were sent to him on November 28, 2001, and January 7 and March 28, 2002. Formal charges were filed on August 19, 2002, alleging that the letters sent by Janousek, as described above, constituted violations of Janousek's oath of office, see Neb. Rev. Stat. § 7-104 (Reissue 1997), and Canon 1, DR 1-102(A), of the Code of Professional Responsibility, which provides in relevant part:

> A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (3) Engage in illegal conduct involving moral turpitude.
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

On February 19, 2003, Janousek filed an answer to the formal charges, generally denying the allegations made regarding the letters described above. Janousek explained to the Counsel for Discipline that he had moved and suffered from health problems that had prevented him from timely responding to

inquiries from the office of the Counsel for Discipline. The Counsel for Discipline accepted this explanation and dismissed the formal charges with respect to Janousek's failure to cooperate with the investigation.

A referee was appointed, and a hearing was held. The evidence adduced at the hearing is summarized above. Janousek refused at that time to either admit or deny sending the letters, citing a fear of criminal prosecution, but did admit generally that he had "for about three weeks behav[ed] like a total jackass." Janousek expressed remorse for his behavior. At oral argument, Janousek personally admitted responsibility for sending the letters.

The referee concluded that Janousek had sent the letters described above and that this conduct constituted violations of his oath as an attorney and DR 1-102(A). The referee, noting Janousek's three prior reprimands, recommended a 2-year suspension from the practice of law.

EXCEPTION

The Counsel for Discipline takes exception to the recommended sanction of a 2-year suspension, arguing that disbarment is the appropriate discipline. Janousek does not take exception to the referee's report.

ANALYSIS

[2] As previously stated, a proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee. *State ex rel. Counsel for Dis. v. Mills, ante* p. 57, 671 N.W.2d 765 (2003). However, the sole issue presented to this court is the appropriate discipline to be imposed, and neither party has taken exception to the factual findings of the referee. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the court may, at its discretion, adopt the findings of the referee as final and conclusive. *Id.*

[3] To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. James, ante* p. 186, 673 N.W.2d 214 (2004). Based upon our review of the record and the undisputed findings of the referee, we conclude that the above-referenced facts have been established by clear

and convincing evidence. Based on that evidence, we conclude that Janousek has violated DR 1-102(A)(1) and (3) through (6), as well as the attorney's oath required by § 7-104.

[4-6] The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *James, supra*. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Id.* Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases. *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001).

Janousek and the Counsel for Discipline have each cited Nebraska cases, arising from disciplinary actions, presenting circumstances they argue are at least similar to those of the instant case for purposes of determining the sanction to be imposed. Both parties refer us to *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001). In *Lopez Wilson*, the respondent became angry after he learned that the complainant, the respondent's client and close friend, had begun an intimate relationship with the respondent's ex-wife. We imposed a 2-year suspension from the practice of law as a sanction for the respondent's conduct, which conduct included going to the complainant's apartment late at night and threatening to reveal confidential information about the complainant to the court that had issued the complainant's divorce decree and to the then Immigration and Naturalization Service.

The Counsel for Discipline also cites *State ex rel. Counsel for Dis. v. Sipple*, 265 Neb. 890, 660 N.W.2d 502 (2003), *cert. denied* 540 U.S. 985, 124 S. Ct. 486, 157 L. Ed. 2d 376. In that case, the respondent threatened and intimidated his client in a workers' compensation case, attempting to pressure the client into accepting a settlement offer. When that failed and his client

obtained new counsel, the respondent contacted opposing counsel and the Workers' Compensation Court in an attempt to sabotage his former client's case. We imposed a 2-year suspension from the practice of law.

Janousek, on the other hand, cites *State ex rel. NSBA v. Schleich*, 254 Neb. 872, 580 N.W.2d 108 (1998). In that case, we imposed a 6-month suspension from the practice of law upon the respondent, who had illegally placed a listening device on his home telephone and used the device to record his wife's telephone conversations over a period of 7 to 10 days.

While some aspects of these cases are superficially similar to the circumstances of this case, we do not find any of them to be particularly helpful to our determination here. Cases from other jurisdictions have arisen from somewhat more comparable circumstances, but are still distinguishable. See, e.g., *Disciplinary Counsel v. Keith*, 92 Ohio St. 3d 404, 750 N.E.2d 1106 (2001) (respondent disbarred for 2 years of stalking, harassing, physically assaulting, and vandalizing property belonging to former girl friend); *Bd. of Prof. Ethics & Conduct v. Apland*, 599 N.W.2d 453 (Iowa 1999) (respondent suspended from practice of law for 2 years for threatening and harassing former wife and her boyfriend); *In re Van Buskirk*, 981 P.2d 607 (Colo. 1999) (3-year suspension from practice of law imposed on respondent for two domestic disturbances at former fiance's apartment); *People v. Groland*, 908 P.2d 75 (Colo. 1995) (1-year suspension from practice of law imposed for respondent's repeated violation of former wife's restraining orders); *In re Frick*, 694 S.W.2d 473 (Mo. 1985) (respondent disbarred for conduct directed at former girl friend, including anonymous threatening letters, violence, vandalism, and use of firearm to avoid capture by security guards who interrupted act of vandalism). To the extent that our review of case law supports any conclusion, it is this: The fact that no attorney appears to have previously engaged in behavior like Janousek's is indicative of just how egregious his behavior was.

Several aspects of this case reflect adversely on Janousek's fitness to practice law. Obviously, as the referee concluded, the heart of the charges against Janousek is his authorship of the letters. Janousek engaged in a deliberate campaign to discredit the complainant, deprive her of legal counsel, interrupt her education, and

terrorize her. Janousek's appalling "White Aryan Resistance" letter was composed entirely of degrading, vile racism and obscenity. Moreover, Janousek's interference with the complainant's attorney-client relationship demonstrates complete disregard for the most fundamental tenet of professional responsibility—that "every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence." See Canon 1, EC 1-1, of the Code of Professional Responsibility.

[7,8] We also note that Janousek's threats and harassment were not limited to the letters. The complainant's testimony included several other allegations, which were uncontested by Janousek. Janousek used racial slurs against the complainant when she asked for repayment of a debt Janousek later conceded he owed. Janousek threatened to abuse the legal process to harass the complainant and filed a counterclaim against the complainant which she testified was groundless and which was later dismissed. Janousek threatened the complainant's life. It is beyond dispute that hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability and adversely reflects on one's fitness to practice law. See *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001). Despite Janousek's attempt to portray his behavior as a cohesive, isolated incident, the record shows a series of distinct incidents intended to persecute the complainant. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. *State ex rel. Counsel for Dis. v. Cannon*, 266 Neb. 507, 666 N.W.2d 734 (2003).

[9] Also relevant is the fact that Janousek's conduct was arguably criminal, even though he was convicted only of violating a protection order. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. *State ex rel. Nebraska State Bar Assn. v. Bremers*, 200 Neb. 481, 264 N.W.2d 194 (1978).

[10,11] We also take note of Janousek's three prior private reprimands, even though those cases did not involve facts similar to those of the instant case. We impose disciplinary sanctions

to deter others from misconduct in order to protect the public and to maintain the reputation of the bar as a whole. See *State ex rel. Special Counsel for Dis. v. Shapiro*, 266 Neb. 328, 665 N.W.2d 615 (2003). The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice. *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002). Janousek's prior violations of our disciplinary rules, while distinguishable on their facts, are nonetheless relevant to the primary question before us in this case—whether Janousek is currently fit to practice law in Nebraska. Janousek's serial disregard for our disciplinary rules indicates that he is not.

[12] We conclude, based on our de novo review of the record, that Janousek's conduct is intolerable. Janousek's behavior is not only disgraceful, but shows disrespect for the law, the legal profession, the legal process, the authority of the courts, and basic principles of justice, fairness, and human dignity. Although the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors, there is no record in this case of any persuasive mitigating factors. See *State ex rel. Counsel for Dis. v. Lechner*, 266 Neb. 948, 670 N.W.2d 457 (2003). Upon due consideration, we find that Janousek should be disbarred from the practice of law in the State of Nebraska.

CONCLUSION

The Counsel for Discipline's exception is sustained. It is the judgment of this court that Janousek should be disbarred from the practice of law in the State of Nebraska, and we therefore order Janousek disbarred, effective immediately. Janousek is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Janousek is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V. KELVIN L. THOMAS, APPELLANT.

673 N.W.2d 897

Filed January 30, 2004. No. S-02-1302.

1. **Confessions: Appeal and Error.** A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous.
2. **Motions to Suppress: Search Warrants: Judgments: Affidavits: Appeal and Error.** A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Search Warrants: Affidavits: Probable Cause.** The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The question is whether the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause.
4. **Confessions: Due Process.** The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession.
5. **Confessions: Proof.** The State has the burden to prove that a defendant's statement was voluntary and not coerced.
6. **Confessions: Appeal and Error.** In making a determination about whether a statement was voluntary, a totality of the circumstances test is applied, and the determination reached by the trial court will not be disturbed on appeal unless clearly wrong.
7. **Confessions: Police Officers and Sheriffs: Due Process.** While the circumstances surrounding the making of the statement and the characteristics of the individual defendant at the time of the statement are potentially material considerations, coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.
8. **Confessions: Police Officers and Sheriffs: Appeal and Error.** When considering whether a statement was voluntary, the inquiry is whether the trial court was clearly wrong in finding that police conduct, in the context of the totality of the circumstances, did not render the accused's confession involuntary.
9. **Confessions.** The confession of an accused may be involuntary and inadmissible if obtained in exchange for a promise of leniency.
10. **Confessions: Police Officers and Sheriffs.** Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or promise, does not make a subsequent confession involuntary.
11. **Confessions.** An improper promise of leniency will not render a confession involuntary unless it overcomes the defendant's free will and impairs his or her capacity for self-determination.

12. **Constitutional Law: Miranda Rights: Self-Incrimination.** To safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation.
13. **Constitutional Law: Self-Incrimination: Police Officers and Sheriffs.** Once an accused invokes his or her constitutional rights to remain silent and to the services of an attorney, the authorities must refrain from initiating further conversations and must scrupulously honor the accused's request.
14. **Confessions: Miranda Rights: Police Officers and Sheriffs.** The police are not required to accept as conclusive any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning.
15. **Constitutional Law: Police Officers and Sheriffs.** Resolution of ambiguity in the invocation of the constitutional right to remain silent is a question of fact.
16. **Search Warrants: Affidavits: Probable Cause.** To credit a confidential source's information in making a probable cause determination, the affidavit should support an inference that the source was trustworthy and that the source's accusation of criminal activity was made because of information obtained in a reliable manner.
17. **Search Warrants: Affidavits.** Among the ways reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
18. **Search Warrants.** By identifying himself or herself by name, the informant is put in the position to be held accountable for providing a false report, which makes the informant more reliable.
19. **Search Warrants: Affidavits.** Omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit.
20. **Search and Seizure: Search Warrants: Motions to Suppress: Proof.** A defendant who seeks to suppress evidence obtained under a search warrant has the burden of establishing that the search warrant is invalid so that evidence secured thereby may be suppressed.
21. **Search Warrants: Affidavits: Probable Cause: Courts: Appeal and Error.** The role of an appellate court is to determine whether the affidavit used to obtain a search warrant, if it contained the omitted information, would still provide a magistrate or judge with a substantial basis for concluding that probable cause existed for the issuance of the warrant.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Jon Bruning, Attorney General, J. Kirk Brown, and Kimberly A. Klein for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Kelvin L. Thomas appeals a district court order sentencing him for first degree murder, use of a deadly weapon to commit a felony, and being a felon in possession of a firearm. Thomas argues that (1) statements to the police were not voluntarily made because investigators indicated that he would receive a lower sentence if he told them the murder was not premeditated, (2) the statements should have been suppressed because he invoked his *Miranda* rights, and (3) the district court erred when it failed to suppress evidence because the application for a search warrant omitted facts affecting probable cause. We determine that the district court was not clearly erroneous in its conclusions. Accordingly, we affirm.

BACKGROUND

On November 30, 2001, Terrence Quinn, an employee of Victory Auto Sales in Omaha, was found lying on the office floor, bleeding. Quinn later died, and an autopsy revealed the cause of death as gunshot wounds to the head. Quinn also had a laceration on his forehead.

On December 2, 2001, John L. Williams called Crimestoppers with information about the death and agreed to come to the police station. Williams told the police that Thomas, a black male, had told Williams that he had robbed a person at the location of Victory Auto Sales and had a lot of money. Williams reported that Thomas had purchased a white 1978 Oldsmobile 98 for $1,500 and stereo equipment valued at $2,000 to $3,000. He also purchased a cellular telephone and new eyeglasses. According to Williams, Thomas did not have a job and, only 2 days before, could not afford a pack of cigarettes. Williams identified Thomas from a photographic lineup.

Williams stated that while in the car with Thomas on December 1, 2001, Thomas showed him a .22-caliber gun and stated that he needed to get rid of it and would either give it to

Thomas' cousin or dispose of it in a park. The two stopped at the cousin's apartment and then left. After the stop at the apartment, Thomas told Williams that he had robbed and shot a man at a car dealership. Thomas stated that the man rushed him, that he struck the man with the gun, that the man kept coming, and that he eventually fired an unknown number of shots at the man. Williams also stated that Thomas often wore a black leather coat with a hood and black jeans.

Employees of Stereo West verified that on December 1, 2001, a man meeting Thomas' description who drove an older white Oldsmobile, with no plates, purchased stereo equipment for $2,294.29. The man used the name "Jamine Parker," wore a black coat with a hood, and told the employees that he had just bought the car. The employees were unable to positively identify Thomas from a photographic lineup.

Because of the information from Williams and the employees at Stereo West, a police investigator obtained a search warrant. The affidavit for the search warrant, however, failed to mention that employees at the store were unable to positively identify Thomas in a photographic lineup. The affidavit also failed to disclose that Williams was a convicted felon for theft by deception. After a search of Thomas' residence, officers seized items indicating that Thomas had made the purchases reported by Williams.

Thomas was arrested and taken to police headquarters for questioning by officers Donald Ficenec and Kevan Barbour. He was advised of his *Miranda* rights and agreed to make a videotape-recorded statement. Thomas initially denied involvement in the robbery and stated that he earned money by selling drugs and shooting dice. For the first 30 to 45 minutes, the police officers focused on minimizing Thomas' culpability by informing Thomas that sometimes a robbery could go bad and that sometimes the victim behaves "really stupid," rushes the robber, and then gets hurt.

The officers confronted Thomas with the evidence against him. The officers then focused on convincing Thomas that they understood how the death was unintentional and stressed that it was likely Quinn's fault because he rushed Thomas. In exhorting Thomas to tell the truth, the officers repeatedly stated that they could tell Thomas did not mean to kill Quinn and was not a "hard and cold criminal." Appealing to Thomas' good-heartedness, the

officers pointed out evidence that Thomas had given his girl friend money and had bought her baby a coat. They further stressed that if the death was an accident, Thomas needed to tell his side of the story or people would think he was a "frickin' animal" and "hardened core criminal."

The following colloquy then occurred:

> [Thomas]: I didn't hurt nobody now man.
>
> [Barbour]: Yeah – yeah, you did. And I gotta . . . .
>
> [Thomas]: I'm done talkin' man, I know what I did, how can ya'll keep on sayin I did it.
>
> [Ficenec]: You know what it's gonna sound like – what it's gonna look like? You know what premeditated murder is?
>
> [Thomas]: No.
>
> [Ficenec]: Okay, that's when you make up your mind ahead of time – I'm gonna go kill that man and then take his money – okay – that's called first degree premeditated murder, okay – every time somebody gets killed, it ain't all the same, every circumstance is different. The worst circumstance is premeditated, when you decide ahead of time "That's wh[at] I'm gonna go do, I'm gonna go kill him and take his money," okay – that's a whole lot different than "I'm just gonna take his money and I ain't gonna hurt nobody" and shit goes to hell on you without – because of things that are beyond your control, okay?
>
> [Thomas]: But that's first degree. You can get life though – can ya?
>
> [Ficenec]: The only two people – for premeditated murder, yes you can . . . but the only two people that know exactly how it went down inside there – and whether it was premeditated or not is you and him and he sure as hell can't tell us. You're the only one left, cause we can tell you what – we can tell you who did it, cause we've got all the evidence in the world to prove it. We can't crawl into your head – and we can't tell you exactly how, what you were thinkin' – when this went down, or the exact way it went down, whether or not this was – you just went in there bam bam, now take his money or if you went in there and said "Hey man, be cool, just give me the money" and this guy

> freaked out on ya, okay – there's a big difference. One circumstance is you goin' in there because you're just a cold blooded heartless bastard and you're ready to get rid of anybody that stands in your way. The other is – you know, "all I want to do is just get me enough money to get me somewhere where I can stay, where it's warm, where it's got heat, and where I ain't stayin' in this house with no heat in the middle of winter, I'm just trying to get myself an old five hundred dollar car so I can get around, you know, get myself another job so I don't have to be doin' this shit anymore", who knows – okay. But there's a big difference between somebody that intentionally went in there to hurt somebody and somebody that didn't and things just went to shit on 'em.
>
> [Thomas]: But either way, right now, I lose either way –
>
> [Barbour]: Well, I . . . you . . . we must . . . it . . . it ain't all the same . . .
>
> [Thomas]: It's wrecking my life, my life is gone now. I'm tried with some, some bullshit.

After this dialog, the officers returned to the theme that Thomas did not intend to kill anyone, and Thomas repeated that his life was gone. Ficenec then stated:

> What's not bullshit is there's a big frickin' difference between goin' in there ahead of time with a plan that 'I'm gonna kill that man and take his money', and goin' in there with, you know, 'I'm doin' this because I need the money, but I'm scared, I'm nervous, I hope everything goes all right and . . . and that he just gives me money and I can get out of there and I don't want to hurt nobody', and the guy tries to be a hero and freaks out on ya. [W]hat anybody, for any crime that goes to court, okay, one thing they look at is what was their intent, okay? There's a big difference between somebody that intentionally hurt somebody and somebody who doesn't. Just think about when you were a kid, okay? If you broke something of your mom's. All right if you did it because you were just kinda horsin' around and, you know, accidentaly [sic] knock over something and break it . . . yeah, she gets a little mad, but it'd be a hell of a lot worse if you purposely went and broke something, you know what I

> mean? . . . There's a difference between those people that do it intentionally to hurt you and those people that don't mean to, that's just the way things turned out.
>
> . . . .
>
> [Ficenec]: You for . . . forgive one, you don't the other.

After these statements, Barbour asked what Thomas would do if he caught two employees stealing and one employee explained his need for money and was remorseful while the other denied it all and made up a silly excuse. Specifically, Barbour asked which employee Thomas would keep, and Thomas replied that he would keep the person who told the truth. The officers then returned for several minutes to the theme that Thomas had a "good heart" and did not mean for the shooting to occur.

Barbour then asked Thomas to "show me your heart" and stressed that Thomas did not want people to think he was a hardened core criminal. Shortly after, Thomas stated, "He tried to rush me" and "I got scared and I just started shooting." The following colloquy then occurred:

> [Thomas]: [sobbing] Now my fuckin' life is gone.
>
> [Barbour]: Well, I don't know if your life is gone.
>
> [Thomas]: My life is gone. I'm 23, I ain't got shit now. By the time I get out probably . . . I be like 50, 60 years old. My life is gone . . . probably get life, probably.
>
> [Barbour]: I don't know what you're going to get. All I know is, is that I know that you . . . I knew when you sat down there you had a heart, Kelvin, and I know that you didn't mean it to go like that. . . . Explain to me what happened.

Thomas then confessed the details of the robbery and shooting. After Thomas provided the details of the crime, Thomas, while crying, stated, "I'm not worried about the time . . . cause it's too late now I'm just hurt right now. It been hurting every [sic] since Friday. This is how, exactly how I've been feelin' but I ain't been showin' nobody."

Thomas moved to suppress his statements and the items recovered in the search. At the hearing on the motion, Ficenec testified that he is an attorney and is aware that felony murder carries the same penalty as first degree premeditated murder. The district court overruled the motions, finding: (1) The affidavit for

the search warrant did not include deliberately false statements; (2) Thomas did not invoke his right to remain silent when he stated that he was finished talking; and (3) the officers did not discuss possible charges, deals, or bargains that might be made if Thomas cooperated.

Thomas waived his right to a jury, and trial was held on stipulated facts, with Thomas objecting to the admissibility of the evidence obtained under the search warrant and during his interview. The court found Thomas guilty of first degree murder, use of a firearm to commit a felony, and being a felon in possession of a firearm. Thomas was sentenced to life imprisonment for first degree murder, 10 to 15 years' imprisonment for use of a firearm to commit a felony, and 5 to 10 years' imprisonment for being a felon in possession of a firearm.

ASSIGNMENTS OF ERROR

Thomas assigns, rephrased, that the district court erred by overruling his motions to suppress because (1) his statements were not voluntarily made, (2) his statements were obtained after he invoked his right to remain silent, and (3) evidence was collected under a search warrant issued without probable cause and which was based on material omissions in the affidavit.

STANDARD OF REVIEW

[1] A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous. *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000).

[2] A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

[3] The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis

of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The question is whether the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause. *State v. March*, 265 Neb. 447, 457, 658 N.W.2d 20, 29 (2003).

ANALYSIS

VOLUNTARY CONFESSION

Thomas argues that his statements were not voluntarily made because they were obtained by a promise of leniency. Thomas specifically argues that the police investigators' comments about the sentence for premeditated murder, when felony murder would carry the same sentence, was an improper promise of leniency that overbore his will and resulted in his statement.

[4-6] The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession. *State v. Garner, supra*. The State has the burden to prove that a defendant's statement was voluntary and not coerced. *Id.* In making this determination, a totality of the circumstances test is applied, and the determination reached by the trial court will not be disturbed on appeal unless clearly wrong. *Id.*

[7,8] While the circumstances surrounding the making of the statement and the characteristics of the individual defendant at the time of the statement are potentially material considerations, coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment. *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986); *State v. Garner, supra*. Thus, the inquiry is whether the trial court was clearly wrong in finding that police conduct, in the context of the totality of the circumstances, did not render the accused's confession involuntary. *State v. Garner, supra*.

[9-11] The confession of an accused may be involuntary and inadmissible if obtained in exchange for a promise of leniency. *Id.*; *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993); *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d

83 (1991). However, mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or promise, does not make a subsequent confession involuntary. *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000). In addition, an improper promise of leniency will not render a confession involuntary unless it overcomes the defendant's free will and impairs his or her capacity for self-determination. *Smith v. Bowersox*, 311 F.3d 915 (8th Cir. 2002).

In *Smith v. Bowersox*, 311 F.3d at 917, a police detective in Missouri told an accused that he would not " 'get the chair' " because " 'they don't do that in this state,' " and the accused later confessed. Although the statement was technically correct because Missouri uses lethal injection instead of an electric chair, the Eighth Circuit determined that the statement was an improper, deceptive promise of leniency. The Eighth Circuit also determined, however, that the deceptive promise of leniency would not by itself render the confession involuntary. Noting that the investigator later backed away from the statement, the court determined that when all the circumstances were considered, the confession was voluntary.

Here, without specifically stating so, the investigators incorrectly indicated that premeditated murder would receive a greater sentence than felony murder. But a deceptive statement about possible sentences is only one of several factors to be considered. See *Smith v. Bowersox, supra*. After discussing premeditated murder, the officers returned to the theme that Thomas was a "good person" instead of a "hardened core criminal" and repeated the evidence against him. Several minutes after the discussion of premeditated murder, Thomas stated, "He tried to rush me" and "I got scared and I just started shooting." Thomas then stated that his life was over and that he would probably get a life sentence. An investigator responded that he did not know what sentence Thomas would get, after which Thomas provided specific details of the shooting.

We do not ignore the investigators' incorrect statements to Thomas that premeditated murder is "worse" than felony murder. Although the investigators did not make specific promises, the comments incorrectly presented the idea that premeditated

murder would receive a greater sentence than felony murder. But the record does not show that Thomas' confession was caused by misinformation about possible sentences. Instead, Thomas gave in to the general theme that he was not an "animal" or "hardened core criminal." This conclusion is supported by several factors: (1) Between the discussion of premeditated murder and Thomas' confession, the investigators returned to their previous themes without specifically discussing penalties; (2) both before and after his confession, Thomas indicated a knowledge that he could get a life sentence for the crime; and (3) Thomas provided the specific details after an investigator told him that they did not know what sentence he would get. This conclusion is further supported, because after providing details of the crime, Thomas, while crying, stated, "I'm not worried about the time . . . cause it's too late now I'm just hurt right now. It been hurting every [sic] since Friday. This is how, exactly how I've been feelin' but I ain't been showin' nobody." Thus, Thomas indicated that a general remorse about the crime was the primary reason for his confession.

The record supports the conclusion that the primary reason for Thomas' confession was a general concern that he should do the right thing to show that he was not a "hardened core criminal," as the investigators had suggested. Under the totality of the circumstances, and after viewing the videotape, we conclude that the references to premeditated murder did not overbear Thomas' will to cause the confession. We conclude that the district court's determination that Thomas' confession was voluntary was not clearly wrong.

Invocation of Right To Remain Silent

Thomas next argues that his confession should have been suppressed because it was made after he invoked his *Miranda* rights and the investigators continued questioning him.

[12-15] To safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation. *State*

v. Dallmann, 260 Neb. 937, 621 N.W.2d 86 (2000). Once an accused invokes his or her constitutional rights to remain silent and to the services of an attorney, the authorities must refrain from initiating further conversations and must scrupulously honor the accused's request. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). But the police are not required to accept as conclusive any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning. *Id.* Resolution of ambiguity in the invocation of the constitutional right to remain silent is a question of fact. *Id.*

The district court's determination about invocation of the right to remain silent was not clearly erroneous. Thomas never clearly sought to invoke his right to remain silent. Instead, he interrupted an accusation that he had committed the crime by stating, "I'm done talkin' man, I know what I did, how can ya'll keep on saying I did it." After this, Thomas continued to converse with the officers. Thomas' single statement that he was done talking could be interpreted as a response in frustration to the investigators' unwillingness to believe that he was not involved in the crime instead of a clear invocation of his right to remain silent. Thomas also followed the statement by a question requesting further information, which also acted to encourage further dialog. This single statement was not a clearly stated intent to end the interview. Had he wanted to terminate the interview, he could have made his wishes clear. See, generally, *State v. Mata, supra.* We conclude that the district court's determination that Thomas did not invoke his right to remain silent is not clearly erroneous.

Probable Cause for Search Warrant

Thomas contends that the search warrant lacked probable cause because it failed to establish Williams' credibility and omitted material information about him. In particular, he argues that (1) Williams' reliability was not established, (2) the officer failed to identify Williams as a convicted felon, (3) the officer failed to state that the Crimestoppers program pays money to informants, and (4) the affidavit failed to state that Stereo West employees were unable to identify Thomas in a photographic lineup.

[16,17] We first note that Thomas relies on cases involving confidential informants. We have said that to credit a confidential

source's information in making a probable cause determination, the affidavit should support an inference that the source was trustworthy and that the source's accusation of criminal activity was made because of information obtained in a reliable manner. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), *disapproved in part on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). We have also said that among the ways reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.*

[18] Here, however, Williams was not a confidential informant. He provided his name, he met with police officers, and his name was listed in the affidavit for the search warrant. We have noted that by identifying himself or herself by name, the informant is put in the position to be held accountable for providing a false report, which makes the informant more reliable. See *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988). Further, Williams' statements were corroborated. The police went to Stereo West and confirmed that a person matching Thomas' description and clothing, and driving a similar car, had purchased a large amount of stereo equipment the day after the murder. We disagree with Thomas' argument that the affidavit lacked probable cause because Williams' reliability was not established.

Thomas next argues that the affidavit omitted material information that (1) Williams was convicted of felony theft by deception, (2) the Crimestoppers program pays money to informants, and (3) Stereo West employees were unable to identify Thomas in a photographic lineup.

[19-21] We have said that omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit. *State v. Utterback, supra.* However, a defendant who seeks to suppress evidence obtained under a search warrant has the burden of establishing that the search warrant is

invalid so that evidence secured thereby may be suppressed. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993), *disapproved in part on other grounds, State v. Johnson, supra*. The role of an appellate court is to determine whether the affidavit used to obtain a search warrant, if it contained the omitted information, would still provide a magistrate or judge with a substantial basis for concluding that probable cause existed for the issuance of the warrant. *Id.* If a substantial basis for probable cause would still exist, Thomas' arguments fails.

Here, the district court's finding that there would still be probable cause if the omitted material was included in the affidavit was not clearly erroneous. Specific information about the Crimestoppers program and Williams' past arrest affects Williams' reliability. As previously stated, Williams' reliability was established because he met with police, his name was provided, and the information was corroborated. Although employees at Stereo West were unable to pick Thomas out of a photographic lineup, this information, had it been included, would not vitiate probable cause in the light of the other corroborating evidence. We conclude that the district court's determinations were not clearly erroneous and that had the omitted material been included, the issuing magistrate would have had a substantial basis for concluding that probable cause existed for the issuance of the warrant.

CONCLUSION

We conclude that the district court was not clearly erroneous in determining that Thomas' confession was voluntary and that he did not invoke his right to remain silent. We further conclude that the court was not clearly erroneous in determining that the search warrant was based on probable cause and should not be suppressed. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. RUFINO J. VILLARREAL, RESPONDENT.

673 N.W.2d 889

Filed January 30, 2004. Nos. S-03-042, S-03-368.

1. **Disciplinary Proceedings.** When no exceptions to the report of a referee in an attorney proceeding are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
2. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
3. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
5. ____. The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
6. ____. The following may be considered by the Nebraska Supreme Court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
7. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
8. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.
9. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.
10. ____. An attorney's continuing to practice law contrary to an order of the Nebraska Supreme Court warrants a sanction of disbarment.

Original actions. Judgments of disbarment.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

I. INTRODUCTION

This matter involves two separate attorney discipline proceedings, cases Nos. S-03-042 and S-03-368, filed against respondent, Rufino J. Villarreal. We consolidate the two cases for purposes of

this opinion. Respondent was admitted to the practice of law in the State of Nebraska on April 12, 1994, and a large percentage of his practice entailed immigration cases.

II. PROCEDURAL HISTORY

1. Case No. S-03-042

On January 14, 2003, the chair of the Committee on Inquiry of the Second Disciplinary District filed an application for temporary suspension against respondent. On January 15, this court ordered respondent to show cause why the court should not enter an order temporarily suspending his license to practice law in this state. Respondent filed a response, and following due consideration thereof, on January 29, this court entered an order temporarily suspending respondent from the practice of law.

On December 16, 2003, the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, filed a motion for contempt against respondent alleging that despite the temporary suspension order, respondent continued to engage in the practice of law. On December 17, this court ordered respondent to show cause why the court should not enter an order holding respondent in contempt of court for his willful disobedience of its order of temporary suspension dated January 29, 2003. Respondent was served personally on December 29. No response has been received by the court, and the matter is now before the court for disposition.

2. Case No. S-03-368

On April 2, 2003, formal charges were filed by relator against respondent. On May 5, additional formal charges were filed. Respondent filed answers to the formal charges disputing the allegations. A referee was appointed and heard evidence. Although 19 charges were filed, relator dismissed 8 charges prior to or at the hearing conducted by the referee.

The referee filed a report on November 26, 2003. With respect to the 11 counts at issue in the charges, the referee concluded that respondent's conduct had breached disciplinary rules of the Code of Professional Responsibility and his oath as an attorney in 10 of those counts. As to the 11th count, the referee did not find evidence of a rule violation, and that count will not be further

addressed in this opinion. The referee recommended that respondent be disbarred from the practice of law. Neither relator nor respondent filed exceptions to the referee's report.

On December 9, 2003, relator filed a motion for judgment on the pleadings under Neb. Ct. R. of Discipline 10(L) (rev. 2001). Respondent did not file a response to relator's motion, and the matter is now before the court for disposition.

III. FACTUAL BACKGROUND

1. Case No. S-03-368

Each of the formal charges filed against respondent involved immigration clients of respondent, and as stated above, the referee concluded that respondent's conduct had breached disciplinary rules of the Code of Professional Responsibility and his oath as an attorney in 10 separate counts.

The referee's findings are contained in a 112-page report. We repeat the essential findings here. In summary, each of respondent's clients involved in this case sought to achieve legal status. According to the referee's report, respondent engaged in a "scheme" in which he would knowingly file unwarranted asylum claims on behalf of his clients, with no intention of pursuing such claims. The clients, having been brought to the attention of the immigration authorities, would then be placed in deportation proceedings, at which time respondent planned to apply for "cancellation" relief, a procedure by which an illegal immigrant might obtain permanent resident status. According to the referee, respondent never intended to follow through with the asylum claims he filed; rather, he used them as a device to have his clients placed in deportation proceedings where he might assert a cancellation claim. The referee found that respondent's "scheme" was "not creative lawyering. It is dishonest and deceitful conduct on the part of the respondent . . . ."

The referee stated that respondent, in carrying out his "scheme," had engaged in a "long, repeated pattern" of filing asylum claims on behalf of his clients that were unwarranted under existing law. Referring to the testimony of clients, the referee determined that "[u]nder any plausible reading of principles or current United States or international asylum law, the type of asylum claims advanced by the respondent on behalf of the witnesses

. . . ha[d] no merit whatsoever." The referee further found that the respondent "frequently, through either neglect, failure to develop the cases, or intentionally, submitted asylum claims that had no basis in fact."

The referee further found that the record was "replete with evidence of [respondent's] repeated and substantial neglect of his clients' cases." According to the referee, respondent failed to communicate adequately and clearly with his clients, many of whom did not speak English. The referee also found that respondent failed to develop the clients' cases, either factually or legally, and failed to attend immigration proceedings with his clients.

The referee determined that respondent's conduct was prejudicial to the administration of justice. According to the referee's report, respondent's conduct was not only harmful to his clients, but it was also harmful to the legal system in general. "By filing asylum claims that rarely, if ever, had any credible factual or legal basis, the respondent simultaneously exposed his clients to deportation proceedings, and contributed to the burgeoning caseload in an already overworked immigration system."

Referring to the 10 counts for which the evidence established violations of the Code of Professional Responsibility, the referee found by clear and convincing evidence that as a result of respondent's conduct, respondent had violated Canon 1, DR 1-102(A)(1) (violating disciplinary rule), DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 6, DR 6-101(A)(2) (handling legal matter without adequate preparation) and DR 6-101(A)(3) (neglecting legal matter); and Canon 7, DR 7-101(A)(2) (failing to carry out contract for employment), DR 7-101(A)(3) (engaging in conduct prejudicial to client), DR 7-102(A)(2) (knowingly advancing unwarranted claim or defense), and DR 7-102(A)(5) (knowingly making false statement). The referee also found that respondent had violated his oath of office as an attorney.

In his report, the referee specifically found by clear and convincing evidence in case No. S-03-368 that respondent had violated the disciplinary rules recited above and his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). With respect to

the sanction which ought to be imposed for the foregoing violations, and considering the mitigating and aggravating factors the referee found present in the case, the referee recommended that respondent be disbarred from the practice of law.

2. Case No. S-03-042

As noted above, respondent was temporarily suspended from the practice of law by an order of this court in case No. S-03-042 dated January 29, 2003. On December 16, relator filed a motion for contempt alleging that respondent continued to engage in the practice of law from his office in Omaha, Nebraska. Attached to the motion are numerous exhibits supporting the allegation. These exhibits include an application for asylum bearing respondent's signature as the "Preparer" and dated November 3, 2003; a December 2 billing statement in the total amount of $962.01 from the "Villarreal Law Office," itemizing work performed from October through December; and a flyer purportedly sent to clients, which provided, "**Dear Client:** Just for December, if you pay 50% of your balance, we will give you credit for the remaining 50%. This is a promotion that won't be repeated again."

After reviewing the motion and its attachments, and finding cause demonstrated by relator, on December 17, 2003, this court issued an order to show cause why respondent should not be held in contempt of the court's January 29 order. Respondent was personally served with the show cause order on December 29. Respondent failed to respond to the show cause order.

IV. ANALYSIS

1. Findings

(a) Case No. S-03-368

[1] In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings under rule 10(L). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Hart*, 265 Neb. 649, 658 N.W.2d 632 (2003). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude that the violations found by the referee are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted.

[2-4] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Sipple*, 265 Neb. 890, 660 N.W.2d 502 (2003). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Hart, supra.*

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude in case No. S-03-368 that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), (4), and (5); DR 6-101(A)(2) and (3); DR 7-101(A)(2) and (3); and DR 7-102(A)(2) and (5). We further conclude in case No. S-03-368 that respondent has violated the attorney's oath of office. See § 7-104.

(b) Case No. S-03-042

Based upon the motion for contempt and the supporting documents attached thereto, and respondent's failure to show cause why he should not be held in contempt, we find the record in case No. S-03-042 sufficient to find respondent to be in contempt of this court and do hereby find respondent to be in contempt of this court.

2. Factors Affecting Discipline To Be Imposed

[5,6] We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of

the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

[7] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Hart*, 265 Neb. 649, 658 N.W.2d 632 (2003); *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

[8] The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.

3. Discipline To Be Imposed

(a) Case No. S-03-368

The evidence in case No. S-03-368 establishes, inter alia, that respondent committed 60 different violations of disciplinary rules, including engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; engaging in conduct prejudicial to the administration of justice; handling matters without adequate preparation; neglecting legal matters; failing to carry out contracts for employment; engaging in conduct prejudicial to his clients; knowingly advancing unwarranted claims; and knowingly making false statements.

Moreover, the referee found that based upon his observations during the hearing, the clients respondent represented were "largely uneducated, at least in the sense of a formal education, not fluent in English, legally vulnerable, generally very trusting, and so desirous of obtaining legal immigration status in the United States that they were willing to try any proposed solution suggested by the respondent." The referee found that these were

clients with whom respondent needed to exercise care. The referee observed:

> It is true that the respondent's clients did not have, relatively speaking, a substantial amount of money at stake in their cases. But they had . . . something at stake much more valuable than money. They had at stake their very ability to live in the United States with proper immigration status, their financial livelihood, and, if they were unable to obtain legal status, their ability to leave the United States other than under the cloud of deportation, so that they might have a chance to immigrate legally at some point. As an attorney quoted by the California Supreme Court recognized, in terms of what is at stake for applicants in asylum cases, "Asylum cases are probably the most sensitive cases that the field of immigration deals with. They are like death penalty cases." *Gadda v. State Bar*, 50 Ca.3d 344, 354, 787 P.2d 95, 101, 267 Cal.Rptr. 114, 120 (1990). The respondent's conduct, in almost every instance, jeopardized these very fundamental interests of his clients.

The referee noted in his report that he found very little evidence of remorse on the part of respondent and that respondent showed no sign of recognizing that his conduct was defiant in any way. According to the referee, "I believe the respondent would, if currently practicing, engage in the same type of conduct that brought us to these proceedings." In connection with this observation of the referee, we note that one of the attachments to the motion for contempt filed in case No. S-03-042 is an asylum application prepared by respondent.

[9] This court has consistently noted that cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. See, *State ex rel. Counsel for Dis. v. Cannon*, 266 Neb. 507, 666 N.W.2d 734 (2003); *State ex rel. NSBA v. Miller*, 258 Neb. 181, 602 N.W.2d 486 (1999). In this regard, we note that the record reflects that respondent has been involved in two prior disciplinary proceedings. In 1998, respondent received a private reprimand for violating DR 1-102(A)(1), (4), and (5) and DR 7-102(A)(5). In 1999, respondent received another private reprimand for violating DR 1-102(A)(1), (5), and (6), based on respondent's misdemeanor

conviction for false reporting. With the exception of DR 1-102(A)(6), respondent's prior rule violations are essentially identical to the types of violations which were repeated in case No. S-03-368.

As mitigating factors, we note that the record contains documents submitted by respondent in case No. S-03-368 to show work he has performed as an attorney in the community.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and concludes that respondent should be disbarred from the practice of law.

(b) Case No. S-03-042

[10] This court has previously held in *State ex rel. NSBA v. Thierstein*, 218 Neb. 603, 357 N.W.2d 442 (1984), and *State ex rel. NSBA v. Frank*, 219 Neb. 271, 363 N.W.2d 139 (1985), that continuing to practice law contrary to this court's order warrants a sanction of disbarment. Based on this precedent, the motion for contempt and the supporting documents attached thereto, and respondent's failure to show cause why he should not be held in contempt, we find the record in case No. S-03-042 sufficient to find respondent to be in contempt of this court and, as noted above, find respondent to be in contempt of this court. Upon due consideration, we conclude that respondent's contempt is an independent basis for disbarment from the practice of law. Continued contempt will subject respondent to the contempt provisions of Neb. Rev. Stat. § 25-2121 (Reissue 1995).

V. CONCLUSION

We conclude that the proper discipline in each of the cases Nos. S-03-042 and S-03-368 is disbarment. Respondent is disbarred from the practice of law forthwith. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT IN NO. S-03-042.
JUDGMENT OF DISBARMENT IN NO. S-03-368.

DEBORAH LEA NELSON, NOW KNOWN AS DEBORAH LEA NECHKASH, APPELLANT, V. TERRY ALAN NELSON, APPELLEE, AND ARLENE NELSON, PATERNAL GRANDMOTHER, AND JACQUELINE M. MCKERN AND HERBERT M. MCKERN, MATERNAL GRANDPARENTS, INTERVENORS-APPELLEES.

674 N.W.2d 473

Filed February 6, 2004. Nos. S-02-252, S-02-512.

1. **Visitation: Appeal and Error.** Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's 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 refrain from action, but 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. **Statutes: Intent.** Statutes which effect a change in the common law are to be strictly construed.
4. **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 a fact to be proved.

Petitions for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and HANNON and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, GERALD E. MORAN, Judge. Judgment of Court of Appeals affirmed.

Andrew C. Sigerson, of Blazek & Associates, P.C., L.L.O., for appellant.

Michael B. Lustgarten and Matthew A. Headley, Senior Certified Law Student, of Lustgarten & Roberts, P.C., for intervenor-appellee Arlene Nelson.

Diane L. Berger for intervenors-appellees Jacqueline M. McKern and Herbert M. McKern.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Deborah Lea Nelson, now known as Deborah Lea Nechkash, appealed from an order of the district court for Douglas County

granting two separate petitions for grandparent visitation and from a subsequent order holding her in contempt for violation of the visitation order. The Nebraska Court of Appeals determined that the district court abused its discretion in ordering visitation and reversed, and remanded with directions to dismiss. The court also dismissed the appeal from the contempt order as moot. *Nelson v. Nelson*, Nos. A-02-252, A-02-512, 2003 WL 1798939 (Neb. App. Apr. 8, 2003) (not designated for permanent publication). We granted the grandparents' petition for further review.

BACKGROUND

The following detailed summary of the testimony and procedural background of these cases is adopted substantially, and for the most part verbatim, from the opinion of the Court of Appeals.

A decree dissolving the marriage of Deborah and Terry Alan Nelson was entered in August 2001. Terry died a few weeks later. Deborah was awarded custody of their three children: Erica Brooke Nelson, born June 14, 1990; Alan James Nelson, born April 23, 1992, and Cullan Justin Nelson, born May 17, 1994. Deborah remarried on December 7, 2001.

Arlene Nelson, a widow, is the children's paternal grandmother, and Jacqueline M. McKern and Herbert M. McKern are the maternal grandparents. They filed separate petitions to intervene in the dissolution action, which petitions were granted. Arlene filed a petition for visitation on December 19, 2001, and the McKerns filed a similar petition on January 2, 2002. Deborah answered with general denials. A trial on both petitions was held on January 16.

Arlene testified that prior to her husband's death in 1993, Deborah, Terry, and the children came to Arlene's house "more than twice a week" and that she and her husband took them out to eat on "almost a weekly basis." There were also times during this period when the children spent the night with Arlene and her husband. After her husband's death and until approximately 3 years prior to the trial, Arlene saw the children on at least a weekly basis when she became their daycare provider. Arlene testified that she performed the following services in her role as daycare provider:

> [T]hree years ago, I went over on a daily basis to [Deborah and Terry's] home and — I got over there about 6:15 in the morning and I did — I cleaned the kitchen and picked up everything, got the kids breakfast and took them to school and picked them up. The one was a kindergartner at the time.
>
> During the summer, I did the same thing. I took them to swimming lessons and I picked them up and I took them to my house and watched them on a daily basis. I was their day care provider.

Arlene was the children's daycare provider for approximately 2 years.

Arlene testified that during the 2 years preceding the trial, the children spent the night at her house when Terry exercised his visitation rights and perhaps on a few other "sporadic" occasions. Arlene testified that she has had regular contact with the children since they were born, except for a period when Deborah would not allow the children or Terry to visit Arlene because of a dispute over money.

Arlene requested an order that she and the McKerns be allowed to share visitation with the children either Friday evening to Sunday evening once a month, or Saturday morning to Sunday evening every other weekend. She asked for court-ordered visitation, in part because she believed it would be her only contact with the children and the children's only contact with Terry's side of the family. Arlene testified that Terry's brother, sisters, and cousins no longer have contact with the children because "that's not allowed." Arlene did not have much contact with the McKerns but testified that she had previously involved them in functions at her home relating to the children.

On cross-examination, Arlene read an excerpt from a statement she had written during Deborah and Terry's divorce proceedings. It read:

> Deborah Nelson is hard to get along with, destructive family person who cares little about the needs of her own children and/or other people. She wants no church affiliation for herself or her children. A drinker and lazy in all things. Puts herself first and has no family relationships because she has run out of people who will do for her. Manipulative to where she has damaged the lives of her own children. Deborah's

> only a biological mother, and has never provided a home atmosphere for the children or her husband. Deborah always had to be in control and center stage. Money is and always has been her goal.

The McKerns, the maternal grandparents, live on a farm near Council Bluffs, Iowa. Jacqueline testified that the children enjoyed visiting the farm and being with the farm animals. Other than a Christmas visit shortly before trial, the McKerns had not seen the children for more than a year. Jacqueline testified that prior to that visit, "there was not much contact at all," because the McKerns "were not talking" to Deborah.

Jacqueline testified that she has five other grandchildren. She feels that it is in the Nelson children's best interests to have ongoing contact with the rest of Deborah's side of the family. Jacqueline testified that Deborah does not have a relationship with any member of their family. While Jacqueline admits there is "some unhappiness between the family," she feels that she is able to be with the children "and not provide any negative feelings" to them.

On cross-examination, Jacqueline admitted that she had not asked Deborah for visitation with the children before seeking court-ordered visitation. After Deborah received notice that Jacqueline had petitioned for visitation rights, Deborah brought the children to see Jacqueline. Jacqueline admitted that on this occasion, she had a brief discussion with Deborah but did not acknowledge the children. On another occasion, in March 2000, Deborah called and asked Jacqueline to watch the children. Jacqueline refused, saying she did not want to be a babysitter. Jacqueline asked the court to award grandparent visitation to be shared with Arlene.

Herbert testified that he made the following statement to Terry at the time of the divorce proceedings:

> Will testify that Terry is a better parent for the children. Terry has always worked overtime in the past and provided for the children. Deborah has had no family involvement with either Terry's family or her own family, except for her grandfather who she goes to for money. She has isolated herself from the kids and from family members. She put herself first and will never take responsibility for any

> wrongdoing by her. She needs to be in control at all times. Deborah has talked negative[ly] to Terry whenever she was in front of any family members, whether her family or Terry's family.

Deborah testified that she believed it was not in her children's best interests to have contact with their grandparents "at this time" because of the lack of relationship between the children and the grandparents in the past and the grandparents' "negative feelings" toward her and her new husband. She testified that she notices negative changes in her children's behavior after they visit their grandparents and that the children do not look forward to the visits. Deborah testified that she genuinely wishes that visitation were not a "vindictive thing" and that the grandparents actually wanted to see the children. She further stated that "if their motive is the right one and if the kids are in a safe environment and [the grandparents] are not trying to attack me or my husband or the kids, they just want to actually see them, then I would be willing [to allow visitation]."

Deborah characterized her relationship with Arlene as "on/off." Deborah testified that in 1996 and 1997, Arlene had "no relationship" with the children or with her. She stated that there was tension among Arlene, Terry, and herself due to an unrelated legal matter, and that money issues between Arlene and Terry "split them up." Deborah, Terry, and Arlene participated in several counseling sessions which did not succeed in improving their relationship. Deborah does not believe that Arlene had a beneficial relationship with the children during the period that she provided daycare for them. She testified that she ended this arrangement when the children reported that during an argument, Arlene "took a knife out of the drawer and said ['L]et's settle this between you.['']" Arlene did not address this incident in her testimony.

Deborah testified about the visit to the McKerns' home after she learned that they were seeking a visitation order. The visit occurred outside the house. When Deborah asked Jacqueline why she had not called, Jacqueline responded, "I should not have to." Jacqueline then told Deborah that she was "a bitter person" and that she was "not going to argue with [her]" and then walked back into the house. Deborah testified that she has never had a very

good relationship with Herbert. Deborah's breakdown in her relationship with Jacqueline was caused in part because of her belief that she should not have to be the one making the effort to contact the McKerns, that "it should be a mutual relationship."

The district court entered an order establishing grandparent visitation rights on January 30, 2002. It found by clear and convincing evidence that the grandparents had a beneficial relationship with the children, that it was in the best interests of the children that a grandparent-grandchild relationship continue, and that such a relationship would not adversely interfere with the relationship between Deborah and the children. The order granted the following visitation: the first Sunday of each month from 1 to 6 p.m., a 3-hour period on December 24 or 25, a 3-hour period within 2 days before or on each of the children's birthdays, a 3-hour period on the Thanksgiving weekend, and a 3-hour period during the Easter or spring break from school. In addition, the order contained the following provision: "The grandparents shall not make disparaging statements about [Deborah] or her husband to the minor children, or in the presence of the minor children."

Deborah appealed from this order and from a subsequent order finding her in contempt for not complying with the visitation order. The appeals were consolidated in the Court of Appeals. In a 2 to 1 opinion, that court reversed the visitation order and remanded the cause with directions to dismiss. It also dismissed the appeal from the contempt order as moot. *Nelson v. Nelson*, Nos. A-02-252, A-02-512, 2003 WL 1798939 (Neb. App. Apr. 8, 2003) (not designated for permanent publication). The Court of Appeals concluded that while the record reflected a previous relationship between the children and Arlene, "the record contain[ed] no evidence from which it can be inferred that the relationship between Arlene and the children was beneficial to the children." *Id.* at *6. The court further concluded that the McKerns failed to present clear and convincing evidence of a significant relationship with the children, much less a significant beneficial relationship. *Id.*

ASSIGNMENT OF ERROR

The grandparents assign that the Court of Appeals erred in concluding that the district court abused its discretion in awarding them visitation.

STANDARD OF REVIEW

[1] Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion. *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999); *Morris v. Corzatt*, 255 Neb. 182, 583 N.W.2d 26 (1998).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but 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. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

ANALYSIS

[3] At common law, " 'grandparents lacked any legal right to visitation and communication with their grandchildren if such visitation was forbidden by the parents. . . . Indeed, the parents' obligation to allow such visitation was a moral, not a legal obligation.' " *Pier v. Bolles*, 257 Neb. at 124, 596 N.W.2d at 4, quoting *Ex parte Bronstein*, 434 So. 2d 780 (Ala. 1983). In 1986, the Nebraska Legislature enacted the grandparent visitation statutes, 1986 Neb. Laws, L.B. 105, thereby creating a procedure for grandparents to seek court-ordered visitation. See Neb. Rev. Stat. § 43-1801 et seq. (Reissue 1998). Generally, statutes which effect a change in the common law are to be strictly construed. See, *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998); *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *Strauel v. Peterson*, 155 Neb. 448, 52 N.W.2d 307 (1952).

The statute implicated in this case, § 43-1802(2), provides:

> In determining whether a grandparent shall be granted visitation, the court shall require evidence concerning the beneficial nature of the relationship of the grandparent to the child. The evidence may be presented by affidavit and shall demonstrate that a significant beneficial relationship exists, or has existed in the past, between the grandparent and the child and that it would be in the best interests of the child to allow such relationship to continue. Reasonable rights of

visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continues, and that such visitation will not adversely interfere with the parent-child relationship.

The U.S. Supreme Court in *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion), recognized that court-ordered grandparent visitation raises the issue of "perhaps the oldest of the fundamental liberty interests recognized by this Court," the interest of parents in the care, custody, and control of their children. See, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (holding liberty of parents and guardians includes right to direct upbringing and education of children under their control); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (holding liberty protected by Due Process Clause includes right of parents to establish home, bring up children, and control their education). The *Troxel* plurality held that a Washington grandparent visitation statute was unconstitutional as applied because it violated a fit custodial parent's due process right to make decisions regarding the care, custody, and control of her children by placing the burden on the parent to prove that visitation would not be in the best interests of the children. Although none of the parties in this case frame their arguments in constitutional terms, *Troxel* provides context for our analysis of this conflict between a parent and grandparents over visitation rights.

[4] Nebraska's grandparent visitation statutes clearly and significantly place the burden of proof upon the grandparent seeking a visitation order. Pursuant to § 43-1802(2), a court is without discretionary authority to order grandparent visitation until a petitioning grandparent proves by clear and convincing evidence that "(1) [t]here is, or has been, a significant beneficial relationship between the grandparent and the child; (2) it is in the best interests of the child that such relationship continue; and (3) such visitation will not adversely interfere with the parent-child relationship." *Eberspacher v. Hulme*, 248 Neb. 202, 206, 533 N.W.2d 103, 105 (1995). 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 a fact to be proved. *State ex rel. Special Counsel for Dis. v. Shapiro*, 266 Neb. 328, 665 N.W.2d 615 (2003); *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000). In the absence of such evidence of the statutory prerequisites set forth in § 43-1802(2), court-ordered grandparent visitation is an abuse of judicial discretion.

We have recognized that any inquiry into the "significant beneficial relationship" requirement of § 43-1802(2) will necessarily be "fact-dependent." *Rosse v. Rosse*, 244 Neb. 967, 973, 510 N.W.2d 73, 78 (1994). We therefore examine the facts of this case in light of this requirement.

Arlene's testimony establishes the nature and frequency of her contacts with the children over the years, but reveals nothing about the nature of the relationship which existed as a result of those contacts. Although she emphasizes her past role as the children's daycare provider, the evidence of this relationship does little more than establish that Arlene performed various housekeeping and transportation chores for the children. There is no testimony or other evidence upon which to base a qualitative assessment of the personal relationship that existed between Arlene and the children during this or any other period. We simply cannot determine from the record whether the relationship between Arlene and the children was congenial or acrimonious, affectionate or indifferent, trusting or deceitful, loving or simply custodial. When asked on direct examination whether she believed the relationship to be beneficial to her and the children, Arlene gave an affirmative response, but no supporting reasons or explanation. While the scant evidentiary record may not reflect the true nature of Arlene's relationship with the children, it is the only evidence we have, and it falls far short of establishing clear and convincing evidence of a significant beneficial relationship. We therefore agree with the Court of Appeals' conclusion that the record "contains no evidence from which it can be inferred that the relationship between Arlene and the children was beneficial to the children. At most, it shows there was contact between Arlene and the children, but the nature of that contact is unknown." *Nelson v. Nelson*, Nos. A-02-252, A-02-512,

2003 WL 1798939 at *6 (Neb. App. Apr. 8, 2003) (not designated for permanent publication).

The evidence concerning the relationship between the McKerns and the children is even more tenuous. The McKerns had "not much contact at all" with the children. Jacqueline described a recent Christmas visit with the children as having gone "very well," but she admits that she did not even acknowledge the children's presence during another recent visit when she and Deborah exchanged harsh words at the doorstep of her home. There is no evidence of affection, kindness, tenderness, or even civility between the McKerns and the children, and we cannot assume the existence of such emotions simply by virtue of the biological relationship. We therefore agree with the conclusion of the Court of Appeals that the McKerns failed to present clear and convincing evidence of a significant beneficial relationship with the children.

As the Court of Appeals correctly noted, the complete failure of proof in this case can be demonstrated by contrasting it with the evidence of the grandparent relationship presented in *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994). In *Rosse*, both grandparents offered evidence as to the nature of their personal relationship with their 2½-year-old grandchild, not just the amount of time they spent together. The grandmother testified that she saw her role as " 'loving [her granddaughter] and having her love me.' " *Id.* at 973, 510 N.W.2d at 78. The record reflected that the child lets only the grandmother, whom she calls " 'Nana Therese,' " read to her. *Id.* The grandmother testified that her granddaughter trusts her, tells her that she loves her, and has fallen asleep in her arms. *Id.* The grandfather testified that he plays with his granddaughter, who calls him " 'Grandpa Jack,' " and that they have a good time together. *Id.* at 974, 510 N.W.2d at 78. He also testified that his granddaughter gives him kisses, which he considers a sign of affection. *Id.* Based on this record, and giving due consideration to the age of the child, we determined that there was clear and convincing evidence to support the trial court's finding that a significant beneficial relationship existed between the grandparents and their granddaughter. We cannot reach that conclusion on the record in the instant case.

The grandparents' proof in this case fails for the additional reason that there is no evidence upon which a court could conclude that visitation would be in the best interests of the children, which must be established by clear and convincing evidence before a court can even consider ordering grandparent visitation under § 43-1802(2). Other than a general conclusory statement by Jacqueline that she felt it would be in the children's best interests to have ongoing contact with the rest of Deborah's side of the family, the only evidence regarding the best interests of the children was testimony by Deborah, summarized above, explaining why she did not believe that grandparent visitation would be beneficial to her children. In *Pier v. Bolles*, 257 Neb. 120, 129, 596 N.W.2d 1, 8 (1999), we held that the trial court abused its discretion in ordering grandparent visitation where the evidence consisted solely of the grandmother's statement that she had " 'a close, loving relationship with [the grandchild] since his birth' " and that she and her husband had exercised regular visitation when permitted. Here, the evidence regarding best interests of the children does not even rise to this level.

Thus, there is a completely inadequate factual basis for the finding of the district court that "it [wa]s in the best interests of said children that the grandparent-grandchildren relationship continue." In announcing his holding from the bench, the district judge explained:

> Here is what I honestly think. I think there has been so much turmoil in these kids' lives that regardless of whether the grandparents and [Deborah] get along, I think it is of a significant beneficial relationship to these kids that they have a relationship with their grandparents and I don't think if I leave it up to [Deborah], it's going to happen.

While we certainly agree with the general proposition that a strong and healthy relationship with grandparents is in the best interests of children, that is not the issue before us. In the legitimate exercise of her parental rights, Deborah has concluded that the interests of *her* children would not be served by an ongoing relationship with *their* grandparents at the present time, given the generally strained familial relationship. Whether or not we agree with that decision, we do not have legal authority to countermand it by ordering grandparent visitation in the absence of clear and

convincing evidence that "a significant beneficial relationship exists, or has existed in the past, between the grandparent and the child and that it would be in the best interests of the child to allow such relationship to continue." See § 43-1802(2). The statutory requirement that grandparents present such evidence before a court may even consider ordering visitation gives proper deference to the fundamental right of a fit parent to make decisions regarding their children's upbringing. See *Troxel v. Granville*, 530 U.S. 57, 72-73, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion) ("the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made"). Because the grandparents in this case did not meet their evidentiary burden, the Court of Appeals correctly reversed the visitation order and remanded the cause with directions to dismiss.

CONCLUSION

Based on the foregoing analysis, we conclude on further review that the Court of Appeals did not err in determining that the trial court abused its discretion in granting the grandparents visitation with the children, and we therefore affirm the judgment in case No. S-02-252, which reverses the visitation order and remands the cause with directions to dismiss. Inasmuch as there is no assignment of error directed to the Court of Appeals' disposition of case No. S-02-512, we likewise affirm the judgment of dismissal in that case.

AFFIRMED.

McCORMACK, J., concurring in part, and in part dissenting.

I concur with the majority that the McKerns failed to present clear and convincing evidence of a significant beneficial relationship with the children. However, I respectfully dissent from the majority's conclusion that Arlene failed to prove by clear and convincing evidence that (1) a significant beneficial relationship existed between herself and the children and (2) it would be in the best interests of the children to allow such relationship to continue. I would reverse the Court of Appeals' decision in part and restore the district court's award of visitation rights to Arlene.

Any inquiry into the "significant beneficial relationship" requirement of Neb. Rev. Stat. § 43-1802(2) (Reissue 1998) will necessarily be "fact-dependent." *Rosse v. Rosse*, 244 Neb. 967, 973, 510 N.W.2d 73, 78 (1994). The record in this case indicates that Arlene was the children's daycare provider for about 2 years. She went to Deborah and Terry's house every day at about 6:15 a.m., cleaned the kitchen, fed the children breakfast, took them to school, and picked them up from school. During the summer, Arlene took them to and picked them up from swimming lessons and again watched them on a daily basis. Based on this evidence, I would conclude that the district court did not abuse its discretion in finding that a significant beneficial relationship existed between Arlene and the children.

The majority reaches the opposite conclusion because Arlene's testimony "reveals nothing about the nature of the relationship" between herself and the children and leaves unclear whether that relationship was "congenial or acrimonious, affectionate or indifferent, trusting or deceitful, loving or simply custodial." The majority's construction of the "significant beneficial relationship" prong of § 43-1802(2) apparently requires evidence of an interpersonal, emotional bond between grandparent and grandchild. The majority contrasts this case with *Rosse v. Rosse, supra*, where there was plentiful evidence of hugs and kisses between grandparents and their grandchild. I certainly agree that outward signs of affection between grandparents and grandchildren, such as those in *Rosse*, are evidence that a significant beneficial relationship exists. However, there are many ways a grandparent can establish a relationship with a grandchild that is beneficial to both the grandparent and, more important, to the grandchild. In this case, Arlene attended to the children's needs every day for 2 years and performed many of the same tasks that a parent might otherwise perform. Arlene's contact with the children is not appreciably different than the contact between the grandparents and grandchild in *Rosse*. There, the grandmother read stories to her grandchild and the grandfather took his grandchild to the park and zoo, he played with her, and apparently they went "places" together. *Rosse v. Rosse*, 244 Neb. at 974, 510 N.W.2d at 78. The primary distinction between the grandparent-grandchild relationship in *Rosse* and the one in this case is not the contacts, but the

additional evidence of hugs and kisses in *Rosse*. I would not find the presence or absence of such evidence in the record dispositive of the issue. Common sense indicates to me that caring for your grandchildren's everyday needs for 2 years constitutes clear and convincing evidence that a significant beneficial relationship exists. In light of these findings, I would also conclude that the district court did not abuse its discretion in finding that it was in the best interests of the children that their relationship with Arlene continue. See *Rosse v. Rosse, supra*.

The final criterion of § 43-1802 required Arlene to prove by clear and convincing evidence that visitation would not adversely interfere with the parent-child relationship. As indicated by the statement Arlene made at trial, the relationship between herself and Deborah may be fairly characterized as strained. Were it not, court-ordered visitation would be unnecessary. However, there is no evidence that Arlene has ever directed toward the children any scorn she feels about Deborah or has otherwise sought to undermine or disparage Deborah in the children's presence. Furthermore, the district court's order expressly prohibited such comments from being made in the future. I would conclude that the district court did not abuse its discretion in concluding that Arlene's visitation would not adversely interfere with the parent-child relationship. For all of the above reasons, I believe the Court of Appeals erred in reversing the district court's award of visitation rights to Arlene.

HENRY MISLE AND BRYAN MISLE, APPELLANTS, V.
HJA, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

674 N.W.2d 257

Filed February 6, 2004. No. S-02-445.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
5. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.
6. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
7. **Contracts.** The construction of a contract is a matter of law.
8. **Contracts: Intent.** When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract.
9. **Courts: Final Orders.** A district court can modify a nonfinal order outside the term in which the order was rendered.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

James F. Cann, of Domina Law, P.C., for appellants.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., and, on brief, Michael C. Cox, Allen E. Daubman, and Matthew D. Maser, of Koley Jessen, P.C., L.L.O., for appellees HJA, Inc., and Estate of Abram Misle.

David S. Houghton and J.P. Sam King, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee Julius Misle.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Henry Misle (Misle) and his brothers, Abram Misle (Abram) and Julius Misle (Julius), were the sole stockholders of HJA, Inc., a Nebraska corporation which owned and operated several automobile dealerships in Lincoln, Nebraska. In 1990, the parties entered into a written agreement whereby the corporation could

acquire Misle's stock, as well as dealership franchises held by Misle and his son Bryan Misle (Bryan), in exchange for certain cash payments. This litigation, commenced in 1991, involved various claims that the 1990 agreement was breached. Many of the claims have been resolved, and by 1997, HJA, the estate of Abram, and Julius had paid or were current on all amounts due under the agreement. However, a dispute remained as to whether they were liable under the agreement to Misle and Bryan for state and federal taxes, penalties, and interest associated with payments which had not been made in a timely manner. That dispute is the subject of this appeal.

FACTS

In March 1990, Misle, Bryan, HJA, Abram, and Julius entered into a contract designated as an "Exclusive Option Agreement" and a second agreement which the parties refer to as a "Side Letter Agreement." The record reflects that these documents constitute a single unambiguous agreement, and we hereinafter refer to them as "the agreement." Under the terms of the agreement, Abram, Julius, and HJA were given an option to purchase Misle's shares of HJA stock in exchange for an option payment to Misle. This provision is referred to in the record as the "buyout." The agreement also included a covenant by Misle not to compete with HJA and its related entities, for which Misle was to receive a specified sum payable in 120 equal monthly installments. The buyout option was exercised, and between March 15, 1990, and January 1991, pursuant to the agreement, certain payments were made to or on behalf of Misle. After that time, however, HJA, Abram, and Julius stopped making payments directly to Misle, although they did continue to pay certain debts held in Misle's name.

On January 21, 1991, Misle and Bryan filed this action for breach of contract in the district court for Lancaster County, naming HJA, Abram, and Julius as defendants (hereinafter collectively the defendants). Abram died during the pendency of the suit, and the action was thereafter revived to join the personal representative of his estate. A bench trial was held in 1996. On January 7, 1997, the district court entered a "Modified Memorandum Opinion and Judgment" (modified judgment), resolving significant portions of the dispute. The court found that the defendants had breached the

terms of both the buyout and the related covenant not to compete. It ordered that certain specified sums be paid to Misle as a result of those breaches. In the court's analysis of the evidence presented at trial, it noted that

> even though the defendants discontinued direct payments to [Misle and Bryan] . . . under the agreement, they did continue for a period of time to make payments on outstanding indebtedness under the "non-compete" clause. As a side issue to this, the evidence would also show that as a consequence of these payments, federal tax forms were issued by HJA to [Misle] showing income to him for the various years in which payments were made. In turn, this resulted in federal and state assessment of taxes based on this income for the years involved, and upon the failure of the payment of those taxes, interest and penalties were assessed against [Misle]. Direct evidence with regard to this matter shows that [Misle] was unable to pay the taxes because of the failure of the defendants to provide the income to him as contemplated in the [noncompete clause]. The evidence would also show that the exact amount of taxes, penalties and interest are presently unknown, those matters being in litigation in the federal courts at the time of trial.

The court specifically found that

> the failure of the defendants to perform their obligations under [the agreement] has resulted in certain federal and state tax penalties and interest being charged against . . . Misle, the exact amount of which is unknown at this time. . . . Misle . . . is entitled to recover all such penalties and interest attributable to the failure of the defendants to perform. Because of the pending litigation, which will be completed following the date of this opinion, judgment should be granted to . . . Misle . . . on this issue, but any determination of the exact amount due should be separated and reserved for final determination by this Court after final settlement of the pending litigation in the federal courts.

The district court concluded that

> judgment should be and is entered in favor of . . . Misle . . . for all federal and state tax penalties and interest assessed against him which are attributable to the defendants . . . .

> Further, that the determination of the exact amount due for said penalties and interest should be reserved for final determination in a separate proceeding after final settlement of pending litigation of this matter in the federal courts.

The district court subsequently held that the modified judgment was not a final order because it did not completely dispose of all pending issues, and the remaining disputed issues as to "the amount of tax interest and penalty to be assessed as damages" could therefore be resolved in this action.

On October 16, 2000, the U.S. Tax Court filed its memorandum No. 2000-322, which resolved the amount of federal taxes and penalties owed by Misle and his wife for the years 1989 through 1996, inclusive. The primary issue addressed by the Tax Court was whether payments made by the defendants, which were applied to certain of Misle's debts, constituted income which was taxable to Misle and deductible by the defendants. The Tax Court concluded that the payments did constitute taxable income and assessed an "accuracy-related penalty" for Misle's failure to report the payments as income in tax years 1989 through 1994, inclusive, and 1996. The Tax Court rejected Misle's argument that the payments were not income to him because he was not the primary obligor on the debts. The findings of the Tax Court did not reflect any claim by Misle that he was unable to report the income or unable to pay taxes on the income because of failure by the defendants to honor the terms of the agreement.

The Tax Court also assessed penalties for Misle's failure to file a tax return in 1995 and for his failure to make estimated payments in 1995. In doing so, the Tax Court rejected Misle's argument that he was unable to file a 1995 tax return because he could not calculate the value of certain stock transactions. These transactions were entirely unrelated to the agreement. The Tax Court's final decision found Misle and his wife liable for the following amounts of federal taxes: for tax year 1989, taxes due of $19,906 and a penalty of $3,981; for tax year 1990, taxes due of $24,823.47 and a penalty of $4,965; for tax year 1991, taxes due of $72,172 and a penalty of $14,434; for tax year 1992, taxes due of $17,473 and a penalty of $3,495; for tax year 1993, taxes due of $25,173 and a penalty of $5,035; for tax year 1994, taxes

due of $60,196 and a penalty of $11,887; for tax year 1995, taxes due of $60,631 and a penalty of $18,353; for tax year 1996, taxes due of $64,217 and a penalty of $12,843.

On May 1, 2001, Misle and Bryan filed an amended petition in the district court. This petition alleged that the agreement contained the following provision:

> "We specifically agree that if the federal and state income taxes (associated with these payments) shall be due prior to the scheduled receipt of such payment, e.g. such loans being accelerated or refinanced at a different bank, or if taxing authorities require recognition of all such payments as income prior to their receipt by [Misle], or for any other reason, then the amounts due under . . . the Agreement shall be accelerated and become due at such time."

The amended petition then alleged that in the 1997 modified judgment, the court entered judgment "in favor of [Misle and Bryan] for all federal and state tax penalties and interest assessed against . . . Misle attributable to the Defendants for breach of the agreement." The petition thereafter set forth the sums of taxes and penalties found by the Tax Court for the years 1990 through 1996, inclusive, and noted that state taxes and penalties had not yet been determined. It prayed that "partial judgment be entered in favor of [Misle and Bryan]" for the entire amount of sums found to be due by the Tax Court for the years 1990 to 1996, inclusive; federal taxes and interest for the years 1997 and 1998; interest on federal taxes and penalties for the years 1990 through 1998, inclusive; and state taxes, penalties, and interest for the years 1990 through 1998, inclusive.

In their answer, HJA and the estate of Abram admitted that the district court had ruled that Misle was entitled to tax penalties and interest which were attributable to HJA and the estate of Abram's failure to perform under the agreement, but denied that they had any liability for the actual tax deficiencies at issue. HJA and the estate of Abram further alleged that they were liable for only "those penalties and interest, if any, which [were] attributable" to their breach of the agreement.

With the issues thus joined, HJA and the estate of Abram filed a motion for summary judgment asserting, inter alia, that they had "no liability for any tax deficiencies claimed by . . . Misle"

and "no liability for any penalties or interest as . . . Misle's incurrence of the same were not attributable to any breach of contract by Defendants." A hearing on the motion was held on October 24, 2001, before a judge to whom the case had been reassigned subsequently to the 1997 modified judgment. The court received evidence in support of and in opposition to the motion, and took judicial notice of the pleadings filed in 2001. On November 26, the district court granted partial summary judgment in favor of HJA and the estate of Abram. In this order, the district court found that the taxes and penalties assessed by the Tax Court for the years 1990 through 1996, inclusive, were attributable to Misle's failure to report the debt payments as income and his failure to file a tax return in 1995. Based on this finding, the district court concluded that "[t]here is no evidence that any of the penalties assessed [for tax years 1990 to 1996] have even a remote relationship to the defendants' breach of the contract." The district court further concluded that because the defendants were current on required contractual payments by December 29, 1997, Misle had received all money due him prior to the time taxes were due in 1997 and 1998, and that thus any taxes or penalties for those years were also not attributable to the defendants' breach of the agreement. Noting that the amended petition did not include any claim on behalf of Bryan, the court entered summary judgment against him. Finally, the court overruled that portion of the motion for summary judgment relating to state tax penalties and interest, finding there was insufficient evidence to support the moving parties' claim that they were entitled to judgment as a matter of law on these issues.

Following an additional hearing, the district court entered an order on March 11, 2002, granting Julius' motion for summary judgment for the same reasons set forth in its previous order. In the same order, the court determined that because there was no evidence that state tax issues should be treated differently than federal tax issues or any evidence that any of Misle's state tax liability was caused by a breach of the agreement, summary judgment was appropriate for all defendants as to all remaining issues.

Misle and Bryan filed a timely motion for new trial, which was overruled. They then perfected this appeal, which we moved to our docket pursuant to our statutory authority to regulate the

dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Misle and Bryan assign, restated and consolidated, that the trial court erred (1) in granting summary judgment in favor of HJA with respect to Misle's claim for reimbursement of tax deficiencies, penalties, and interest and (2) in refusing to receive two affidavits offered in opposition to the motions for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003); *Wright v. Farmers Mut. of Neb.*, 266 Neb. 802, 669 N.W.2d 462 (2003).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003); *Borley Storage & Transfer Co. v. Whitted*, 265 Neb. 533, 657 N.W.2d 911 (2003).

[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *K N Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003); *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599 (2003).

ANALYSIS

[4] We begin by noting that while there are multiple parties to this action, the issues presented for review in this appeal involve only appellant Misle and appellee HJA. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003). Misle and Bryan neither assign nor argue any error

with respect to the entry of summary judgment against Bryan or that in favor of Julius and the estate of Abram. Accordingly, we consider only the question of whether the district court erred in entering summary judgment in favor of HJA on Misle's claims.

[5,6] In our review of this issue, we are guided by familiar general principles. The party moving for summary judgment, in this case HJA, has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. See, *Wolfe, supra*; *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Polinski v. Sky Harbor Air Serv.*, 263 Neb. 406, 640 N.W.2d 391 (2002); *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000). In analyzing the evidence presented to the district court within this framework, it is helpful to divide Misle's claim against HJA into three categories: (1) the claim that HJA is liable for taxes incurred by Misle for the years 1990 through 1996, inclusive, as determined by the Tax Court; (2) the claim that HJA is liable to Misle for penalties and interest on such liability; and (3) the claim that HJA is liable for taxes, penalties, and interest which Misle incurred for the years 1997 and 1998.

1990-96 Taxes

The evidence offered by HJA in support of its motion for summary judgment includes the 1997 modified judgment, which specifies the issues which remained unresolved at that time, and the subsequent opinion of the Tax Court, which determined tax liability and penalties owed by Misle for the years 1990 through 1996, inclusive. The 1997 modified judgment, which is an interlocutory order, refers twice to "federal and state tax penalties and interest" charged against Misle as a result of HJA's breach of the agreement, in amounts which had yet to be determined by the Tax Court. Following each appearance of that phrase, the district court concluded that Misle was entitled to recover such

"penalties and interest" when the amounts were determined. Thus, while the 1997 order clearly anticipates a possible future recovery from HJA of penalties and interest to be assessed against Misle by federal and state taxing authorities, it does not find that the actual tax liability upon which such penalties and interest may be based is a recoverable element of damages in Misle's breach of contract action.

The Tax Court opinion further reinforces this conclusion. The opinion focuses upon payments actually made by HJA during the years in question but not reported as income by Misle. The Tax Court concluded that such payments did constitute taxable income to Misle in the years that they were made and that therefore, Misle had an obligation to pay taxes on said amounts. Thus, Misle's tax liability arose from payments which HJA actually made under the agreement, not from any alleged failure or delay in making such payments. Taken together, the 1997 modified judgment and the opinion of the Tax Court constitute a prima facie showing that HJA has no liability to Misle for the taxes he was determined to owe on payments made under the agreement for the years 1990 through 1996, inclusive.

[7,8] Misle argues, however, that such liability arises from the following language in the agreement pertaining to payments for his covenant not to compete:

> Pursuant to . . . the Agreement, . . . Misle is to receive $2.8 million over a period of 120 months. We acknowledge that such payments are designed to be sufficient to retire your indebtedness of approximately $1.2 million plus interest thereon, as well as the federal and state income tax due from you on the receipt of such monies. We specifically agree that if the federal and state income taxes (associated with these payments) shall be due prior to the scheduled receipt of such payment, e.g. such loans being accelerated or refinanced at a different bank, or if taxing authorities require recognition of all such payments as income prior to their receipt by [Misle], or for any other reason, then the amounts due under . . . the Agreement shall be accelerated and become due at such time.

The construction of a contract is a matter of law. *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d

876 (2002); *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002); *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001).

The plain language of the above-quoted contractual provision relied upon by Misle does not require HJA to assume liability for tax obligations incurred by Misle as a result of payments made pursuant to the agreement. Instead, the plain language acknowledges that Misle would incur tax liability with respect to payments made to him or on his behalf under the agreement and reflects only an undertaking by HJA to accelerate the installment payments for the covenant not to compete if necessary to allow Misle to meet his tax obligations in a timely manner. We therefore conclude as a matter of law that HJA has no obligation to pay taxes owed by Misle on the payments made by HJA under the agreement, either as an element of damages or pursuant to any contractual undertaking.

1990-96 Penalties and Interest

In its 1997 modified judgment, the district court found that Misle incurred tax liability as a consequence of payments made by HJA directly to his creditors under the agreement, and

> upon the failure of the payment of those taxes, interest and penalties were assessed against [Misle]. *Direct evidence with regard to this matter shows that [Misle] was unable to pay the taxes because of the failure of the defendants to provide the income to him as contemplated* in the [covenant not to compete].

(Emphasis supplied.) We do not know what "direct evidence" the court was referring to because the record from the 1996 trial has not been provided to us in this appeal. We do know, of course, that the record before the district court at that time did not include the final adjudication by the Tax Court with respect to penalties and interest owed by Misle. That adjudication, made

in October 2000, conclusively establishes that the penalties and interest assessed for the years 1990 through 1996, inclusive, did not result from Misle's *failure to pay* taxes on income which he reported, but, rather, from his *failure to report income* because of a mistaken or misguided belief that it was not subject to taxation. The record does not reflect any tax penalties or interest other than those which are the subject of the Tax Court adjudication and related state assessments.

Misle assigns and argues that the district court erred in sustaining objections to affidavits of his lawyer and accountant offered in opposition to HJA's motion for summary judgment. Each affiant sought to characterize certain provisions of the agreement and stated that delays by HJA in making payments to Misle prevented him from paying his taxes, resulting in penalties and interest. Counsel for HJA objected to the affidavits on grounds that they had not been served prior to the date of the hearing, see Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002), and that the affidavits constituted legal conclusions and hearsay. We conclude that the district court did not err in sustaining this objection. However, we further note that even if the affidavits had been received, they would not have created a genuine issue of material fact with respect to the basis upon which penalties and interest were assessed. This is so because the opinion of the Tax Court conclusively establishes that such assessment was not due to Misle's failure or inability to pay taxes on reported income, but, rather, his failure to report as income payments made under the agreement during each of the years in question and his complete failure to file a 1995 tax return.

1997-98 Taxes, Penalties, and Interest

The amended petition filed in 2001 included a claim for taxes, penalties, and interest for the 1997 and 1998 tax years, noting that the "precise amount" due for those years was unknown due to a "still pending [Internal Revenue Service] Appeal's Office review." The district court found that based upon the undisputed records maintained by its clerk, HJA had paid all amounts due under the agreement and the modified judgment as of December 29, 1997, thus negating any claim that delayed payments impacted Misle's 1997 or 1998 tax returns. This determination

was correct. As we have previously noted, HJA had no obligation to pay Misle's tax liability. Any claim that it wrongfully deprived him of funds from which he could satisfy his 1997 and 1998 tax liability, thereby resulting in penalties or interest, is clearly refuted by the evidence that all required payments were made before the filing deadline for the 1997 tax returns.

CONCLUSION

[9] For the reasons discussed, we reject Misle's argument that the 2002 order of the district court, entering summary judgment in favor of HJA, is inconsistent with its 1997 interlocutory order and is therefore erroneous. Under Nebraska law, a district court can modify a nonfinal order outside the term in which the order was rendered. See, *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997); *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d 305 (1989). Presented with the 2000 Tax Court adjudication which conclusively refuted a factual premise upon which it had based its 1997 findings, the district court did not err in entering summary judgment in favor of HJA. The judgment is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

IN RE WATER APPROPRIATION A-5000.
DEPARTMENT OF NATURAL RESOURCES, APPELLEE, V. SILVERSTONE AND DAKES CANAL INC. ET AL., APPELLANTS.

674 N.W.2d 266

Filed February 6, 2004. No. S-03-679.

1. **Administrative Law: Statutes: Appeal and Error.** In an appeal from the Department of Natural Resources, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director.
2. **Waters: Administrative Law: Statutes: Proof.** In a proceeding canceling water appropriations for nonuse, the statutes provide that in the first instance, the Department of Natural Resources bears the burden to establish nonuse for the statutory period. All that need be done to establish that fact is the verified report of the department. Once

that report is presented by the department, then a hearing may be held if requested by the appropriators, at which time the appropriators must show cause why the appropriation should not be terminated. The language of the statute clearly indicates that the burden is upon the appropriator to present evidence showing either that water was taken, contrary to the report filed by the department, or that some excuse existed for the water not being taken.

Appeal from the Department of Natural Resources. Affirmed.

John C. Person, of Person Law Office, for appellants.

Jon Bruning, Attorney General, Justin D. Lavene, and David D. Cookson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The Department of Natural Resources (Department) entered an order on May 20, 2003, partially canceling water rights on land owned by Silverstone and Dakes Canal Inc., Vance Dake, and Marcia Uehling (collectively Silverstone). Silverstone appeals the Department's order and asserts that the Department failed to provide proper notice of the proceedings herein and that the Department's findings were not supported by the record. We affirm the Department's order.

STATEMENT OF FACTS

Water appropriation A-5000 is a water right with a priority date of July 30, 1952, to divert 0.57 cubic feet per second (cfs) of water from Sappa Creek at certain points for irrigation of 62.6 acres of land located in Harlan County, Nebraska. Silverstone owns the land covered by appropriation A-5000.

On January 31, 2003, the Department sent a notice to Silverstone stating that a hearing would be held on March 18 "to determine whether all or part of water appropriation A-5000 should be cancelled because of nonuse for more than three consecutive years." The notice stated that "Department records indicate that part of the land approved for irrigation under A-5000 has not been irrigated for more than three consecutive years." The notice further stated that the hearing would be held as provided by

Neb. Rev. Stat. §§ 46-229 to 46-229.05 (Reissue 1998 & Cum. Supp. 2002) and that "[a]ll persons interested in such water appropriation shall appear and show cause why such appropriation or part of the appropriation should not be cancelled or annulled. If no one appears at the hearing, the unused part of the water appropriation may be cancelled." Copies of §§ 46-229 to 46-229.05 were enclosed with the notice, and an address and telephone number for the Department were printed on the bottom of the first page of the notice.

The hearing was held March 18, 2003, in Alma, Nebraska. Department representatives presented a verified field investigation report regarding irrigation of the land covered by water appropriation A-5000. The report stated that on October 9, 2002, an investigator had spoken with Lyle Martin, who had been the tenant on the land for 17 years. The report stated that the investigator had shown Martin an aerial photograph of the land covered by appropriation A-5000, and Martin had pointed out the acres he irrigated using surface water. The aerial photograph was attached to the report, and the investigator indicated on the photograph the area that had been irrigated using surface water in the last 3 years. The pump site was also labeled on the aerial photograph. At the hearing, the hearing officer indicated that any area not shown on the map as having been irrigated using surface water in the last 3 years would be subject to cancellation. Martin and appellant Dake testified at the hearing. Martin did not dispute that the marked area had been irrigated within the last 3 years. Martin stated that a portion of the land outside the area marked on the aerial photograph had last used surface water in 1993 or 1994. Dake generally testified that surface water had been sporadic. An exhibit showing water levels was entered into evidence.

The Department concluded that part of the land designated under water appropriation A-5000 had not been irrigated from Sappa Creek for more than 3 consecutive years and that part of the appropriation should therefore be canceled. The Department issued an "Order of Cancellation in Part" on May 20, 2003. Specifically, the Department ordered that the appropriation of 0.37 cfs from Sappa Creek for 40.9 acres of land be canceled. The Department ordered that the remaining appropriation of

0.20 cfs from Sappa Creek for 21.7 acres of land remain in full force and effect. Silverstone appeals.

ASSIGNMENTS OF ERROR

Silverstone asserts that (1) the Department's notice of hearing failed to state the issues involved as required by Neb. Rev. Stat. § 84-913 (Reissue 1999); (2) the Department's notice of hearing failed to state a telephone number which any person might call for information regarding sufficient cause for nonuse as required by § 46-229.02; (3) the Department's finding that 40.9 acres of the land under water appropriation A-5000 had not been irrigated from Sappa Creek for more than 3 consecutive years was not supported by competent and relevant evidence and was arbitrary, capricious, and unreasonable; and (4) the Department erred in failing to find that sufficient cause existed for nonuse as provided in § 46-229.04(3).

STANDARD OF REVIEW

[1] In an appeal from the Department of Natural Resources, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director. *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002).

ANALYSIS

Adequacy of Notice.

Silverstone asserts that the Department did not provide adequate notice because the notice failed to state the issues involved and it failed to state a telephone number which any person might call for information regarding sufficient cause for nonuse. We conclude that the notice in this case provided adequate notice of the issues to be taken up at the hearing and contained the information required under § 46-229.02.

Silverstone first asserts that the notice did not state the issues involved as required by § 84-913 of the Administrative Procedure Act which provides that in any contested case, a notice of hearing

"shall state the time, place, and issues involved." Section 46-229.02, which is found within the statutes concerning the regulation of irrigation rights, specifically addresses the notice required for hearings regarding cancellation of water appropriations and provides in part as follows:

> If it shall appear that any water appropriation has not been used for some beneficial or useful purpose or having been so used at one time has ceased to be used for such purpose for more than three consecutive years, the department shall appoint a place and time of hearing, shall serve notice upon the owners of such water appropriation or such ditch, canal, or other diverting works to show cause by such time and at such place why the water appropriation owned by such person should not be declared forfeited and annulled because such water appropriation had not been used for more than three consecutive years prior to receiving such notice, and shall also serve such notice upon the landowners under such water appropriation, ditch, or canal. The notice shall contain a copy of section 46-229.04 and a department telephone number which any person may call for information regarding sufficient cause for nonuse.

The notice in the present case stated that a hearing would be held on March 18, 2003, "to determine whether all or part of water appropriation A-5000 should be cancelled because of nonuse for more than three consecutive years." The notice stated that "Department records indicate that part of the land approved for irrigation under A-5000 has not been irrigated for more than three consecutive years." The notice further stated that the hearing would be held as provided by §§ 46-229 to 46-229.05 and that "[a]ll persons interested in such water appropriation shall appear and show cause why such appropriation or part of the appropriation should not be cancelled or annulled. If no one appears at the hearing, the unused part of the water appropriation may be cancelled." Copies of §§ 46-229 to 46-229.05 were enclosed with the notice.

Silverstone argues that the notice failed to fully state the issues involved because the notice did not state that the appropriation would not be canceled if the Department found there had been sufficient cause for nonuse and because the notice did not state

what constituted sufficient cause under § 46-229.04(3). We determine that the notice adequately informed Silverstone of the issues because it clearly stated that the purpose of the hearing was "to determine whether all or part of water appropriation A-5000 should be cancelled because of nonuse for more than three consecutive years." The notice also stated that interested persons should appear at the hearing to "show cause why such appropriation or part of the appropriation should not be cancelled or annulled." Furthermore, copies of §§ 46-229 to 46-229.05 were provided with the notice and § 46-229.04(3), which was transmitted with the notice, lists eight circumstances which can support a claim of cause for nonuse. The statements in the notice and the inclusion of copies of the statutes fully advised Silverstone of the issues that would be addressed at the hearing. Compare, generally, *Lariat Club v. Nebraska Liquor Control Comm., ante* p. 179, 673 N.W.2d 29 (2004). Although the notice itself did not contain mention of what would constitute sufficient cause for nonuse, that information was contained in the statutes provided with the notice. We therefore reject Silverstone's first assignment of error with respect to the adequacy of notice.

Section 46-229.02 states that the notice shall include "a department telephone number which any person may call for information regarding sufficient cause for nonuse." Silverstone argues that although the notice contained the Department's telephone number, the notice did not indicate the significance of the telephone number and, therefore, did not satisfy § 46-229.02. The Department argues generally that the telephone number listed at the bottom of the first page of the notice met the statutory requirement. Acknowledging that the notice did not contain an explicit statement that the telephone number could be called for information regarding sufficient cause for nonuse, the Department specifically argues that such a statement is not required and that the language in § 46-229.02 merely advises the Department to supply a telephone number in the notice which in turn can be called for information regarding sufficient cause for nonuse. Giving the statute its plain and ordinary meaning, see *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002), we agree with the Department that provision of the telephone number was sufficient under § 46-229.02.

With respect to Silverstone's challenges, we conclude that the notice provided to Silverstone was adequate, and we therefore reject both of Silverstone's assignments of error regarding adequacy of notice.

Department's Findings.

Silverstone next asserts that the Department erred in finding that the canceled portion of the land had not been irrigated for more than 3 consecutive years and, in the alternative, erred in not finding sufficient cause for nonuse. We determine that there was sufficient competent and relevant evidence in the record to support the Department's findings and that the Department's order was not arbitrary, capricious, or unreasonable.

[2] With regard to proceedings canceling appropriations for nonuse, we note that § 46-229.04(1) provides that "[a]t such hearing the verified field investigation report of an employee of the department shall be prima facie evidence for the forfeiture and annulment of such water appropriation." Furthermore, we have stated as follows:

> "The statutes provide that in the first instance the Department bears the burden to establish nonuse for the statutory period. All that need be done to establish that fact is the verified report of the Department. Once that report is presented by the Department, then a hearing may be held if requested by the appropriators, at which time the appropriators must show cause why the appropriation should not be terminated. The language of the statute clearly indicates that the burden is upon the appropriator to present evidence showing either that water was taken, contrary to the report filed by the Department, or that some excuse existed for the water not being taken."

In re Applications T-61 and T-62, 232 Neb. 316, 325, 440 N.W.2d 466, 472 (1989) (quoting *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 313 N.W.2d 271 (1981)).

At the hearing in the present case, the Department presented a verified field investigation report which indicated that only a specific portion of the land covered by water appropriation A-5000 had been irrigated by surface water in the last 3 years. Martin's testimony at the hearing indicated that the remaining portion of

the land had not been irrigated by surface water in at least the last 3 years. Taking the field report and testimony together, the Department established nonuse of a portion of the appropriation for the statutory 3-year period, and it was Silverstone's burden to show cause why that portion of the appropriation should not be canceled. See *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002) (indicating, in motor vehicle context, that report and testimony may be taken together to establish administrative department's case).

With respect to its burden regarding the portion ultimately ordered canceled, Silverstone was obliged to present evidence showing either that water was taken or that some excuse existed for the water not being taken. Martin's testimony, Dake's generalized reference to sporadic surface water levels, and the exhibit regarding water levels did not establish that water was taken or that there was sufficient cause for nonuse. Instead, the evidence at the hearing supported the report's assertion that only a portion of the land had been irrigated using surface water in at least the last 3 years, and the Department's finding of nonuse without cause regarding the remaining portion. We therefore conclude that both the Department's finding of nonuse and its refusal to find sufficient cause for nonuse were supported by competent and relevant evidence in the record and that the Department's order canceling part of water appropriation A-5000 was not arbitrary, capricious, or unreasonable. We reject Silverstone's assignments of error regarding the Department's findings and order.

CONCLUSION

We conclude that the Department provided notice which adequately set forth the issues and which met the requirements of § 46-229.02 with respect to inclusion of a telephone number. We further conclude that the Department's findings were supported by competent and relevant evidence in the record and that its order was not arbitrary, capricious, or unreasonable. We therefore affirm the Department's May 20, 2003, order canceling part of water appropriation A-5000.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JAMES R. GILMOUR, RESPONDENT.

674 N.W.2d 483

Filed February 6, 2004. No. S-03-694.

Original action. Judgment of suspension.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

Respondent, James R. Gilmour, was admitted to the practice of law in the State of Nebraska on September 13, 1988, and at all times relevant hereto worked as a bank employee in Marshalltown, Iowa. Respondent is not actively engaged in the practice of law in Nebraska and has been an inactive member of the Nebraska State Bar Association since January 1, 1994. On September 23, 2003, amended formal charges were filed against respondent (formal charge). The formal charge sets forth a single count, including charges that the respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and DR 1-102(A)(6) (engaging in conduct that adversely reflects on fitness to practice law).

On December 16, 2003, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest the allegations that he violated DR 1-102(A)(4) and (6) and effectively waived all proceedings against him in connection therewith in exchange for a judgment of suspension for 2 years. Upon due consideration, the court approves the conditional admission and orders that respondent be suspended from the practice of law in the State of Nebraska for 2 years.

FACTS

In summary, the formal charge alleges the following: From 1988 through 1996, respondent was a trust officer and vice president for Hawkeye Bank and Trust in Marshalltown. From 1997

to 1999, respondent was executive vice president for Mercantile Bank, a successor to Hawkeye Bank and Trust, in Marshalltown. From 1999 to November 2001, respondent was the market area president of U.S. Bank, a successor to Mercantile Bank, in Marshalltown (hereinafter, Hawkeye Bank and Trust, Mercantile Bank, and U.S. Bank collectively referred to as "bank").

Beginning in 1993 and continuing through 2001, respondent, while working as a bank employee, personally accepted money from a bank client for which no additional bank services or any other services were provided. The record contains a dispute as to whether the money was a loan or a gift. On November 8, 2001, respondent's employment with the bank was terminated as a result of his receipt of the payments.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly admits the relevant facts outlined in the formal charge and knowingly does not challenge or contest that he violated DR 1-102(A)(4) and (6). We further find that respondent waives all proceedings against him in connection herewith.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(4) and (6) and that respondent should be suspended for a period of 2 years, effective immediately, after which time respondent may apply for reinstatement. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

KAREN CARLSON AND C. DEAN CARLSON, APPELLEES, V. LESLIE A. OKERSTROM AND K & B TRANSPORTATION, INC., A NEBRASKA CORPORATION, APPELLANTS.

675 N.W.2d 89

Filed February 13, 2004. No. S-02-1076.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
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 refrain from acting, but 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. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
4. **Judgments: Verdicts.** To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
5. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

6. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
7. **Physicians and Surgeons.** In performing a differential diagnosis, a physician begins by "ruling in" all scientifically plausible causes of the patient's injury. The physician then "rules out" the least plausible causes of injury until the most likely cause remains.
8. **Rules of Evidence: Expert Witnesses.** Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert.
9. **Trial: Expert Witnesses.** Whether a witness is qualified as an expert is a preliminary question for the trial court.
10. **Trial: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
11. **Trial: Expert Witnesses: Physicians and Surgeons.** Testimony of qualified medical doctors cannot be excluded simply because they are not specialists in a particular school of medical practice. Instead, experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value.
12. **Trial: Rules of Evidence: Expert Witnesses.** Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), it is not enough that a witness is qualified as an expert. The trial court must also act as a gatekeeper to ensure the evidentiary relevance and reliability of the expert's opinion.
13. **Rules of Evidence: Expert Witnesses.** In those limited situations in which a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
14. **Courts: Expert Witnesses.** In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might "bear on" a judge's gatekeeping determination. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.
15. ____: ____. It is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial court must also determine if the witness has applied the methodology in a reliable manner.
16. **Trial: Expert Witnesses: Physicians and Surgeons.** In determining whether an expert medical opinion based on a differential diagnosis is admissible, the question will be whether the expert conducted a reliable differential diagnosis.

17. **Physicians and Surgeons: Expert Witnesses.** The first step in conducting a reliable differential diagnosis is for the medical expert to compile a comprehensive list of hypotheses that might explain the set of salient clinical findings under consideration.
18. ____: ____. If, during the first step of a differential diagnosis, the medical expert rules in a potential cause that is not capable of causing the patient's symptoms, the expert's opinion is of questionable reliability. Similarly, if the expert completely fails to consider a cause that could explain the patient's symptoms, the differential diagnosis is not reliable.
19. ____: ____. Once the medical expert has ruled in all plausible causes for the patient's condition, the next step in conducting a differential diagnosis is to engage in a process of elimination, eliminating hypotheses on the basis of a continuing examination of evidence so as to reach a conclusion as to the most likely cause of the findings in that particular case.
20. ____: ____. In analyzing the second step of a differential diagnosis under the framework 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), the question is whether the medical expert had a reasonable basis for concluding that one of the plausible causative agents was the most likely culprit for the patient's symptoms. In other words, the expert must be able to show good grounds for eliminating other potential hypotheses.
21. ____: ____. When a patient develops symptoms after encountering an agent which is known to be capable of causing those symptoms, expert medical testimony relying on the temporal connection between exposure and the onset of symptoms is entitled to greater weight.
22. **Physicians and Surgeons.** It is acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners.
23. **Physicians and Surgeons: Words and Phrases.** A physician, independently of legal issues, typically uses the term "causation" to refer to the various levels of underlying abnormality that have substantially led to the next higher level of abnormality, disease, or diagnosis. This "chain," or web, of causation is considered the pathogenesis or pathophysiology of a disease.
24. **Physicians and Surgeons: Expert Witnesses.** The inability to trace the exact pathogenesis of a patient's condition does not make a physician's opinion that an agent was the ultimate cause of the patient's condition per se unreliable so long as other reliable factors support the physician's opinion.
25. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
26. **Trial: Expert Witnesses: Evidence.** Where opinion evidence of experts is in conflict, the resolution of the conflict becomes a question for the jury.
27. **Trial: Physicians and Surgeons: Expert Witnesses: Evidence: Proof.** Where expert opinion evidence on medical causation is in conflict, the resolution of the conflict is a question for the jury, even if the party that bore the burden of proof on the issue introduced the conflicting testimony.
28. **Damages: Appeal and Error.** An appellate court gives the fact finder's determination of damages great deference.
29. ____: ____. An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.

30. **Damages: Marriage: Words and Phrases.** Damages for loss of consortium represent compensation for a spouse who has been deprived of rights to which he or she is entitled because of the marriage relationship, namely, the other spouse's affection, companionship, comfort, and assistance and particularly his or her conjugal society.
31. **Damages.** Pain and suffering and loss of consortium are types of damages for which the law provides no precise measurement.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Gerald L. Friedrichsen and Susan E. Hager, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellants.

Bernard J. Glaser, Jr., for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

A jury awarded C. Dean Carlson (Dean) $894,901 and his wife, Karen Carlson, $259,578 for injuries they suffered because of an automobile collision caused by the negligence of Leslie A. Okerstrom.

On appeal, Okerstrom and his employer, K & B Transportation, Inc. (collectively the appellants), claim that the court erred in allowing the Carlsons' expert, Daniel B. Einspahr, M.D., to testify that Dean developed a dysfunctional bladder because of injuries he suffered in the collision. Specifically, the appellants argue that (1) because Einspahr was an internist and not a urologist or neurologist, he was not qualified to testify as an expert on Dean's bladder condition, and (2) the basis for his opinion was unreliable. The appellants also contend that they were entitled to a partial directed verdict and that the jury verdicts were excessive.

We determine that the trial court did not err in finding that Einspahr was qualified to testify and that Einspahr's opinion had a reliable basis. In addition, we reject the appellants' claims that they were entitled to a partial directed verdict and that the verdicts were excessive. Affirmed.

I. BACKGROUND

The collision occurred in Fillmore County, Nebraska, on March 24, 1996. The Carlsons were in their van northbound on

U.S. Highway 81; Dean was driving, and Karen was in the passenger seat. A Nebraska Department of Roads' gravel truck was stopped in the southbound lane, waiting to turn left into a facility operated by the Department of Roads. Okerstrom, who was driving a semitruck trailer for K & B Transportation (hereinafter K & B), collided with the back of the gravel truck. The collision propelled the gravel truck into the northbound lane where it collided with the Carlsons' van.

The Carlsons alleged that Okerstrom's negligence caused the collision and that K & B was vicariously liable for Okerstrom's negligence. Dean alleged that because of the collision, he had suffered loss of peripheral vision in his right eye, loss of bladder control, impotency, headaches, chronic pain, psychological trauma, and physiological contusions and trauma. Karen alleged that because of the collision, she had suffered an acute cervical strain, headaches, psychological trauma, and physiological contusions and trauma. Both Dean and Karen also made loss of consortium claims. At the time of the collision, Dean was 55 and Karen was 53. The details of the injuries that the Carlsons allege they suffered are discussed at length in the analysis portion of our opinion.

Before trial, K & B admitted that Okerstrom was its agent and both Okerstrom and K & B admitted that Okerstrom's negligence had caused the collision. Thus, the issues at trial were (1) whether the collision had caused the injuries alleged by Karen and Dean and (2) the extent of those injuries.

One of the main disputes between the parties was whether trauma suffered in the collision caused Dean to lose the ability to void his bladder. To prove the causal connection of his bladder condition to the collision, Dean relied on the expert testimony of Einspahr. Before trial, the appellants filed a motion in limine to prevent Einspahr from testifying that the collision had caused Dean's bladder injury. Relying on Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), they argued that (1) Einspahr was not qualified to testify on the causation issue because he was not a specialist in urology and (2) the methodology Einspahr had employed in reaching his opinion was not reliable under the standards we adopted in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (adopting 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 its progeny).

After conducting a *Daubert* hearing, the court overruled the motion. The appellants renewed their objection at trial, during Einspahr's testimony. The court also overruled the renewed objection.

The appellants did not present any evidence during the trial. When the Carlsons rested, the appellants moved for a directed verdict. To support the motion, the appellants noted that in addition to Einspahr's testimony, the Carlsons had also presented the deposition testimony of Ajay K. Singla, M.D., who testified that the cause of Dean's bladder condition was unclear. The appellants argued that because the Carlsons had offered conflicting opinions on whether the collision was the cause of Dean's bladder condition, the appellants were entitled to a directed verdict on that issue. The court denied the motion and allowed the case to proceed to the jury.

The jury returned general verdicts for Dean and Karen. It awarded Dean $894,901 for his damages and Karen $259,578 for her damages. The appellants moved for judgment notwithstanding the verdicts or in the alternative for a new trial. The motion was based on several grounds, including the failure to exclude Einspahr's testimony, the court's decision overruling the motion for a partial directed verdict, and the excessiveness of the verdicts. The court denied the motion. We granted the appellants' petition to bypass.

II. ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in (1) admitting into evidence Einspahr's testimony that the collision caused Dean's bladder condition, because the testimony failed to meet the standards announced in *Schafersman v. Agland Coop, supra*; (2) overruling their motions for partial directed verdict and for judgment notwithstanding the verdict; and (3) concluding that the jury verdicts were not excessive.

III. STANDARD OF REVIEW

[1] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Perry Lumber Co. v.*

Durable Servs., 266 Neb. 517, 667 N.W.2d 194 (2003); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but 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. *Perry Lumber Co. v. Durable Servs., supra.*

[3] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003).

[4] To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

[5] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002).

[6] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Perry Lumber Co. v. Durable Servs., supra.*

IV. ANALYSIS

1. Admissibility of Einspahr's Causation Opinion

Since the collision, Dean's bladder has become dysfunctional; he can no longer void it without the assistance of a catheter. Dean alleges that injuries he sustained in the collision led to his bladder condition. To establish this causal connection at trial, he relied on the expert testimony of Einspahr. In their first assignment of error, the appellants assert that the trial court erred in allowing Einspahr to testify.

Rule 702 governs the admissibility of expert testimony. It provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Here, the appellants essentially make three arguments: the court (1) committed clear error in determining that Einspahr was qualified to testify as an expert on whether the collision had caused Dean's bladder condition; (2) abused its discretion in concluding that the differential diagnosis conducted by Einspahr was reliable under the standards we set out in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (adopting 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 its progeny); and (3) abused its discretion in allowing Einspahr to testify because on cross-examination, he conceded that his opinion was based on speculation.

We begin our analysis by describing Dean's bladder condition and how Einspahr reached his opinion. We then turn to the arguments made by the appellants.

(a) Dean's Bladder Condition and Einspahr's Analysis

(i) Basic Operation of Bladder

The bladder is part of the urinary system; its purpose is to store urine until it is voided from the body. In a functional urinary system, the distal sphincter muscle controls when urine exits the bladder. Once the bladder is full, nerve fibers in the bladder are triggered. These nerve fibers meet with other nerve fibers serving other parts of the body to form a nerve, i.e., "[a] bundle of nerve fibers." Taber's Cyclopedic Medical Dictionary 1280 (18th ed. 1997). The message that the bladder is full is transmitted along this nerve to the spinal cord and then to the brain. When the individual decides to act on the sensation that the bladder is full, the brain sends a message to the distal sphincter muscle telling it to relax. The muscles surrounding the bladder then contract and force the stored urine into the urethra and out of the body.

(ii) Symptoms Following Collision and Subsequent Medical Examinations

Dean's abdomen collided with the steering wheel, and his head hit the windshield, but he did not notice any injuries or pain immediately following the collision. An ambulance arrived and took him and Karen to the hospital. A physician at the hospital closed Dean's head wound with stitches. The hospital report states that there was "no indication of chest or blunt abdominal trauma" and that Dean denied "any aches or pains of his extremities." At trial, however, Dean testified that the physician "stitched up" his eye, but did not perform any further physical examinations.

Dean and Karen were released from the hospital on the day of the collision. That evening, Dean did not experience any pain or bruising. However, both he and Karen noticed that his penis was swollen. The next morning, Dean developed a large bruise just below his navel; he claims that the bruise lasted for about 2 weeks and was accompanied by internal aching. After the bruise was gone, the aching continued for over 1 year.

Dean testified that 3 to 4 weeks after the collision, he began to experience difficulty voiding his bladder. He explained that he would experience "a lot of pressure" in his bladder, but that when he attempted to urinate, he would be able to only partially void it. Dean claims that he told this to his son, who is a physician. Because Dean's son is uncomfortable treating family members, he recommended Dean to another physician. Dean, however, did not see a physician at that time. When asked why he did not take his son's advice, he testified, "I just felt it was going to go away."

Dean's bladder condition did not improve. Instead, it worsened to the point when he was completely unable to urinate. In June 1996, about 3 months after the collision, he saw a general practitioner, who referred him to a urologist, Don L. Henslee, M.D. Although Henslee did not testify at trial and his medical records were not offered into evidence, Einspahr, who relied on Henslee's reports, testified about Henslee's findings.

Henslee attempted to determine why Dean was unable to urinate. Many potential reasons exist why a person might develop the inability to void his or her bladder, including obstruction in the

urinary tract, prostatic enlargement, and infection. Additionally, a dysfunction in the nervous system serving the bladder, generically referred to as "neurogenic bladder," can cause the inability to void. Henslee found that there was no obstruction in Dean's urinary tract system and that his prostate was not enlarged. He eventually diagnosed Dean with neurogenic bladder.

As noted, however, neurogenic bladder is a generic term. It covers a broad range of problems with the nervous system serving the bladder, including injury to the individual nerve fibers that serve the bladder, injury to the nerve that those nerve fibers run in, injury to or disease of the spinal cord, and injury to or disease of the brain. In addition, neurogenic bladder can be idiopathic or, in other words, without a recognizable origin. Taber's Cyclopedic Medical Dictionary 960 (18th ed. 1997). Henslee was unable to determine what specifically was wrong with the nervous system serving Dean's bladder. Nor was he able to determine whether the accident or some other agent had caused Dean to develop neurogenic bladder.

To pinpoint the problem with Dean's nervous system, Henslee referred him to a neurologist, Gary L. Pattee, M.D. Pattee did not testify, and his medical records were not introduced into evidence. According to Dean and Einspahr, who relied on Pattee's reports, Pattee conducted several tests on Dean, including a spinal tap and an MRI. Pattee's testing was unable to find any damage or disease to Dean's nervous system. Specifically, he determined that Dean did not have multiple sclerosis, a tumor affecting the nervous system, or an injury to the spinal cord. But according to Einspahr, Pattee's findings did not mean that the nervous system serving Dean's bladder was functioning properly. Einspahr testified that it meant that the injury was most likely to a portion of the nervous system that was not capable of being tested.

At the time he saw Pattee, Dean was having intermittent fevers. Pattee was concerned that these fevers indicated that an infection had caused Dean's bladder condition, and he referred Dean to Einspahr, who specializes in internal medicine. Einspahr explained that he focuses on common complex medical problems that occur in adult patients. He first saw Dean in February or March 1997. After examining him, Einspahr ruled out infection as the cause of the bladder condition. But at that

time, he did not express an opinion about what was wrong with Dean's bladder or what agent or event had caused Dean to develop his bladder condition.

Dean saw several other physicians over the course of the next 4 years. He visited the Mayo Clinic to get the opinion of a specialist in urology. He also sought the opinion of Singla, a urologist, who at the time was practicing in Omaha, and Jack W. McAninch, M.D., a trauma urologist in California. These physicians could not pinpoint where Dean's nervous system was malfunctioning, nor could they determine what had caused it to malfunction. In fact, McAninch, who did not testify at trial, concluded that Dean was not suffering from neurogenic bladder. Instead, he believed that an enlarged prostate had caused Dean's bladder retention and that surgery could rectify the problem.

(iii) Einspahr's Opinion on Causation

To prove the causal connection between his bladder condition and the collision, Dean relied on the testimony of Einspahr. As noted, Einspahr is not a urologist. Rather, he is a specialist in internal medicine. He has no training in urology other than what was required while he was in medical school. Einspahr, however, testified that Dean's urological symptoms include the types of symptoms he would evaluate during the ordinary course of his practice as an internist.

As discussed earlier, Einspahr originally expressed no opinion as to the cause of Dean's bladder condition; he only ruled out the possibility that infection was the cause. But in the summer of 2000, Einspahr, at the request of Dean and his counsel, reevaluated Dean. After this reevaluation, Einspahr came to the conclusion that the collision had caused Dean to develop the neurogenic bladder condition. At trial, he testified to this to a reasonable degree of medical certainty.

[7] Einspahr based his conclusion that the collision had caused Dean to develop neurogenic bladder on the results of a differential diagnosis. Within the medical community, "differential diagnosis" appears to be a generic term, which is used to refer to a variety of diagnostic techniques. See, generally, Jerome P. Kassirer & Richard I. Kopelman, Learning Clinical Reasoning 112-14 (Williams & Wilkins 1991) (commenting on

"fuzzy and incomplete" concept and outlining five forms of differential diagnosis). But within the legal world, an entire subset of case law evaluating the reliability of the differential diagnosis technique has developed. Generally, these courts explain that "[i]n performing a differential diagnosis, a physician begins by 'ruling in' all scientifically plausible causes of the [patient's] injury. The physician then 'rules out' the least plausible causes of injury until the most likely cause remains." *Glastetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986, 989 (8th Cir. 2001). See, also, *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). This is consistent with the technique that Einspahr employed, and it is the meaning of differential diagnosis that we will use in the remainder of our discussion.

As noted earlier, there are several potential causes for bladder retention. These include obstruction in the urinary tract, enlarged prostate, and infection. In addition, bladder retention can be caused by those conditions that fall under the general rubric of neurogenic bladder: (1) injury to the individual nerve fibers that serve the bladder, (2) injury to the nerve that those nerve fibers run in, (3) injury to or disease of the spinal cord, (4) injury to or disease of the brain, and (5) idiopathic neurogenic bladder. In conducting his differential diagnosis, Einspahr considered each of these possibilities.

Einspahr then considered the "ruling out" portion of his analysis. Based on the reports of Henslee and Pattee, Einspahr was able to rule out obstructions to the urinary tract, multiple sclerosis, injury to the spinal cord, and tumors in the spinal cord as possible causes for Dean's condition. In addition, his own examination of Dean had ruled out infection as the cause of Dean's bladder retention.

After Dean saw McAninch, Einspahr reexamined Dean and found, as McAninch had, that Dean's prostate was now enlarged enough to cause bladder retention. But Einspahr did not believe that this fully explained Dean's condition. He noted that a prostate examination done by him in 2000 as well as Henslee's initial examination and the examination done at the Mayo Clinic had shown that Dean did not have an enlarged prostate. From this, he concluded that Dean had not developed an enlarged prostate until 4 years after his bladder retention problems had begun. Thus, it

was Einspahr's opinion that two independent conditions were causing Dean's bladder retention: prostatic enlargement and neurogenic bladder. According to Einspahr, even if the enlarged prostate were operated on, Dean's bladder would still not function properly because of the neurogenic bladder condition.

At this point in his analysis, Einspahr was left with two possible explanations for what had caused Dean to develop neurogenic bladder: (1) the collision caused trauma that injured the nervous system serving Dean's bladder or (2) he had idiopathic neurogenic bladder. Relying on the fact that Dean developed the bladder condition within weeks of the collision, Einspahr concluded that the collision was the more likely explanation for Dean's neurogenic bladder.

(b) Qualification

[8-10] Under rule 702, a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert. Whether a witness is qualified as an expert is a preliminary question for the trial court. *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003). A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *Id.*

[11] In arguing that the court committed error in determining that Einspahr was qualified to testify, the appellants focus on the fact that Einspahr does not specialize in either urology or neurology. However,

> [t]estimony of qualified medical doctors cannot be excluded simply because they are not specialists in a particular school of medical practice. . . . Instead, experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value.

(Citation omitted.) *Ashby v. First Data Resources*, 242 Neb. 529, 535, 497 N.W.2d 330, 335-36 (1993). See, also, *Mitchell v. U.S.*, 141 F.3d 8 (1st Cir. 1998); *Holbrook v. Lykes Bros. S.S. Co., Inc.*,

80 F.3d 777 (3d Cir. 1996); *Vilcinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997).

Although Einspahr was not a specialist in either urology or neurology, he does hold a medical degree and testified that while at medical school, he had some training in urology. Moreover, he is a board-certified internist. He explained that "internal medicine, basically, deals with the care of the adult patient . . . it really covers . . . any type of problem that may effect [sic] the adult patient" and that Dean's urological symptoms include the types of symptoms that he would evaluate in his practice as an internist. Further, the record shows that Pattee, a neurologist, felt confident enough with Einspahr's ability to diagnose bladder conditions that he referred Dean to him. These factors indicate that Einspahr's knowledge of bladder maladies was such that his opinion had probative value. Thus, the court's ruling that Einspahr was qualified to testify as an expert was not erroneous.

(c) Reliability of Einspahr's Differential Diagnosis

(i) Daubert/Schafersman *Framework*

[12-14] Under rule 702, it is not enough that a witness is qualified as an expert. The trial court must also act as a gatekeeper to ensure the evidentiary relevance and reliability of the expert's opinion. *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). In *Schafersman*, we rejected the "general acceptance" test for determining the admissibility of an expert's testimony. In its place, we adopted 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 its progeny, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), and *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Specifically, we held:

> [I]n those limited situations in which a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the

> testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.

Schafersman v. Agland Coop, 262 Neb. at 232, 631 N.W.2d at 876-77. We further explained:

> In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that *Daubert* said might "bear on" a judge's gatekeeping determination. See [*Kumho Tire Co. v. Carmichael, supra*]. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. See *id.* These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances. See, e.g., *Oddi v. Ford Motor Co.*, 234 F.3d 136 (3d Cir. 2000), *cert. denied*, 532 U.S. 921, 121 S. Ct. 1357, 149 L. Ed. 2d 287 (2001) (setting forth additional factors to be considered).

Schafersman v. Agland Coop, 262 Neb. at 233, 631 N.W.2d at 877.

There is, however, an ambiguity in *Schafersman*. At one point, we drew a distinction between a methodology and the application of a methodology. We stated that "once the validity of the expert's reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was *applied* in a particular case will generally go to the weight of such evidence." (Emphasis in original.) *Id.* at 232, 631 N.W.2d at 877. Since *Schafersman*, we have repeated, but not applied, this dictum twice more. See, *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

But other language in *Schafersman* casts doubt upon the distinction between a methodology and its application. We said, "In evaluating expert opinion testimony under *Daubert*, when such testimony's factual basis, data, principles, methods, or *their*

application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." (Emphasis supplied.) *Schafersman v. Agland Coop*, 262 Neb. 215, 233, 631 N.W.2d 862, 877 (2001). Thus, we find it necessary to clarify whether a court, having determined that a methodology is reliable at a general level, must also decide if the expert seeking to testify reliably applied the methodology.

Following *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), there was some debate in the federal courts over whether an expert's deviation from an otherwise reliable methodology went to admissibility or weight. See Christopher B. Mueller, *Daubert Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*, 33 Seton Hall L. Rev. 987 (2003). Some courts held (or at least suggested) that if the methodology the expert claimed to be using was generally reliable, the expert's opinion was reliable enough to be admissible under *Daubert*; any misapplications in the methodology were for the fact finder to sort out. See, e.g., *U.S. v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994). See, also, *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997). But it soon became apparent to most courts that the distinction between methodology and application was unworkable. As one often-cited opinion explained:

> [I]t is extremely elusive to attempt to ascertain which of an expert's steps constitute parts of a "basic" methodology and which constitute changes from that methodology. If a laboratory consistently fails to use certain quality controls so that its results are rendered unreliable, attempting to ascertain whether the lack of quality controls constitutes a failure of a methodology or a failure of application of methodology may be an exercise in metaphysics. Moreover, any misapplication of a methodology that is significant enough to render it unreliable is likely to also be significant enough to skew the methodology.

In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 745 (3d Cir. 1994). See, also, *Cavallo v. Star Enterprise*, 892 F. Supp. 756 (E.D. Va. 1995), *affirmed in part* 100 F.3d 1150 (4th Cir. 1996).

For the federal courts, the confusion was cleared up with the 2000 amendments to Fed. R. Evid. 702. The 2000 amendments were meant to codify *Daubert* and its progeny. The revised rule explicitly requires courts to determine if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) *the witness has applied the principles and methods reliably to the facts of the case*." (Emphasis supplied.) 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure 19 (Supp. 2002). The advisory committee's note to the 2000 amendment explains that the "amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case." *Id.* at 21-22. See, also, Mueller, *supra* (noting that amendment to rule 702 settled debate in federal courts).

[15] We agree with the approach that has become prevalent in the federal courts. We are skeptical that there is a meaningful distinction between a methodology and the application of that methodology. When a step in an otherwise valid methodology is performed incorrectly, we fail to see how the expert's results can be any more reliable than if the methodology itself had been wholly invalid. Accordingly, we hold that it is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial court must also determine if the witness has applied the methodology in a reliable manner.

With this framework in mind, we turn to the question whether Einspahr's expert testimony was reliable.

(ii) Einspahr's Differential Diagnosis

[16] Einspahr reached his conclusion that the collision caused Dean to develop neurogenic bladder after conducting a differential diagnosis. Courts have recognized that "differential diagnosis *generally* is a technique that has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results." (Emphasis supplied.) *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d at 758. See, *Coastal Tankships, U.S.A., Inc. v. Anderson*, 87 S.W.3d 591 (Tex. App. 2002). See, also, *Schafersman v. Agland Coop*, 262 Neb. 215, 631

N.W.2d 862 (2001). But that does not mean that simply by uttering the phrase "differential diagnosis," an expert can make his or her opinion admissible. Rather, the question will be whether the expert conducted a *reliable* differential diagnosis. See, *Turner v. Iowa Fire Equipment Co.*, 229 F.3d 1202 (8th Cir. 2000); *In re Paoli R.R. Yard PCB Litigation, supra.*

[17,18] The first step in conducting a reliable differential diagnosis is to "compile a comprehensive list of hypotheses that might explain the set of salient clinical findings under consideration." *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1057 (9th Cir. 2003) (as amended on denial of rehearing (Sept. 25, 2003)). At this stage of the analysis, the question is which of the "competing causes are *generally* capable of causing the patient's symptoms." *Id.* at 1057-58. If the expert "rules in" a potential cause that is not capable of causing the patient's symptoms, the expert's opinion is of questionable reliability. See *id.* Similarly, if the expert *completely* fails to consider a cause that could explain the patient's symptoms, the differential diagnosis is not reliable. See *id.* Cf. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202 (4th Cir. 2001) ("if an expert utterly fails to consider alternative causes . . . a district court is justified in excluding the expert's testimony").

[19,20] Once the expert has ruled in all plausible causes for the patient's condition, the next step is to "engage in a process of elimination, eliminating hypotheses on the basis of a continuing examination of the evidence so as to reach a conclusion as to the most likely cause of the findings in that particular case." *Clausen v. M/V New Carissa*, 339 F.3d at 1058. In analyzing the second step of a differential diagnosis under the *Daubert/Schafersman* framework, the question is whether the expert had a reasonable basis for concluding that one of the plausible causative agents was the most likely culprit for the patient's symptoms. In other words, the expert must be able to show good grounds for eliminating other potential hypotheses. See, *Clausen v. M/V New Carissa, supra*; *Heller v. Shaw Industries, Inc.*, 167 F.3d 146 (3d Cir. 1999); *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994); *Nelson v. American Home Products Corp.*, 92 F. Supp. 2d 954 (W.D. Mo. 2000).

What constitutes good grounds for eliminating other potential hypotheses will vary depending upon the circumstances of each

case. But some generalizations are possible. Subjective beliefs and unsupported speculation will never suffice. See *Clausen v. M/V New Carissa, supra*. Likewise, conclusions based on discredited or improperly performed diagnostic tools are suspect. To take an extreme example, if a physician were to testify that he had eliminated a plausible cause for the patient's condition by employing palmistry, a court would be justified in excluding the opinion. Conversely, a decision to eliminate an alternative hypothesis based on information gathered by using the traditional tools of clinical medicine—physical examinations, medical histories, and medical testing—will usually have the hallmarks of reliability required by *Daubert* and *Schafersman*. See *In re Paoli R.R. Yard PCB Litigation, supra*. But we emphasize that these are just guideposts and that often, an expert's decision to rule out an alternative hypothesis will depend on other factors for which clear rules are not available.

Here, there is no debate about whether Einspahr correctly performed the first step of his differential diagnosis. The parties agree that trauma is capable of causing neurogenic bladder and that Einspahr properly ruled in other causes that could have explained Dean's condition. Instead, the appellants focus on the "ruling out" portion of his analysis. They contend that instead of relying on good grounds for his opinion, Einspahr improperly relied exclusively upon the temporal connection between the collision and the onset of symptoms.

[21] Courts have been cautious when faced with an expert opinion based on the temporal connection between exposure to an agent and the onset of symptoms. See Joseph Sanders & Julie Machal-Fulks, *The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law*, 64 Law & Contemp. Probs. 107 (Autumn 2001). That symptom Z occurred after event Y will generally not support the conclusion that Y caused Z. See, *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999); *Moore v. Ashland Chemical Inc.*, 151 F.3d 269 (5th Cir. 1998); *Nelson v. American Home Products Corp., supra*; *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (dismissing expert's opinion that contaminated feed caused cows to become ill when only basis for opinion was that cows became ill after eating feed); Sanders

& Machal-Fulks, *supra*. But many of these cases involved situations where there was no previous scientific evidence showing that the agent in question was capable of causing the plaintiff's condition. See, *Moore v. Ashland Chemical Inc., supra*; *Schafersman v. Agland Coop, supra*. When a patient develops symptoms after encountering an agent which is known to be capable of causing those symptoms, courts have been more willing to admit expert testimony relying on the temporal connection between exposure and the onset of symptoms. See, *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 (5th Cir. 1999); *Moore v. Ashland Chemical Inc., supra*. Cf. *Heller v. Shaw Industries, Inc.*, 167 F.3d 146 (3d Cir. 1999). Here, it is undisputed that trauma is capable of causing neurogenic bladder, and thus Einspahr's reliance upon the temporal factor is entitled to greater weight.

Moreover, we note that the appellants overstate the extent to which Einspahr relied on the temporal connection between the collision and the onset of symptoms. Most of Einspahr's "ruling out" decisions were based on the results of well-accepted clinical diagnostic techniques. Based on Einspahr's own physical examinations of Dean and the physical examinations and medical testing of Dean by other qualified physicians, Einspahr ruled out obstructions to the urinary tract, multiple sclerosis, injury to the spinal cord, tumors in the spinal cord, and infection. Similarly, Einspahr's rejection of McAninch's theory that prostatic enlargement was the only cause of Dean's condition was based on the results of prostate examinations done by himself, Henslee, and a physician at the Mayo Clinic after the collision but before McAninch's examination.

[22] As discussed earlier, physical examinations and medical testing are standard procedures in the medical community and generally provide good grounds for eliminating hypotheses during the "ruling out" portion of a differential diagnosis. We also note that Einspahr's conclusions were not rendered invalid, because he relied on physical examinations and medical testing performed by the other physicians. "[I]t is . . . acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners." *Kannankeril v. Terminix Intern., Inc.*, 128 F.3d 802, 807 (3d Cir. 1997).

In fact, only one step in Einspahr's analytical process relied on the temporal connection between the collision and the onset of the symptoms—his conclusion that it was more likely that trauma from the collision injured the nervous system serving Dean's bladder than that Dean was suffering from idiopathic neurogenic bladder. We recognize that the other physicians that saw Dean disagreed with this step in Einspahr's analysis. But, given that Dean's bladder retention began 3 to 4 weeks after the collision and was accompanied by bruising and internal aching in the area where the nerve fibers serving the bladder run, the court acted within its discretion in determining that the temporal factor was strong enough and accompanied by enough other factors to serve as a reliable basis for Einspahr's conclusions. Accord *Curtis v. M&S Petroleum, Inc., supra* (holding that trial court abused its discretion in excluding expert's opinion that chemical exposure had caused refinery workers to become ill when (1) it was well accepted that exposure to chemical at level workers were exposed was capable of causing illness, (2) multiple workers developed symptoms shortly after exposure, and (3) workers' symptoms subsided after exposure ended).

(iii) Alleged Concessions Made by Einspahr

In arguing that Einspahr's opinion was not admissible, the appellants also rely on what they claim are concessions made by Einspahr during cross-examination. During the trial, the following exchanges occurred between Einspahr and counsel for the appellants:

> [Counsel]. You told me in your deposition that it is impossible to say what the cause of [Dean's] bladder condition is; correct?
>
> [Einspahr]. Yes.
>
> . . . .
>
> Q. You are aware of no overt injuries that [Dean] may have suffered in the motor vehicle accident; correct?
>
> A. No.
>
> Q. That would —
>
> A. That's correct.
>
> Q. You can't describe how the — the injury could've occurred.

A. No.

Q. Or what part of his body was injured.

A. No.

Q. And you agree with the Mayo Clinic that it would be conjecture to explain how [Dean] developed a problem with his bladder after the motor vehicle accident.

A. I agree.

Q. And conjecture to you means what?

A. It's anyone's guess.

The appellants claim that in these exchanges, Einspahr effectively conceded that his opinion that the collision caused Dean's injuries was sheer speculation.

The interpretation of Einspahr's cross-examination testimony proffered by the appellants is not unreasonable, and if it were the only interpretation, we would agree that the district court erred in admitting Einspahr's opinion. Cf. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 245 (5th Cir. 2002) (stating that "perfectly equivocal opinion does not make any fact more or less probable and is irrelevant under the Federal Rules of Evidence"). But after reviewing the record, we conclude that another reasonable interpretation for Einspahr's testimony exists. Given our abuse of discretion standard, we are bound to accept this second interpretation.

[23] It is plausible that Einspahr and the appellants' counsel were talking about different levels in the chain of medical causation.

> A physician, independent of legal issues, typically uses the term *causation* . . . to refer to the various levels of underlying abnormality that have substantially led to the next higher level of abnormality, disease, or diagnosis. This "chain," or web, of causation is considered the "pathogenesis" or pathophysiology of a disease.

Mary Sue Henifin et al., *Reference Guide on Medical Testimony*, in Reference Manual on Scientific Evidence 439, 451 (Federal Judicial Center 2d ed. 2000). As we understand Einspahr's testimony, he claims that the collision is the ultimate causative agent. The collision caused a trauma injury to Dean's nervous system, which in turn caused Dean's bladder condition. As we read Einspahr's cross-examination answers, he was not conceding that he was uncertain whether the ultimate causative agent

was the trauma Dean suffered in the collision. Rather, he meant that he could not fully trace the other steps in the "web of causation," i.e., the pathogenesis of Dean's bladder condition. Specifically, he could not pinpoint where Dean's nervous system had been injured in the collision or describe the exact manner in which that injury was causing Dean's bladder to malfunction. Thus, this second interpretation of Einspahr's cross-examination testimony is not inconsistent with his ultimate conclusion that the collision caused Dean's bladder condition.

[24] The inability to trace the exact pathogenesis of Dean's bladder condition does not make Einspahr's opinion per se unreliable so long as other reliable factors supported his opinion that the collision was the ultimate causative agent. Cf. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1314 (9th Cir. 1995) ("[n]ot knowing the mechanism whereby a particular agent causes a particular effect is not always fatal to a plaintiff's claim. Causation can be proved even when we do not know precisely *how* the damage occurred, if there is sufficiently compelling proof that the agent must have caused the damage *somehow*"). Here, even though he could not trace the exact pathogenesis of Dean's bladder condition, a number of other factors make Einspahr's testimony reliable: (1) trauma is a recognized cause of neurogenic bladder, (2) the close temporal connection between the collision and the onset of symptoms, and (3) the medical testing and physical examinations which ruled out several other plausible causes for Dean's bladder condition.

2. Directed Verdict and Judgment Notwithstanding Verdict

In reference to the appellants' second assignment of error, they argue that they "were entitled to a directed verdict on the issue of whether [Dean's] bladder condition was caused by the accident because [the Carlsons] offered conflicting medical opinions as to the cause and nature of [Dean's] bladder condition." Brief for appellants at 29.

[25,26] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Kinney v. H.P. Smith*

Ford, 266 Neb. 591, 667 N.W.2d 529 (2003). To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003). Where opinion evidence of experts is in conflict, the resolution of the conflict becomes a question for the jury. *Palmer v. Forney*, 230 Neb. 1, 429 N.W.2d 712 (1988).

In addition to offering Einspahr's testimony, the Carlsons introduced into evidence the deposition of Singla, a board-certified urologist who saw Dean several times during 1999. Unlike Einspahr, Singla testified that it was unclear what was causing Dean's bladder retention. He based this conclusion on his testing of Dean, which testing had shown that the muscles in Dean's bladder were generating enough pressure to push the urine out of his bladder. Although Singla did not rule out the collision as the cause of Dean's bladder condition, he testified that if it had been the cause, he would have expected the retention to have begun almost immediately after the collision.

The record suggests that the appellants had originally planned to offer Singla's deposition during their case in chief. Apparently, by introducing Singla's deposition before the appellants had the opportunity to do so, the Carlsons sought to minimize the importance of his testimony. In their closing arguments, the Carlsons' counsel told the jury, "[Singla] was really friendly to us. And — I mean, we're not afraid of what . . . Singla said." The Carlsons' counsel emphasized that Singla conceded that he was not aware of all the facts surrounding Dean's injuries. The Carlsons' counsel also argued that even though Singla's testing had shown that the muscles in Dean's bladder were generating enough pressure to push the urine out of the bladder, he had also found that Dean's distal sphincter muscle was not relaxing. The Carlsons' counsel claimed that this was consistent with the theory that the nerves serving Dean's bladder were injured in the collision.

The appellants, as we understand it, argue for an exception to the rule that where the opinion evidence of experts is in conflict, the resolution of the conflict is for the jury. See *Palmer v. Forney, supra*. They contend that when a party who bears the burden of proof on the issue of medical causation offers conflicting expert

testimony on that question, the court should direct a verdict against the party. Applying their proposed exception to the facts here, the appellants claim that by introducing Singla's opinion, the Carlsons negated Einspahr's opinion as a matter of law, leaving the Carlsons with no evidence establishing a causal link between the collision and Dean's injuries.

[27] We are not persuaded by the appellants' argument. It treats the decision to offer a hostile expert's opinion as the equivalent of conceding the correctness of that opinion. But no litigant would offer a hostile expert's opinion to concede a key element of its case. Rather, the decision to do so would be a tactical one meant to advance the litigant's position. Here, for example, the Carlsons introduced Singla's deposition so that they could minimize those aspects of it that were adverse to them. The appellants' argument is inconsistent with how litigation is practiced and would serve only as a trap for the unwary. We hold that where expert opinion evidence on medical causation is in conflict, the resolution of the conflict is a question for the jury, even if the party that bore the burden of proof on the issue introduced the conflicting testimony.

Here, Einspahr's testimony was sufficient to allow a reasonable jury to conclude that the collision caused Dean's bladder condition. This was not negated by the Carlsons' decision to introduce Singla's deposition. How to resolve the conflict between Einspahr's opinion and Singla's opinion was a question for the jury. Accordingly, the district court did not err in denying the appellants' motions for partial directed verdict and for judgment notwithstanding the verdict.

3. Excessiveness of Verdicts

The jury awarded Dean $894,901 and Karen $259,578. In their final assignment of error, the appellants argue that the court abused its discretion in denying a new trial because the verdicts were excessive. See Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002).

(a) Verdict for Dean

Dean established that because of the collision, he has incurred $14,321.43 in medical expenses and property damage. He also presented evidence showing that his optic nerve was injured in

the collision and that as a result, he has lost some of the peripheral vision in his left eye. Most of his evidence on damages, however, focused on his bladder condition.

Dean presented reliable evidence establishing that because of the collision, his bladder will never function properly and that he will be forced to self-catheterize for the rest of his life. To self-catheterize, he uses a sterile catheter tube that is about 20 inches long and one-quarter inch in diameter. The end of the catheter is lubricated; Dean inserts the tube into his penis and pushes it up until the tube reaches his bladder. The motion is slow and causes pain which Dean compared to rubbing an open sore. He generally self-catheterizes three to four times per day.

In addition to testifying about the pain that self-catheterization causes him, Dean also presented evidence showing the risks and financial costs that he will incur because of his condition. Self-catheterization presents a significant risk of infection; to reduce the risk, Dean generally uses a new catheter each time that he self-catheterizes. When he first started self-catheterizing, a catheter cost $2.50; the current price is $4.30. Further, the risk of infection has interfered with Dean's business. He and his son own a company that cleans drains. Because by its nature the business is unsanitary, Dean goes home so that he can clean up before self-catheterizing.

[28,29] The appellants characterize Dean's bladder condition as an "inconvenience" and argue that the jury's award was "excessive in light of [the] actual impact [Dean's] injuries have had on his life." Brief for appellants at 34. But on appeal, we give the fact finder's determination of damages great deference. *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002). An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000). A reasonable jury could have concluded that Dean's bladder condition is a significant disability which will force him to live with pain and to incur substantial costs for the remainder of his life. Accordingly, the jury's award for Dean was not the result of passion, prejudice, mistake, or some other means not apparent in the record.

(b) Verdict for Karen

Karen sought damages for her medical expenses and pain and suffering. She suffered two cracked ribs in the collision and was treated at the hospital. After the collision, she developed an unusual amount of fatigue and a generalized sensation of pain, which she likened to having the flu. About 4 months after the collision, she was diagnosed as having posttraumatic stress syndrome, which she was told would improve in time. In addition, she was treated for her lingering pain by a chiropractor until May 1998, when he determined that she had reached maximum medical improvement. Karen continues to suffer from pain in her lower back and hip area. During her testimony, Karen described the pain as being "not intolerable pain" and stated that it is the type of pain that "an aspirin [can] take care of." Her documented medical expenses were $2,963.24.

[30] Karen also made a consortium claim. Damages for loss of consortium represent compensation for a spouse who has been deprived of rights to which he or she is entitled because of the marriage relationship, namely, the other spouse's affection, companionship, comfort, and assistance and particularly his or her conjugal society. *Anson v. Fletcher*, 192 Neb. 317, 220 N.W.2d 371 (1974). Here, Karen testified that before the collision, she and Dean had a good sexual relationship, but that now the relationship is "pretty much non-existent." She further testified that Dean lacks the stamina that he had before the collision and that he is unable to perform household chores with the same regularity that he did before the collision.

[31] The amount of evidence supporting the jury's verdict for Karen is not overwhelming. But we are dealing with types of damages—pain and suffering and loss of consortium—for which "the law provides no precise measurement." See *Brandon v. County of Richardson*, 264 Neb. 1020, 1029, 653 N.W.2d 829, 837 (2002). Although the verdict was generous, we conclude it was not so excessive as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. When viewed in a light most favorable to Karen, the evidence shows that because of the collision, she has suffered and will continue to suffer some pain, and that because of Dean's injuries, she suffered a loss of Dean's assistance and conjugal society. Thus, the

court acted within its discretion in concluding that the jury verdict for Karen was not excessive.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
WALDO F. WARRINER, APPELLANT.
675 N.W.2d 112

Filed February 20, 2004. No. S-03-522.

1. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Statutes.** The meaning of a statute is a question of law.
3. **Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Statutes: Motor Vehicles.** The use of hazard lights while driving is proscribed by the plain language of Neb. Rev. Stat. § 60-6,230(1) (Reissue 1998).
5. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
6. **Statutes: Appeal and Error.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
7. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
8. **Statutes: Legislature: Public Policy.** It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.
9. **Statutes.** Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.

Appeal from the District Court for Knox County, PATRICK G. ROGERS, Judge, on appeal thereto from the County Court for Knox County, PHILIP R. RILEY, Judge. Judgment of District Court affirmed.

Ronald E. Temple, of Gatz, Fitzgerald, Vetter & Temple, for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Waldo F. Warriner appeals from his conviction and sentence for driving under the influence of alcohol. The issue presented in this appeal is whether Warriner violated the Nebraska Rules of the Road, Neb. Rev. Stat. § 60-601 et seq. (Reissue 1998 & Supp. 2001), by driving his pickup truck with the hazard lights activated.

BACKGROUND

The facts surrounding Warriner's arrest are undisputed. Wallace Holz, a Bloomfield, Nebraska, city police officer, was at the Bloomfield police station in the early morning hours of April 10, 2002, when he saw a pickup truck pass his office with its hazard lights activated. Holz left the office and pursued the truck in his police vehicle. While pursuing the truck, Holz saw the truck weaving within its lane; however, Holz was unable to testify at trial whether the weaving occurred before or after the truck left the city limits of Bloomfield. Holz caught up to and stopped the truck about half a mile outside Bloomfield and identified the driver as Warriner. Holz observed Warriner and suspected that Warriner was under the influence of alcohol. Warriner was arrested, and a subsequent blood test revealed a blood alcohol content of .268 grams of alcohol per 100 milliliters of blood.

Warriner was charged in the county court on April 25, 2002, with driving under the influence, a Class W misdemeanor. Warriner entered a plea of not guilty and filed a motion to suppress evidence resulting from the stop of his vehicle, on the basis that the stop was not based upon reasonable suspicion. On October 28, the county court overruled Warriner's motion to suppress. Warriner was found guilty of driving under the influence and sentenced accordingly. Warriner appealed to the district court, which affirmed the judgment of the county court. Warriner appeals.

ASSIGNMENTS OF ERROR

Warriner assigns that the county court erred in failing to sustain (1) his motion to suppress and (2) his objection at trial to evidence gathered from the stop of his pickup truck.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are

reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003).

[2,3] The meaning of a statute is a question of law. *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

ANALYSIS

Warriner argues that the evidence against him is the fruit of an illegal seizure, because, according to Warriner, Holz did not have reasonable suspicion, while inside the city limits of Bloomfield, to pursue and detain Warriner. Neb. Rev. Stat. § 29-215(2)(b) (Cum. Supp. 2002) provides that a police officer,

> if in a fresh attempt to apprehend a person suspected of committing a misdemeanor or a traffic infraction, may follow such person anywhere in an area within twenty-five miles of the boundaries of the law enforcement officer's primary jurisdiction and there arrest and detain such person and return such person to the law enforcement officer's primary jurisdiction[.]

The only ground for suspicion that Warriner had committed a misdemeanor or a traffic infraction, that the record shows to have indisputably occurred within the city limits of Bloomfield, is his operation of his truck with its hazard lights activated. If Warriner's use of his hazard lights was a violation of the Nebraska Rules of the Road, then Holz was authorized to pursue Warriner outside Bloomfield pursuant to § 29-215(2)(b) and had probable cause to stop the vehicle. See *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999) (traffic violation, no matter how minor, creates probable cause to stop driver of vehicle). Thus, the parties agree that the issue in this appeal is whether use of hazard lights on a moving vehicle violates § 60-6,230, which states:

> (1) Except as provided in sections 60-6,231 to 60-6,233 and subsections (4) and (5) of this section, *no person shall operate any motor vehicle or any equipment of any description on any highway in this state with any rotating or flashing light.*

(2) Except for stop lights and directional signals, which may be red, yellow, or amber, no person shall display any color of light other than red on the rear of any motor vehicle or any equipment of any kind on any highway within this state.

(3) Blue and green lights may be displayed on vehicles of the Military Department for purpose of convoy control when on any state emergency mission.

(4) A single flashing white light may be displayed on the roof of school transportation vehicles during extremely adverse weather conditions.

(5) Blue and amber rotating or flashing lights may be displayed on vehicles used for the movement of snow when operated by the Department of Roads or any local authority.

(Emphasis supplied.)

The term "hazard lights," as we use it here and as it is commonly understood, refers to "an emergency switch for flashing all directional turnsignals simultaneously." See § 60-6,220. Hazard lights on vehicles are generally activated only when a vehicle is disabled or if it is parked where operators of other vehicles need to be warned to use unusual care in approaching, overtaking, or passing it. See, *id.*; *State v. Blair/Vanis*, 171 Or. App. 162, 14 P.3d 660 (2000).

[4-7] It is evident that the use of hazard lights while driving is proscribed by the plain language of § 60-6,230(1). Hazard lights are undoubtedly "flashing lights," and § 60-6,230(1) plainly prohibits the operation of a motor vehicle, on any highway of this state, with any flashing light, except as otherwise specifically allowed by statute. Statutory language is to be given its plain and ordinary meaning. *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000). It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

The Nebraska Rules of the Road explain, in specific provisions, when a flashing or rotating light is acceptable (and often

mandatory). Section 60-6,230 itself explains that military vehicles, school transportation vehicles, and snow removal vehicles may use certain types of rotating or flashing lights. Sections 60-6,231 to 60-6,233 provide for the use of rotating or flashing lights by emergency response vehicles, and § 60-6,232 allows the use of a rotating or flashing amber light by pilot vehicles, vehicles moving extraordinarily large objects, construction or maintenance vehicles, certain government vehicles, and tow trucks. Flashing turn signal lights are required by §§ 60-6,161 and 60-6,226. The use of hazard lights on a disabled vehicle is expressly permitted by §§ 60-6,161 and 60-6,220. These, however, are specific exceptions to the general rule, set forth in § 60-6,230(1), that flashing lights are not to be used on a vehicle being operated on a highway of this state. No specific provision of the Nebraska Rules of the Road establishes an exception to that general rule which would allow the use of hazard lights on a vehicle being operated on the highways of this state. See *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000) (special provisions of statute in regard to particular subject will prevail over general provisions in same or other statutes).

[8,9] Warriner, however, contends that § 60-6,230(1) cannot really mean what it says, because the statute is "clearly aimed toward the regulation of colored flashing lights, such as blue and green flashing lights." Brief for appellant at 12. Warriner sets forth several examples in which he claims a motorist may want to use hazard lights. But it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state. *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002). The Legislature has done so in unambiguous language, and where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. *State v. Rubio*, 261 Neb. 475, 623 N.W.2d 659 (2001).

Nor is the plain language of § 60-6,230(1) unreasonable. As previously noted, hazard lights on vehicles are generally activated only when a vehicle is disabled or if it is parked where operators of other vehicles need to be warned to use unusual care in approaching, overtaking, or passing it. The use of hazard lights on a vehicle being operated on a roadway could prove distracting

or dangerous to other drivers, who would be unable to ascertain what, if anything, was meant by the hazard lights and who might assume that the vehicle was on the shoulder when it was not. See, e.g., *Wolkenhauer v. Smith*, 822 F.2d 711 (7th Cir. 1987) (semitractor trailer collided with vehicle pushing malfunctioning pickup truck because semitractor trailer driver saw hazard lights and assumed vehicles were on shoulder). Furthermore, because all the turn signals on a vehicle are activated by the hazard lights, other drivers would be unable to tell if the vehicle intended to maintain its course, change lanes, or turn.

In short, while a statute may be construed to avoid injustice or an absurd consequence, see *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001), § 60-6,230(1) is neither unjust nor absurd. There is no merit to Warriner's argument that the plain language of the statute should not be given effect and, consequently, no merit to Warriner's assignments of error.

CONCLUSION

The plain language of § 60-6,230(1) proscribes the use of hazard lights on a vehicle being operated on the highways of this state. Consequently, because Holz observed Warriner violating the Nebraska Rules of the Road, while in the city of Bloomfield, Holz was authorized to pursue and stop Warriner's vehicle. The subsequent arrest of Warriner and his resulting conviction and sentence are not the fruits of an illegal seizure, and the county court did not err in overruling Warriner's motion to suppress evidence or his subsequent objections to evidence at trial. The judgment of the district court, which affirmed the judgment of the county court, is affirmed.

AFFIRMED.

IN RE WATER APPROPRIATION A-4924.
DEPARTMENT OF NATURAL RESOURCES, APPELLEE, V. LEE BOSE AND CRAIG BOSE, APPELLANTS.

674 N.W.2d 788

Filed February 20, 2004. No. S-03-599.

1. **Administrative Law: Statutes: Appeal and Error.** In an appeal from the Department of Natural Resources, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director.
2. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.
3. **Words and Phrases.** A capricious decision is one guided by fancy rather than by judgment or settled purpose.
4. **Administrative Law: Words and Phrases.** The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds.

Appeal from the Nebraska Department of Natural Resources. Affirmed.

John C. Person, of Person Law Office, for appellants.

Jon Bruning, Attorney General, Justin D. Lavene, and David D. Cookson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The Department of Natural Resources (Department) entered an order on April 28, 2003, canceling water appropriation A-4924. Lee Bose and Craig Bose, the owners of the land subject to the appropriation, appeal.

SCOPE OF REVIEW

[1] In an appeal from the Department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or

unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director. *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002).

FACTS

Water appropriation A-4924 is a water right with a priority date of December 31, 1951. The appropriation allows diversion of no more than 0.67 cubic feet per second of water from the Republican River for irrigation of 77.2 acres of land in Harlan County, Nebraska. The Boses have owned this land since the mid-1970's.

On February 1, 2003, a notice was delivered to the Boses which stated that a hearing would be held on March 20 in Alma, Nebraska. The notice provided in relevant part:

> A hearing will be held at 9:00 a.m. CDT on March 20, 2003, in the Johnson Community Center, 509 Main Street, Alma, Nebraska, to determine whether all or part of water appropriation A-4924 should be cancelled because of non-use for more than three consecutive years. . . .
>
> Water appropriation A-4924 is a water right with a priority date of December 31, 1951, to divert 0.67 cubic f[ee]t per second (cfs) of water from the Republican River at a point in the NE¼SE¼ of Section 18, Township 2 North, Range 19 West of the 6th P.M. for irrigation of the following described lands . . . .

The notice set forth a legal description of the 77.2 acres in question and then stated:

> Department records indicate that the land approved for irrigation under A-4924 has not been irrigated for more than three consecutive years.
>
> The hearing will be held as provided by §§ 46-229 to 46-229.05, R.R.S., 1943, as amended. All persons interested in such water appropriation shall appear and show cause why such appropriation or part of the appropriation should not be cancelled or annulled. If no one appears at the hearing, the unused part of the water appropriation may be cancelled.

At the bottom of the notice, the address, post office box number, telephone number, and fax number of the Department were listed. Copies of Neb. Rev. Stat. §§ 46-229 to 46-229.05 (Reissue 1998 & Cum. Supp. 2002) were enclosed with the notice.

At the hearing, the Department introduced as part of its evidence a verified field investigation report conducted for the Department by Brad Edgerton. The report included the following entry:

> On September 25, 2002 at about 9:00 A.M. I met with Lee and Craig Bose (brothers) at the shop west of Orleans, to discus[s] water appropriations [sic] A-4924.
>
> Craig stated that the acres under this permit have not been irrigated from the River in the past 10 years and that it is now irrigated with ground water wells.

At the hearing, Lee Bose testified that the field investigation report was not accurate:

> We do have a pivot on [the land subject to the appropriation]. And with one year exception when we did have a well go down, we did pump from this pump site on the south end of that in the mid-'90s one time.
>
> . . . .
>
> . . . We were down about a week and shoved a pump in there once when that well went down. Basically, in the last 10 years, we've been getting most of that water from the wells, but that is incorrect.

The following colloquy occurred during the cross-examination of Lee Bose:

> Q What determines whether you use the surface water or the groundwater well?
>
> A When it's dry, we get water wherever we can get it.
>
> Q Okay. But in the last —
>
> A And, yes — My point is, yes, we are set up to virtually irrigate that parcel with the wells.
>
> Q Is that because it's easier or cleaner water or what — why did you go from the surface water to the groundwater?
>
> A That's a no brainer. You don't have to get down in the muck and slop to get out of the river when it's 98 degrees out, yes.

Q Prior to this time your well broke and you used it, when was the last time that water was used out of the river on this property?

A Prior to that issue?

Q Uh-huh.

A I'm not aware that it was.

Following the hearing, the director of the Department issued an order canceling water appropriation A-4924. The order stated that the testimony at the hearing and the records of the Department established that the land subject to the appropriation had not been irrigated from the Republican River for more than 3 consecutive years. As such, the appropriation was ordered canceled pursuant to § 46-229.04. A petition for rehearing filed by the Boses was denied, and they appeal.

ASSIGNMENTS OF ERROR

The Boses assign the following errors: (1) the Department's notice of hearing did not state the issues involved, as provided by Neb. Rev. Stat. § 84-913 (Reissue 1999); (2) the Department's notice of hearing did not contain "a department telephone number which any person may call for information regarding sufficient cause for nonuse," as provided by § 46-229.02; (3) the Department's finding that the land subject to water appropriation A-4924 had not been irrigated from the Republican River for more than 3 consecutive years is not supported by competent and relevant evidence and is arbitrary, capricious, and unreasonable; and (4) the Department erred in its determination because it failed to find sufficient cause existed for the Boses' nonuse, as provided by § 46-229.04(3).

ANALYSIS

ADEQUACY OF NOTICE

The Boses assert that the Department did not provide adequate notice because the notice failed to state the issues involved and failed to state a telephone number which could be called to obtain information regarding sufficient cause for nonuse. The identical issue was addressed by this court in *In re Water Appropriation A-5000, ante* p. 387, 674 N.W.2d 266 (2004). Therein, we held that the Department's notice provided adequate

notice of the issues to be taken up at the hearing and contained the information required under § 46-229.02. In the case at bar, we reach the same conclusion.

DEPARTMENT'S FINDING

The Boses argue that the Department's finding that the land subject to water appropriation A-4924 had not been irrigated from the Republican River for more than 3 consecutive years is not supported by competent and relevant evidence and is arbitrary, capricious, and unreasonable.

[2-4] In an appeal from the Department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable. *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002). A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454, 640 N.W.2d 398 (2002). A capricious decision is one guided by fancy rather than by judgment or settled purpose. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000). The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999).

In the case at bar, the field investigation report by Edgerton was introduced at the hearing as evidence that the appropriation should be forfeited and annulled. Section 46-229.04(1) provides in part that "the verified field investigation report of an employee of the department shall be prima facie evidence for the forfeiture and annulment of such water appropriation." Under the scheme set out in § 46-229.04(1), the burden then shifts to an interested party to present evidence to the Department that the water has been put to a beneficial use during the prior 3 consecutive years.

In *In re Applications T-61 and T-62*, 232 Neb. 316, 440 N.W.2d 466 (1989), we noted that the Department bore the burden to establish nonuse for the statutory period and that this fact

could be established by the verified report of the Department. Once the report has been presented, then the appropriator must show cause why the appropriation should not be terminated. " 'The language of the statute clearly indicates that the burden is upon the appropriator to present evidence showing either that water was taken, contrary to the report filed by the Department [of Water Resources], or that some excuse existed for the water not being taken.' " *Id.* at 325, 440 N.W.2d at 472.

The Boses did not sustain their burden to present evidence that the water had been put to a beneficial use during the prior 3 consecutive years. Lee Bose's testimony regarding use of the appropriation related to an incident that occurred in the mid-1990's. As such, the incident took place more than 3 years before the March 20, 2003, hearing with respect to water appropriation A-4924.

Nothing in the record demonstrates the use of water appropriation A-4924 after the mid-1990's, and therefore, the director's determination that the land covered by this appropriation had not been irrigated for more than 3 consecutive years is supported by the evidence and is not arbitrary, capricious, or unreasonable.

Once it has been established that a water appropriation has not been used for more than 3 consecutive years, it is the burden of the interested party, in this case the Boses, to present evidence that there was sufficient cause for nonuse. See § 46-229.04(1). The Boses claim that the Department failed to find that sufficient cause existed for their nonuse of water appropriation A-4924. The Boses refer to § 46-229.04(3)(c) and (e). These subsections state respectively that sufficient cause for nonuse exists when the available water supply is inadequate to enable its use for beneficial or useful purposes, or in circumstances where a prudent person, following the dictates of good husbandry, would not have been expected to use the water.

We conclude that nothing in the record attests to the Republican River's being an inadequate water source. As such, any argument that the Boses attempt to make regarding sufficient cause pursuant to § 46-229.04(3)(c) is without merit. To the contrary, the testimony presented at the March 20, 2003, hearing tends to show that the Boses used the appropriation from the Republican River only when their ground water wells contained an inadequate water supply. The evidence establishes that this

happened once in the mid-1990's, which was more than 3 years prior to the date of this hearing.

At the hearing, when asked why the Boses had used their ground water wells for irrigation instead of surface water available via water appropriation A-4924, Lee Bose testified that it was a matter of convenience. No evidence was presented to establish how mere convenience could rise to a level of conformance with the dictates of good husbandry. Therefore, the director of the Department did not err in failing to find that sufficient cause existed for nonuse pursuant to § 46-229.04(3)(e).

CONCLUSION

The notice of hearing sent to the Boses complied with the applicable statutory requirements and placed the Boses on notice as to the issues that were to be addressed at the hearing. The director's finding that the land subject to water appropriation A-4924 has not been irrigated from the Republican River for more than 3 consecutive years was based on prima facie evidence in the form of the field investigation report. The Boses have presented no evidence that would necessitate a finding of sufficient cause for nonuse pursuant to § 46-229.04(3). As such, the Department's determination is supported by competent and relevant evidence and is not arbitrary, capricious, or unreasonable. We therefore affirm the Department's order canceling water appropriation A-4924.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ALICE L. ROKAHR, RESPONDENT.

675 N.W.2d 117

Filed February 27, 2004. No. S-02-560.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence.
3. **Disciplinary Proceedings: States.** The Nebraska Supreme Court has the authority to discipline attorneys for conduct committed in another state even where the other state has also imposed discipline on the attorney due to that conduct.
4. **Disciplinary Proceedings: Constitutional Law: States.** The Nebraska Supreme Court's imposition of different discipline on an attorney for conduct committed in another state is not a violation of the Full Faith and Credit Clause of the U.S. Constitution.
5. **Evidence: Words and Phrases.** Clear and convincing evidence is evidence that can be said to produce in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
6. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
7. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
8. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events and throughout the proceeding.
9. ____. In determining an appropriate sanction under Neb. Ct. R. of Discipline 4 (rev. 2001), the Nebraska Supreme Court may consider any of the following as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
10. ____. The propriety of a disciplinary sanction must be considered in reference to the sanctions imposed by the Nebraska Supreme Court in prior cases presenting similar circumstances.
11. ____. Before imposing a disciplinary sanction, the Nebraska Supreme Court must also consider any mitigating factors present.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

John Thomas for respondent.

HENDRY, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

The office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Alice L.

Rokahr. After a formal hearing, the referee concluded that Rokahr had violated the Code of Professional Responsibility and recommended a suspension of 6 months. Rokahr filed exceptions to the referee's findings and recommended sanction.

FACTUAL BACKGROUND

Rokahr was admitted to the practice of law in the State of Nebraska on July 15, 1988. Rokahr is also licensed to practice law in the State of South Dakota. The charges in this case arise from Rokahr's representation of Clara Heine and her son Allen Heine.

Clara's husband, Alphonse Heine, was a farmer and cattle feeder. Alphonse and Clara owned land in Cedar County, Nebraska, and Yankton County, South Dakota. Alphonse and Clara had three children: Mary Frances Arens, Leon Heine, and Allen. Allen and Leon were involved with Alphonse in the family business, the Heine Feedlot Company. Alphonse passed away on September 1, 1984, Clara on April 1, 2002.

Allen and his wife, Marilyn Heine, have six children. Leon and his wife, Arlene Heine, have three children: Paula Heine Fejfar, Rebecca Heine, and Justin Heine.

On June 6, 1974, Alphonse created two trusts: one for Paula and one for Rebecca. The respective terms of the trusts gave Paula and Rebecca the option to terminate their trusts upon attaining 21 years of age "and for six months thereafter." If either chose not to terminate their respective trusts at that time, the trusts would automatically terminate upon their attaining 25 years of age and the assets would be distributed. These trusts named Allen, Paula and Rebecca's uncle, as trustee, and Mary Frances, their aunt, as successor trustee. Paula's trust terminated on her 25th birthday, September 18, 1994; Rebecca elected to terminate her trust on her 21st birthday, February 21, 1995.

The two trusts were initially funded with an equal share of land in Cedar County known as the Gust ground. The Gust ground was deeded by Alphonse and Clara to Allen as trustee for Paula and Rebecca. No one disputes that Paula and Rebecca are the only intended beneficiaries of the Gust ground in Cedar County.

On July 21, 1977, Alphonse and Clara began deeding land in Yankton County, known as the East Larson ground, to Allen as trustee for Paula and Rebecca. Alphonse and Clara initially

deeded seven twenty-fifths of the East Larson ground, with the remaining eighteen twenty-fifths transferred to Allen as trustee as follows: one-fifth interest on December 20, 1978, one-fifth interest on January 22, 1979, one-fifth interest on December 30, 1980, and three twenty-fifths interest on December 23, 1981. On December 31, 1982, an additional one-half interest in the East Larson ground was deeded by Alphonse and Clara to Allen as trustee for Paula and Rebecca. At the time of the 1982 deed, however, all of Alphonse and Clara's interest in the East Larson ground had previously been transferred.

The intent of the 1977, 1981, and 1982 deeds was memorialized with receipts and declarations signed by Allen acknowledging that the land was conveyed to Allen for Paula and Rebecca and that Allen "holds one-half of the interest so conveyed to him" under trust agreements dated April 6, 1976. Although the record does not disclose the existence of any trust dated April 6, 1976, no one appears to dispute that the trusts referenced were those created on June 6, 1974, and we will treat the matter in such fashion. The record contains no receipts or declarations for the 1978, 1979, or 1980 transfers.

On December 23, 1981, Clara created a trust for Justin, who was born on August 14, 1979. Allen was again named trustee, with Arlene, Justin's mother, named successor trustee. Alphonse and Clara, as grantors, deeded an interest in land in Cedar County, known as the Wueben pasture, to Allen as trustee for Justin. There is no dispute that Justin is the only intended beneficiary of the Wueben pasture in Cedar County.

Trusts were also created for five of Allen's six children. The only asset deeded to these trusts for the benefit of Allen's children relevant to our inquiry is land known as the West Larson ground in Yankton County, which abuts the East Larson ground that Allen held in trust for Paula and Rebecca. Allen's brother, Leon, was the initial trustee for each of these five trusts until his resignation on July 10, 1990. Thereafter, by the respective terms of the trusts, Allen and Leon's sister, Mary Frances, became trustee for three of the children, while Allen's wife, Marilyn, became trustee for the other two children.

The record indicates that all of the land deeded in trust to Allen and Leon was used in the operation of the Heine Feedlot

Company. All of the rental income from the lease of these properties was deposited into a single account with no specific accounting as to its individual beneficiaries. The record further indicates that at least with respect to Leon's three children, the profits from the land were generally divided equally between the children.

Following Alphonse's death, Rokahr began representing Clara, both individually and in her capacity as personal representative of Alphonse's estate. Rokahr also represented Allen individually in his capacity as trustee of the three trusts involving Paula, Rebecca, and Justin, and as controlling partner of Heine Feedlot Company.

During the course of Rokahr's representation of Allen as trustee, a concern arose that the deeds purporting to convey the real estate to the three trusts were invalid due to the absence of an ascertainable trust beneficiary. As a result, Rokahr prepared corrective warranty deeds for the East Larson and Gust grounds and the Wueben pasture, which deeds were signed on March 23, 1994. The corrective warranty deeds named Paula and Rebecca as beneficiaries of the Gust ground, Justin as beneficiary of the Wueben pasture, and all three children as beneficiaries of the East Larson ground. The East Larson corrective deeds were filed with the register of deeds for Yankton County on March 24. The Gust ground and Wueben pasture deeds were filed with the register of deeds for Cedar County on September 16 and October 11, respectively. Also in connection with her representation of Allen as trustee, Rokahr prepared an easement for Allen's signature, granting a perpetual right of ingress and egress across the East Larson ground to the benefit of the West Larson ground which would otherwise be "landlocked." The trust beneficiaries of the West Larson ground were five of Allen's children. That easement was dated September 1, 1994, but was not recorded with the register of deeds for Yankton County until March 6, 1995.

FORMAL CHARGES

Formal charges were filed against Rokahr in this court on Mary 22, 2002, alleging she violated the following provisions of the Code of Professional Responsibility:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

. . . .

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

. . . .

(6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

. . . .

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his or her representation of a client, a lawyer shall not:

. . . .

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

(7) Counsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent.

The Counsel for Discipline contends, inter alia, that Rokahr's conduct violated the Code of Professional Responsibility in the following particulars: (1) preparing a corrective warranty deed granting Justin an interest in the East Larson ground when (a) Rokahr knew or should have known that Justin was not intended to have any interest in the East Larson ground, (b) Rokahr's preparation of the corrective warranty deed was in furtherance of Allen's desire to retain a measure of control over the East Larson ground for a minimum of an additional 6 years, or until August 14, 2000, when Justin "attain[ed] twenty-one years of age," and (c) it was improper for Rokahr to assist Allen in such manner, since Allen's conduct violated his fiduciary duties to Paula and Rebecca; (2) preparing the easement with a date of September 1, 1994, when the easement was actually prepared and signed sometime after February 22, 1995, when Paula's and Rebecca's trusts had terminated and Allen no longer had legal authority to act on their behalf; (3) falsely swearing that Rokahr witnessed Allen's

acknowledgment of the easement on September 1, 1994, thereby assisting Allen in committing a fraud in violation of Allen's fiduciary duty to Paula and Rebecca; (4) violating the laws of the State of South Dakota by falsely swearing that Rokahr witnessed Allen's acknowledgment of the easement on September 1, 1994; (5) delaying the transfer of the Gust and East Larson grounds to Paula and Rebecca, even though Rokahr was aware of Allen's obligation to deed the land to Paula on September 18, 1994, and to Rebecca on February 21, 1995; (6) delaying until December 23, 1994, to advise anyone of the preparation and filing of the corrective warranty deed conveying to Justin an interest in the East Larson ground despite the filing of the deed on March 23, 1994; and (7) informing Leon's family, through their attorney, that if they believed that Justin should not have an interest in the East Larson ground, Rokahr would amend the deed, but refusing to do so when such action was requested.

In summary, the Counsel for Discipline argues that the above-enumerated conduct was undertaken by Rokahr in furtherance of Allen's effort to retain a measure of control over the East Larson ground when such control had ended due to the termination of Paula's trust on September 18, 1994, and Rebecca's trust on February 21, 1995. The Counsel for Discipline further contends that once this purported conduct was suspected, Rokahr failed to timely respond to requests for information and the documents needed to explain such conduct and, if necessary, to correct it.

REFEREE'S FINDINGS

A referee was appointed to conduct a hearing in this matter. In a 56-page report filed March 7, 2003, the referee found there was clear and convincing evidence that Rokahr had violated the Code of Professional Responsibility by (1) backdating the easement over the East Larson ground; (2) colluding with Allen in backdating and filing the easement over the East Larson ground; and (3) engaging in delay, deceit, and deception in the delivery of deeds to Paula and Rebecca. In connection with these findings, the referee concluded that Rokahr had violated Canon 1, DR 1-102; Canon 7, DR 7-102 and DR 7-104; and Neb. Rev. Stat. §§ 7-104 and 7-106 (Reissue 1997). In his report, the referee states that Rokahr "has been unwilling to take responsibility for her actions

and has not, in much of her testimony, been candid or forthright in her explanations for her actions" and that Rokahr's "conduct was not isolated to a single incident, but consisted of a series of cumulative acts of misconduct." The referee recommended that Rokahr be suspended from the practice of law for 6 months.

ASSIGNMENTS OF ERROR

Rokahr filed exceptions to the referee's report alleging, renumbered and restated, that (1) Rokahr has already been disciplined in this matter by the State of South Dakota, thus any Nebraska discipline "disrespects South Dakota jurisdiction and sovereignty; disregards the principles of due process, full faith and credit, collateral estoppel, and res judicata; and generally overreaches the proper boundaries of Nebraska jurisdiction"; (2) the Counsel for Discipline failed to provide notice of the complaint in accordance with Neb. Ct. R. of Discipline 8, thereby denying to Rokahr due process of law; (3) the finding that Rokahr backdated the perpetual easement is not supported by clear and convincing evidence and is contrary to law; (4) the finding that Rokahr colluded with her client, Allen, in fraudulent conduct by preparing and filing the easement is not supported by clear and convincing evidence and is contrary to law; (5) the finding that Rokahr engaged in delay, deceit, and deception by failing to timely deliver particular deeds is not supported by clear and convincing evidence and is contrary to law; (6) the findings "are wrong as a matter of law in grafting any fiduciary duty of the client-trustee onto ethical duties of the attorney for the trustee"; and (7) the recommended sanction is "overly harsh and disproportionate to the alleged wrong."

STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Counsel for Dis. v. Mills, ante* p. 57, 671 N.W.2d 765 (2003).

Disciplinary charges against an attorney must be established by clear and convincing evidence. *Id.*

ANALYSIS

South Dakota Discipline

In her first exception to the referee's report, Rokahr argues that since the charges pertain to events that took place in South Dakota, and given that she has already been disciplined by South Dakota with respect to this conduct, further discipline by Nebraska "disrespects South Dakota jurisdiction and sovereignty; disregards principles of due process, full faith and credit, collateral estoppel, res judicata; and generally overreaches the proper boundaries of Nebraska jurisdiction." Brief for respondent at 10. The South Dakota discipline to which Rokahr refers is a letter of admonishment issued by the Disciplinary Board of the State Bar of South Dakota on December 20, 2002, criticizing Rokahr for "acced[ing] to Allen's directions/instruction too readily" and "fail[ing] to exercise independent professional judgment." Although Rokahr's assignment of error is expansive, her argument covers the equivalent of one page in her brief. It is difficult to discern the precise basis of Rokahr's argument other than the claim that the Nebraska disciplinary proceeding offends full faith and credit. We will focus our analysis accordingly.

[3,4] This court has, on occasion, sanctioned attorneys who had already been disciplined by the state in which the ethical violation occurred. See, *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002) (following imposition of 6-month suspension in Iowa, formal charges in Nebraska based on same conduct resulted in 1-year suspension); *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001) (following issuance of public reprimand in Iowa, formal charges in Nebraska based on same conduct resulted in 3-year suspension). Such does not offend the principles of full faith and credit. *Kentucky Bar Ass'n v. Signer*, 533 S.W.2d 534 (Ky. 1976), succinctly analyzes such notion.

In *Signer*, the respondent attorney, Signer, had been admitted to the Ohio bar in 1958 and, after having practiced law in Ohio for more than 5 years, applied for admission to the Kentucky bar without examination. The application was approved, and Signer was admitted to the Kentucky bar in 1966. Thereafter, the Kentucky

Bar Association instituted proceedings to disbar Signer based upon his 1972 disbarment by the Ohio Supreme Court for conduct in Ohio. The Kentucky "trial committee" responsible for determining the effect of Signer's Ohio conduct on his fitness to practice law in Kentucky concluded that the Full Faith and Credit Clause of the U.S. Constitution required that Signer be disbarred or suspended in Kentucky. Rejecting such conclusion and remanding the matter back to the committee, the Kentucky Supreme Court stated:

> The action of the Supreme Court of Ohio in barring Signer from the practice of law in Ohio did not purport to affect his right to practice law in any other state, and could not validly have done so anyway. The Full Faith and Credit Clause cannot possibly be twisted into giving to the Ohio action an effect it did not purport to have. The Ohio court ruled that Signer cannot practice in Ohio. The fundamental requirement of full faith and credit is merely that every other state recognize that he cannot practice in Ohio, and of course we recognize that.
>
> It is conceivable, for example, that under the prevailing standards of one state a lawyer could be disbarred for expectorating on a public sidewalk, whereas in another the rigors of professional discipline might be somewhat less severe. What might suffice to justify disbarment in Ohio might not suffice here. Unlike a marital status, for example, which involves the same two people wherever they may be, the right to practice law does not involve the same two parties from state to state. It involves the individual person on the one hand and the individual state in which he claims the right to practice on the other. The status existing between the two cannot, of itself, determine the status of the same individual person and another state.

Signer, 533 S.W.2d at 536.

We agree with the Supreme Court of Kentucky's analysis of the Full Faith and Credit Clause and determine that Rokahr's first exception to the referee's report is without merit.

NOTICE

Rokahr's second assignment of error alleges in substance that the Counsel for Discipline failed to provide her with proper notice

and an opportunity to respond as required by rule 8(B)(2) and Neb. Ct. R. of Discipline 9(D) and (E). Rokahr contends that the Counsel for Discipline's failure to provide her with notice violates due process, requiring dismissal of the formal charges. In order to adequately analyze Rokahr's assignment of error, we find it necessary to set out in some detail the disciplinary procedure ultimately leading to the filing of formal charges.

Before beginning our analysis, we first note that in their respective briefs, Rokahr and the Counsel for Discipline focus much of their argument on whether certain letters are "grievances" under the disciplinary rules. The term "grievance," however, was not part of the disciplinary rules of the Code of Professional Responsibility until February 2001, and the relevant time period during which the letters at issue were written spans from March 1999 to March 2000. We will therefore limit our analysis to the disciplinary rules in effect at the relevant times.

The record indicates that Mary Frances and Arlene each wrote to the Counsel for Discipline expressing their respective concerns with Rokahr's conduct. The first to complain was Mary Frances. In a letter to the Counsel for Discipline dated March 23, 1999, Mary Frances focused on aspects of Rokahr's conduct she believed to demonstrate a conflict of interest. In compliance with rules 8(B)(2) and 9(D), the Counsel for Discipline furnished a copy of Mary Frances' complaint to Rokahr, to which Rokahr responded on April 7. Upon reviewing Rokahr's response, the Counsel for Discipline, finding no evidence of a conflict of interest, dismissed the complaint. The Counsel for Discipline notified Mary Frances of the dismissal in a letter dated April 27, 1999.

However, Rokahr contends a letter received by the Counsel for Discipline the day prior to the dismissal of the Mary Frances complaint, as well as two letters received by the Counsel for Discipline thereafter, should have been furnished to her. Having received these three letters "only in discovery after the Formal Charges were filed," brief for respondent at 13, Rokahr contends that the disciplinary rules were violated and that she was denied due process in these proceedings. We therefore turn our attention to these three letters.

The first letter Rokahr claims should have been furnished to her was written by Mary Frances and received by the Counsel for

Discipline on April 26, 1999, the day preceding the dismissal of Mary Frances' complaint. Our de novo review of the April 26 letter, however, reveals that it was written by Mary Frances to "rebut" Rokahr's rule 9(E) response to the Counsel for Discipline. Under the definitions section of the disciplinary rules of the Code of Professional Responsibility in effect at the relevant time, a complaint was defined as "[a]ny written statement made by any person alleging conduct on the part of a member which, if true, would constitute a violation of the member's oath or the Code." That the Mary Frances rebuttal did not meet the definition of a complaint, and thus require a copy to be furnished to Rokahr pursuant to rule 9(D), is clearly evidenced by the Counsel for Discipline's April 27 letter. In that letter, the Counsel for Discipline notifies Mary Frances that notwithstanding "your recent reply . . . I have dismissed your complaint." Upon our de novo review, we determine that the April 26 letter did not allege additional conduct constituting a violation of the Code of Professional Conduct. As such, the letter was not a complaint, and rules 8(B)(2) and 9(D) did not require the Counsel for Discipline to furnish a copy of the letter to Rokahr.

The second letter Rokahr argues should have been furnished pursuant to rules 8(B)(2) and 9(D) was also written by Mary Frances to the Counsel for Discipline and dated May 24, 1999. In that letter, Mary Frances questions the Counsel for Discipline's decision to dismiss her complaint. Here again, however, our de novo review of the record shows that despite this May 24 letter, the Counsel for Discipline's initial determination to dismiss Mary Frances' complaint did not change. Simply put, the May 24 letter does not meet the definition of a complaint, and the Counsel for Discipline was not required by rules 8(B)(2) and 9(D) to furnish a copy of the letter to Rokahr.

The final letter Rokahr directs our attention to is dated March 20, 2000, and written by Arlene to Richard T. Seckman, Chair of the Committee on Inquiry of the Third Disciplinary District. In that letter, Arlene notified Seckman of her desire to appeal an earlier determination by the Counsel for Discipline not to investigate Arlene's specific allegations of misconduct by Rokahr. Our de novo review of the record shows this letter is nothing more than a "notice of appeal" to the Committee on Inquiry and

does not meet the definition of a complaint. See Neb. Ct. R. of Discipline 14(A) (rev. 1996). Under such circumstance, rules 8(B)(2) and 9(D) did not require the Counsel for Discipline to furnish a copy of the letter to Rokahr.

In her brief, Rokahr does not argue that the formal charges filed against her were in any way defective, that she was not adequately notified of the actual charges she was to defend against at the hearing before the referee, or that she was denied due process at that hearing. Rokahr's argument is that three specific letters were not furnished to her as required by the disciplinary rules and that such failure denied her due process. Having determined from our de novo review of the record that the three letters were not complaints and were therefore not required to be furnished, Rokahr's second assignment of error is without merit.

EASEMENT

In her third and fourth assignments of error, Rokahr argues the referee's finding that she backdated the easement and colluded with Allen in its preparation and filing are not supported by clear and convincing evidence and are contrary to law.

Upon its face, the easement reflects that it was signed by Allen and Marilyn on September 1, 1994, notarized by Rokahr on that same date, and filed with the register of deeds for Yankton County on March 6, 1995. The Counsel for Discipline, however, contends the easement was actually signed and notarized sometime in late February or early March 1995, at a time when Paula's and Rebecca's trusts had terminated and Allen no longer had the legal authority to act on their behalf. The motivation, as contended by the Counsel for Discipline, was for Allen to perpetually secure, for his children, ingress and egress via the East Larson ground to the West Larson ground which would otherwise be "landlocked." The referee found the Counsel for Discipline's contention was supported by clear and convincing evidence.

In support of his finding, the referee relies on three principal factors. The first factor is Rokahr's appointment calendar, which makes no mention of a meeting with Allen and Marilyn to sign the easement in September 1994. Second, the referee points to a February 22, 1995, letter to Allen from Rokahr. That letter, dated 1 day after Rebecca's trust had terminated and 5 months after the

termination of Paula's trust, provides in relevant part: "Please find enclosed a copy of the Perpetual Easement . . . on the parcel of land in Yankton County . . . . *If this is acceptable, please let me know and we can make arrangements for its signing*." (Emphasis supplied.) Finally, the referee relies on Rokahr's billing records. A review of those records indicates that Allen was billed for the preparation and signing of an easement on March 15.

Evidence purporting to support Rokahr's contention that the easement was signed on September 1, 1994, consists principally of Rokahr's testimony and the testimony of Allen and Marilyn. At the hearing before the referee, Rokahr testified:

> [Counsel for Discipline:] . . . Did you witness Marilyn and Allen Heine sign the original easement on September 1, 1994?
>
> [Rokahr:] I don't recall.
>
> . . . .
>
> Q Do you have any documentation to substantiate your belief that you saw them execute this document on September 1st, 1994?
>
> A I would look to this document itself as proof that it was in fact signed before me on this date . . . .

Allen testified that to "the best of my knowledge according to the records I can find, I signed it the 2nd of September [1994]."

Marilyn's testimony is at best equivocal:

> [Counsel for Discipline:] When did you sign it?
>
> [Marilyn:] I'm not even going to say a date because all I remember is that it was in the latter part of July, I'm going to say, or the middle part of July when my husband did talk to me about the fact that they were going to probably prepare an easement and that there would be an easement prepared. And I'm going to say it was, you know, probably any time within the next 30 days that I signed it. It was shortly afterwards and I'm not going to say it was ten days or twenty days, I'll just say it was sometime within the 30 day period.

By way of further explanation, Rokahr testified that on or about September 1, 1994, she was in the midst of a 3-day trial. Rokahr contends that it may be due to this trial that she does not specifically recall when Allen and Marilyn signed the easement

or why the easement was not filed until March 6, 1995. Rokahr also testified that she suspected, though did not know for certain, that upon later perusal of the Heine file, she found a "draft" of the easement, and not realizing that the easement had already been signed by Allen and Marilyn on September 1, 1994, prepared and sent the February 22, 1995, letter to Allen to arrange for its signing. As for her billing records not reflecting a charge for the preparation of the letter and easement until March 15, 1995, Rokahr blamed poor billing practices.

Rokahr cites *Stokes v. Rabenberg*, 227 N.W. 466 (S.D. 1929), to support her legal argument that "[t]he acknowledgement itself is proof of the events. . . . Acknowledgment by respondent that she cannot remember all or any part of the transaction is no contradiction of the facts established prima facie by acknowledgement of the easement." Brief for respondent at 15. However, *Stokes* is distinguishable, since the testimony of the notary in *Stokes* was not impeached. Here, we are presented with evidence impeaching the date Rokahr, as notary, acknowledged the easement's execution.

Rokahr testified that she was aware Paula was entitled to the assets of her trust on September 18, 1994, and that Allen wanted the easement over the East Larson ground in place before that date. As such, Rokahr knew that in backdating the easement, she would be aiding Allen in an effort to exert control over property at a time when Allen no longer had legal authority to act on behalf of Paula or Rebecca. Upon our de novo review of the record, giving weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another, we determine that clear and convincing evidence exists to support the referee's finding that Rokahr backdated the easement and colluded with Allen in its preparation and filing. Rokahr's third and fourth assignments of error are without merit.

Delay in Delivery of Deeds

In her fifth assignment of error, Rokahr argues the referee's finding that she engaged in delay, deceit, and deception in the delivery of Paula and Rebecca's deeds is not supported by clear and convincing evidence and is contrary to law.

In finding that Rokahr engaged in delay, deceit, and deception, the referee relied primarily on correspondence between Rokahr and William Klimisch, an attorney retained by Arlene and Leon to represent them in their attempt to resolve disputes surrounding the trusts. The referee found that this correspondence demonstrated Rokahr was aware of Allen's obligation to deed the Gust and East Larson grounds to Paula on September 18, 1994, and to Rebecca on February 21, 1995, yet continually failed to do so even after specific requests from Klimisch.

The record, however, contains conflicting evidence as to precisely when the deeds to the Gust and East Larson grounds were delivered to Paula and Rebecca. Rokahr produced evidence indicating that all deeds were hand delivered to Klimisch on April 24, 1995. Arlene, however, testified that Paula and Rebecca did not receive their East Larson deeds until March 17, 1997, when Arlene picked the deeds up from Rokahr's office.

The record contains evidence supporting Rokahr's contention that the deeds for both the Gust and East Larson grounds were delivered to Klimisch on April 24, 1995. Copies of Rebecca's deeds to the Gust and East Larson grounds contain handwritten notations made by Rokahr's secretary that read: "original given to Klimisch 4/24." Moreover, both Paula's and Rebecca's deeds to the Gust ground were filed with the register of deeds for Cedar County on April 27, 3 days after Rokahr contends all the deeds were delivered to Klimisch.

In addition, the correspondence between Rokahr and Klimisch subsequent to April 24, 1995, does not contain any evidence clearly and convincingly disputing Rokahr's contention. To the contrary, in a letter to Klimisch dated April 25, 1995, 1 day after Rokahr asserts all the deeds were delivered, Rokahr wrote to Klimisch, stating: "Hopefully by now you should have received the deeds transferring the land, which was as [sic] asset of the Rebecca and Paula Heine Trusts, to Rebecca and Paula." Klimisch, the only person who could have directly contradicted Rokahr's contention regarding the delivery of the deeds, did not testify. In our de novo review of the record on this disputed fact, we are unable to conclude that the evidence clearly and convincingly shows that the deeds were not delivered on April 24, 1995, as Rokahr contends.

In concluding that the record supports Rokahr's contention that all deeds were delivered on April 24, 1995, we are mindful that delivery on April 24 still resulted in a delay of 2 months from the date Rebecca's trust terminated and 7 months from the date Paula's trust terminated. However, upon our de novo review of the record, we are unable to conclude that the evidence clearly and convincingly shows this delay was the result of deceitful or misleading conduct by Rokahr.

The record discloses the establishment of eight individual trusts, with conveyances to those trusts made over a span of approximately 9 years. Rokahr had no involvement in drafting either the trusts or the initial deeds which transferred land in Nebraska and South Dakota to those trusts. Rather, Rokahr's involvement began in January 1994, when she was retained by Allen to assist with the closing of Paula's trust which was scheduled to terminate on September 18, 1994.

The record is undisputed that significant problems regarding these trusts required Rokahr's attention. First, as noted above, the trusts were funded over a period of 9 years, with fractional interests in several different properties. For at least three of these properties, deeds had been drafted conveying more than 100 percent of the real estate to the benefiting trust. For example, as of December 23, 1981, all of the East Larson ground had been deeded to Allen as trustee. However, on December 31, 1982, Alphonse and Clara attempted to transfer an additional one-half interest in that same property to Allen as trustee. Also, a total of twenty-nine twentieths of the West Larson ground was transferred for the benefit of Allen's children to Leon as trustee. Finally, a total of thirty-seven thirtieths of the Wueben pasture was transferred to Allen as trustee.

Second, the initial deeds conveying property to the trusts did not include an ascertainable trust beneficiary. This, according to the unrefuted opinion of Rokahr's expert, rendered the deeds "insufficient to convey property" in South Dakota. Not only did this omission bring the legality of the conveyances into question, it is supportive of Rokahr's contention that (1) there was uncertainty regarding the grantor's intent with respect to the East Larson ground and (2) it was this uncertainty, and not deceit, that caused the delay in delivering Paula's and Rebecca's deeds.

Finally, other factors contributed to the confusion surrounding these trusts. First, the profits from the rental income on the Wueben pasture, the Gust ground, and the East Larson ground historically had been deposited into one account and divided equally between Paula, Rebecca, and Justin. Such conduct is supportive of Allen's view that Justin was to have a share of the East Larson ground and Rokahr's drafting of the corrective warranty deeds purporting to convey such interest. Also, in the initial letter written from Klimisch to Rokahr, Klimisch indicated he represented Leon and Arlene "and their minor children." At that time, however, Justin was Leon and Arlene's only minor child. Rokahr claims that this letter led to confusion and delay in her responses to Klimisch as it was necessary for Rokahr to clarify with Paula and Rebecca who precisely Klimisch was representing.

[5] In our de novo review of the record, we acknowledge there is evidence which lends support to the referee's finding that Rokahr engaged in deceit with respect to the delivery of Paula's and Rebecca's deeds. The issue, however, is whether on balance, such evidence can be said to produce in the trier of fact a firm belief or conviction about the existence of the fact to be proved. See *State ex rel. Special Counsel for Dis. v. Shapiro*, 266 Neb. 328, 665 N.W.2d 615 (2003). Given the disputed facts on this question, together with the legal issues Rokahr confronted due to the manner in which the trusts were drafted and the deeds prepared, we cannot conclude that the evidence produces a firm belief or conviction that Rokahr's conduct was deceitful.

Grafting of Ethical and Fiduciary Duties

In her sixth assignment of error, Rokahr argues that the referee erred in "grafting" the fiduciary duty of the trustee onto the ethical duties of an attorney for the trustee. As we read Rokahr's argument, she contends that the duty to deliver the deeds to Paula and Rebecca was Allen's and that as a result, she cannot be held responsible for Allen's failure to deliver the deeds in a timely manner.

Having concluded there was not clear and convincing evidence to support a finding that Rokahr had engaged in delay, deceit, and deception in the delivery of the deeds to Paula and Rebecca, we need not address this assignment of error.

Recommended Sanction

In her seventh and final assignment of error, Rokahr argues that the referee's recommended sanction is "overly harsh and disproportionate to the alleged wrong."

[6-8] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Mills, ante* p. 57, 671 N.W.2d 765 (2003). Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *Id.* For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events and throughout the proceeding. *Id.*

Rokahr's conduct in her representation of Allen is troubling. In the course of this representation, Rokahr backdated the easement over the East Larson ground, thus assisting Allen in breaching his fiduciary duties as trustee. Moreover, when Rokahr filed the easement with the register of deeds for Yankton County, she knew it to be backdated and false.

[9,10] In determining an appropriate sanction under Neb. Ct. R. of Discipline 4 (rev. 2001), we may consider any of the following as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. *Mills, supra.* The propriety of a disciplinary sanction must be considered in reference to the sanctions imposed by this court in prior cases presenting similar circumstances. *State ex rel. NSBA v. Gallner,* 263 Neb. 135, 638 N.W.2d 819 (2002).

In *State ex rel. Nebraska State Bar Assn. v. Butterfield,* 169 Neb. 119, 98 N.W.2d 714 (1959), Butterfield represented clients in a real estate transaction. The referee found that during a subsequent proceeding to set aside a deed involved in that transaction, Butterfield falsely testified that one of the signatures on the deed was not acknowledged before him. The referee further found that

although the acknowledgment had occurred on or before June 7, 1956, Butterfield postdated the acknowledgment to January 2, 1957. The referee concluded that Butterfield had improperly postdated the deed and the acknowledgment and had given false testimony to a court of law. We suspended Butterfield for 6 months.

In *Mills, supra*, this court was presented with an attorney representing the personal representative of an estate. We concluded that Mills had engaged in several acts of misconduct, including (1) falsely acknowledging documents despite failing to witness the signatures of those signing, (2) altering the dates those documents were actually signed, (3) filing those false documents with the county court and the register of deeds, (4) filing a federal estate tax return based on those false documents, (5) lying to the Internal Revenue Service with respect to his representation of the estate, and (6) encouraging his client to aid in his deception by lying to the Internal Revenue Service. We suspended Mills for 2 years.

[11] Before imposing a disciplinary sanction, we must also consider any mitigating factors present. *Mills, supra*. We thus note, as mitigating factors, the various affidavits and testimony expressing support for Rokahr and attesting to her commitment to the legal profession and her involvement in the community.

Rokahr's actions in colluding with her client to backdate the easement over the East Larson ground and then filing that false document with the register of deeds for Yankton County are serious. However, we do not feel these actions rise to the level of the misconduct in *State ex rel. Counsel for Dis. v. Mills, ante* p. 57, 671 N.W.2d 765 (2003), because the record does not reflect that Rokahr elicited the aid of any person in an effort to perpetuate the deception surrounding the preparation and filing of the easement. Nevertheless, we believe Rokahr's conduct merits more than the 6-month suspension recommended by the referee. Thus, upon our de novo review of the record, this court determines that Rokahr should be suspended from the practice of law for a period of 1 year.

CONCLUSION

Rokahr's exceptions to the referee's report are sustained in part, and in part overruled. Rokahr is hereby suspended from the

practice of law for a period of 1 year. Rokahr is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, she shall be subject to punishment for contempt of this court. Rokahr is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997).

JUDGMENT OF SUSPENSION.

GERRARD, J., not participating.

MICHAEL HOWARD MARCOVITZ, APPELLANT,
V. MARY PATRICIA ROGERS, APPELLEE.

675 N.W.2d 132

Filed February 27, 2004. No. S-02-1435.

1. **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.
2. **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.
3. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
4. **Child Custody.** In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Reissue 1998), 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.
5. **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.
6. **Judges: 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.
7. **Evidence: Appeal and Error.** 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 court heard and observed the witnesses and accepted one version of the facts rather than another.

8. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
9. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.
10. ____. In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 1998), the income and earning capacity of each party as well as the general equities of each situation.
11. **Appeal and Error.** An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.
12. **Alimony.** Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
13. ____. Disparity in income or potential income may partially justify an award of alimony.
14. **Child Support: Rules of the Supreme Court: Words and Phrases.** The Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, a 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 and payments received for children of prior marriages.
15. **Child Support: Rules of the Supreme Court.** Generally, child support payments should be set according to the Nebraska Child Support Guidelines.
16. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
17. **Divorce: Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.
18. **Divorce: Property Division.** When awarding property in a dissolution of marriage, the property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule applies where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage.

Appeal from the District Court for Dodge County: DARVID D. QUIST, Judge. Affirmed as modified.

Peter C. Wegman and Amy J. Vyhlidal, of Rembolt, Ludtke & Berger, L.L.P., for appellant.

Clarence E. Mock III and Denise E. Frost, of Johnson & Mock, for appellee.

HENDRY, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Michael Howard Marcovitz appeals from an order dissolving his marriage to Mary Patricia Rogers. The district court for Dodge County awarded custody of the parties' four minor children to Rogers and ordered Marcovitz to pay child support. The court also ordered a division of property and declined to award Marcovitz alimony.

BACKGROUND

Marcovitz and Rogers met in August 1982 and began living together in Denver, Colorado, later that fall. At the time, Rogers owned interests in Skyline Water Company and Diamond Head Development Company (Diamond Head), as well as a fourplex and duplex in the Copper Creek subdivision in Sarpy County, Nebraska. She received all of these assets as gifts from her father. In Denver, Rogers worked as a preschool teacher and also attended the Denver Art Institute. Marcovitz attended classes at Metropolitan State College, where he obtained a degree in bioenvironmental studies in 1985.

Marcovitz and Rogers lived in Denver for approximately 2 years. Marcovitz testified that during that time, he and Rogers began holding themselves out as husband and wife, an assertion that Rogers disputed. Marcovitz testified that the two signed a lease as husband and wife and that he gave Rogers an engagement ring. In 1985, the parties filed their federal income tax return under the status "Married filing joint return," a practice that continued for the next 15 years. The parties maintained separate bank accounts while in Colorado and, except for approximately 3 months in 1986, continued to maintain separate bank accounts for their entire marriage. Their oldest child, Forrest P. Rogers, was born on July 31, 1985. Shortly after Forrest's birth, Marcovitz and Rogers moved to Gunnison, Colorado. There, Marcovitz obtained a master's degree in aquatic ecology from Western State College in 1986, and Rogers eventually earned a bachelor of arts degree in sociology from the same institution.

During the summer of 1986, the couple moved to Birmingham, Michigan. The parties' second child, Max C. Rogers, was born on April 18, 1987. Marcovitz had received a fellowship to pursue a Ph.D. at Wayne State University, which he received in 1992. Rogers received her master's degree in 1989 and also began work on a Ph.D. Marcovitz testified that while in Birmingham, he and Rogers represented themselves to the public as being married by obtaining joint married health insurance, by signing a lease as a married couple, and by wearing wedding rings. Rogers testified that they never held themselves out to be married while living in Birmingham. She admitted that they told their children that they were married and that she believed "people just thought we were married." According to Marcovitz' petition for dissolution and Rogers' answer, the parties were married in New York in August 1991.

They moved to Ann Arbor, Michigan, in the spring of 1991, where Marcovitz received a postdoctoral fellowship at the University of Michigan. Rogers commuted to Detroit, Michigan, to continue her Ph.D. studies at Wayne State University.

The parties purchased a home in Ann Arbor, titled in Rogers' name only. Rogers had sold her duplex in Nebraska and used the proceeds for the downpayment for, and to remodel, the home in Ann Arbor. Rogers testified that she made the mortgage payments on the Ann Arbor home, but that Marcovitz would give her money to be applied toward all of the family's bills, including the mortgage.

Rogers testified that after the parties' marriage, she became concerned about the amount of property she stood to inherit after the death of her father in January 1991 and her husband's possible claims to that property. Those concerns led her to consult with an attorney in Detroit, who drafted a postnuptial agreement. Rogers testified that sometime between May and July 1992, she and Marcovitz went to the attorney's office and signed the postnuptial agreement. Marcovitz testified that the attorney represented both him and Rogers and that he did not believe that the agreement was ever executed.

Rogers testified that the signed postnuptial agreement was placed in a safe deposit box when the couple later moved to Fremont, Nebraska. Rogers testified that only she and Marcovitz

had access to the safe deposit box. When Marcovitz filed for divorce in 1993, the postnuptial agreement was missing from the safe deposit box. Rogers testified that exhibit 76 was a true and accurate copy of the postnuptial agreement signed by both herself and Marcovitz.

The postnuptial agreement includes the following recitals:

> Each of the parties has made full disclosure to the other of the nature, extent, and value of their assets and income.
>
> Each of the parties has consulted counsel in connection with the negotiation and preparation of this Agreement and are satisfied that their respect[ive] rights and interests have been fully explaine[d] to them by counsel, at the time of the execution of this Agreement[.] Notwithstanding such counsel, the parties bargained with each othe[r] as persons in a confidential relationship and agree that they ar[e] bound by the rules governing such dealings.

Section A of the agreement lists the separate property of each party. Marcovitz' separate property consists of bank accounts held in his name only and various items of personal property. Rogers' separate property is more extensive. It consists of bank accounts held in her name only, real property located in Ann Arbor, motor vehicles registered in her name, and various items of personal property. Rogers' separate property also included:

> 4. Any business interest or property either real or personal which [Rogers] had at the time of the marriage from her Family's Trust or has or will subsequently receive(d) from the estate of her father, Franklin Paul Rogers, who died January 13, 1991 or from the estate of [Rogers'] mother or brothers at some later date. Such business or property is more specifically described as:
>
> a. Skyline Water Company
>
> b. Diamond Head Corporation
>
> c. Rogers Realty, Construction, Land and Investment Companies
>
> d. Westgate Plaza, Inc.
>
> e. 4 Plex at Copper Creek
>
> 5. All income, whether from the sale or leasing of the property described in Subparagraph 4, above;

6. Any property substituted for or replacing the property described in Subparagraph 4 or property purchased with any income from the property described in Subparagraph 4, above[.]

The agreement waived any interest a party may have in the separate property of the other party. The agreement also specified that "[a]ny property or income acquired hereafter in their joint names or with the use of joint assets or income derived from employment by either party" was to be considered marital property. The agreement also stated that it "shall be interpreted and enforced in accordance with the laws of the State of Michigan in effect at the time of its execution."

In August 1992, Marcovitz accepted a job as an assistant professor of biology at Midland Lutheran College in Fremont. His salary for the 2002-03 academic year was $38,505. Rogers taught briefly at Metropolitan Community College and Midland Lutheran College, and later at Creighton University as a part-time professor. The family purchased a house in Fremont, jointly titled. The $24,022 downpayment for the house came from the proceeds of the sale of the house in Ann Arbor. The parties carried a mortgage on the house for approximately 6 months before paying off the remainder of their obligation, $95,000. The funds for the mortgage payoff came from Rogers' personal account and represented money that she had received from her father's estate. Three major improvements were made to the house over time. Marcovitz testified that the improvements were paid for from their joint account. However, Rogers produced evidence that the improvements were paid for from her personal account using more than $120,000 in funds she had inherited from her father's estate. The Fremont house was appraised at the time of trial at a value of $225,000.

Marcovitz initiated this action by filing a dissolution petition on August 9, 2000. Rogers filed an answer and cross-petition on August 23. At trial, it was established that Rogers owns a 20-percent interest in Westgate Plaza, Inc. (Westgate), that has a discounted value of $636,765. Rogers receives a monthly salary of $3,000 from Westgate and an annual bonus of approximately $40,000 to $44,000. Rogers also owns a 20-percent interest in Diamond Head. The value of her interest in Diamond Head is "a lot lower" than $87,000. Rogers also owns a 20-percent interest in

Eagle Ridge Development Company (Eagle Ridge). Her interest in Eagle Ridge was acquired from her siblings as a gift after the death of her father. However, there is also testimony that Rogers paid $1,200 for her interest in Eagle Ridge, which was deducted from a subsequent distribution to her. Rogers' interest in Eagle Ridge was valued at approximately $900,000 after discounts.

A decree dissolving Marcovitz' and Rogers' marriage was entered on December 2, 2002. The court awarded custody of the parties' four children to Rogers, subject to the terms of visitation set forth in the decree. Marcovitz was ordered to pay child support in the amount of $759.46 per month for four children, $743.04 for three children, $585.81 for two children, and $423.04 for one child. In calculating child support, the district court found that "[o]nly [Rogers'] income from Westgate Shopping Plaza should be used as 'income' for calculation of child support because [Rogers'] other income is proceeds from the sale of inherited property." Marcovitz was also ordered to pay 32 percent of the children's medical expenses not covered by insurance. Neither party was awarded alimony. Rogers was awarded the parties' marital residence, two vehicles, various items of personal property, and retirement accounts in her own name. Finally, the court ordered Rogers to pay $12,000 in attorney fees.

ASSIGNMENTS OF ERROR

Marcovitz assigns that the district court erred in (1) awarding custody of the four minor children to Rogers; (2) failing to award him alimony; (3) calculating child support by (a) failing to include all of Rogers' income, (b) failing to deviate downward due to his parenting time, and (c) requiring him to pay 32 percent of all of the children's uncovered medical expenses; (4) considering the terms of the postnuptial agreement in determining the marital estate; (5) setting off to Rogers as nonmarital property the parties' residence, certain personal property, and an interest in a real estate corporation; (6) awarding him an inadequate amount of attorney fees; and (7) failing to award him any portion of Rogers' separate property.

STANDARD OF REVIEW

[1] 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. *Schaefer v. Schaefer*, 263 Neb. 785, 642 N.W.2d 792 (2002).

ANALYSIS

CHILD CUSTODY

[2] 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. *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998).

[3,4] When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Id.*; Neb. Rev. Stat. § 42-364 (Reissue 1998). In determining a child's best interests under § 42-364, 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. at 368, 576 N.W.2d at 785.

[5-7] 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. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). 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. *Davidson v. Davidson, supra.*

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 court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

Our de novo review of the record reveals that the district court did not abuse its discretion in awarding custody of the four minor children to Rogers. In addition to those facts recited above, each party generally testified that he or she was more involved in the parenting of the children and was more fit to parent the children than the other. Neither party had many complimentary things to say about the other. Marcovitz testified that while living in Birmingham and Ann Arbor, he was more involved in caring for Forrest and Max than was Rogers. He further testified that he was extremely involved in Forrest and Max's education, that he knows all their teachers and coaches, and that he helped prepare Forrest for the ACT examination. He testified that Rogers has almost no involvement with the children's teachers. He also testified that he has coached the children's soccer teams and introduced them to ballet.

Marcovitz related several concerns about Rogers that he had, should she be awarded custody. He testified that he was concerned about Rogers' mental and religious stability as well as her availability for the children's activities. He was also concerned about the several men that Rogers had relationships with, her history of seeing numerous therapists, the cosmetic surgery she has had and the impact it may have on their daughter, Rogers' "addiction" to the Internet and the pornographic e-mails she has received, and the many "pleasure" trips Rogers takes out of Nebraska.

Rogers' testimony paints a different picture. She testified that she was Forrest and Max's primary caretaker while the parties lived in Gunnison and after moving to Fremont. She testified that she encouraged the children to read, enrolled them in dance classes, took them to museums and art classes, and introduced them to music lessons. She testified that Marcovitz objected to the children's participation in a program designed to help newly divorced families deal with the change as well as her attempts to get therapists for the children. Rogers describes Marcovitz as primarily concerned about his job and as a "judgmental, controlling person who is inflexible."

In awarding custody of the children to Rogers, the district court made the following findings:

> Both parties love the children and have their respective strengths and weaknesses as parents with each party's parental weaknesses fortunately offset by the parental strengths of the other party and therefore, the children need parental involvement from both parties. [Marcovitz] has leveled a number of criticisms against [Rogers] ranging from sexual misconduct to allowing excessive school tardiness. However, in each case, credible witnesses involved in the children's daily li[ves], including those with expert knowledge related to their educational pursuits and extra curricular activities, testified the children have suffered neither demonstrative physical or psychological impairment related to [Rogers'] conduct nor any adverse effect upon their educational or spiritual development. The record demonstrates [Rogers'] avid interest in ensuring the intellectual and spiritual development of the parties' children by arranging participation by the children in a broad spectrum of secular and religious activities.
>
> . . . Though similarly interested in the children's intellectual and spiritual development, [Marcovitz] was less willing to candidly assess his own conduct related to the children. The evidence demonstrates [Marcovitz], though motivated by good intentions, acted inappropriately with teachers and others involved in the children's care, sometimes resorting to disparaging remarks about [Rogers] within hearing range of the children. Moreover, of concern to the Court was proof [Marcovitz] engaged in conduct attempting to undermine [Rogers'] ability to smoothly administrate the children's activities on a daily basis.

From our de novo review of the record in this case, it is apparent that the parties have sharply conflicting testimony as to the other's fitness to parent the children. As noted above, 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 court heard and observed the witnesses and accepted one version of the facts rather than another. *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998). We conclude that the district court

did not abuse its discretion in awarding custody of the children to Rogers.

ALIMONY

[8-10] Marcovitz next argues that the district court erred in refusing to award him alimony. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002). The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 1998), the income and earning capacity of each party as well as the general equities of each situation. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002). The criteria in § 42-365 include

> the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

[11] As mentioned, one of the statutory criteria to be considered is the duration of the marriage. Marcovitz contends that his marriage to Rogers should be considered a 20-year marriage rather than an 11-year marriage. He argues that when the parties started living together in Colorado in 1982, they formed a common-law marriage under Colorado law. See, generally, *People v. Lucero*, 747 P.2d 660 (Colo. 1987). However, there is no indication in our record that this argument was made to the district court, and the district court's order did not address this issue. An issue not presented to or decided by the trial court is not appropriate for consideration on appeal. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). When considering the duration of the parties' marriage, we consider it to be an 11-year marriage.

[12,13] Marcovitz' remaining argument regarding alimony focuses on the disparity in income between the parties. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Bauerle v. Bauerle, supra*. However, we have also stated that " ' "[d]isparity in income or potential income may partially justify an award of alimony." ' " *Id.* at 891, 644 N.W.2d at 136. The record in this case indicates a great disparity between the incomes of the parties. Marcovitz' adjusted gross income in 2000 was $28,248; Rogers' was $236,822. The gap in income was not closed in 2001, when Marcovitz' adjusted gross income was $30,997 and Rogers received $285,000 in distributions from Eagle Ridge *alone*. Marcovitz testified that his living expenses were approximately $3,200 per month; Rogers testified that her living expenses were approximately $11,000 per month.

In prior cases, we have upheld alimony awards in situations involving smaller income disparities than in this case. See, *Bauerle v. Bauerle, supra* (upholding alimony award to wife of $1,500 per month for 120 months where husband's monthly income after expenses was $2,695 and wife's monthly income after expenses was $148); *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (noting that when wife had earning capacity of $34,000 and husband's was $100,000, alimony award of $1,500 per month for 120 months was not abuse of discretion as it tended to even out income disparity). We also note that nonmarital property not subject to property division may be taken into account when determining alimony. See *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002) (court may take into account property acquired by inheritance when determining alimony). Based upon the disparity of income in this case and the division of property explained in greater detail below, we modify the decree and order Rogers to pay Marcovitz alimony in the amount of $2,000 per month for 10 years. Pursuant to § 42-365, Rogers' obligation shall terminate upon the death of either Rogers or Marcovitz or upon Marcovitz' remarriage.

CHILD SUPPORT

Marcovitz assigns that the district court erred in calculating child support. His argument is threefold. First, he contends that the court failed to consider and include some of Rogers' income

in the calculations. Second, he argues that a downward deviation from the child support guidelines is warranted because of the amount of his visitation and parenting time. Finally, while not directly related to the amount of his monthly child support payments, Marcovitz argues that the court erred in ordering him to pay 32 percent of the children's uncovered medical expenses.

[14] The Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, a 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 and payments received for children of prior marriages. *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002). In this case, the district court's calculations were based upon Rogers' income from her ownership interest in Westgate. The court did not include Rogers' income from other sources because it found that that income was derived from the sale of inherited property.

Rogers argues that proceeds from the sale of inherited property are not "income" when calculating child support. She relies on two cases from other jurisdictions for this proposition. In *Thomas v. Thomas*, 932 P.2d 54 (Okla. Civ. App. 1996), the father sold a house, which he had previously inherited, for $36,000, payable in monthly installments of $1,000. A portion ($147.08) of each monthly installment was interest. The trial court included all the proceeds of the sale of the house in the father's income for child support calculation purposes. That decision was reversed on appeal. The court held:

> Payments on a promissory note consist of a return of principal and the interest on that principal. The return of the principal is not "income," and therefore cannot be included in the combined "gross income" of both parents. The interest on a promissory note is income, and should be included when computing the combined gross income.

Thomas v. Thomas, 932 P.2d at 55. Similarly, the Alaska Supreme Court has said that the interest from the sale of inherited property qualifies as income for purposes of calculating child support, while the principal amount of gifts and inheritances does not. *Robinson v. Robinson*, 961 P.2d 1000 (Alaska 1998).

Rogers accurately relates the rule from *Thomas v. Thomas, supra*, and *Robinson v. Robinson, supra*. Her error, however, is in applying it in this case. Eagle Ridge and Diamond Head are real estate development entities and generate profits by selling land owned by each. Rogers contends that the sale of the real estate held by Eagle Ridge and Diamond Head is the sale of inherited property. However, the record indicates otherwise. It indicates that Rogers did not inherit any land owned by these entities, but, rather, inherited an ownership interest in each. Those ownership interests were never sold by Rogers. Thus, the income from Diamond Head and Eagle Ridge was not income from the sale of inherited property, but instead was merely income produced by the inherited property itself. The district court erred in including only Rogers' income from Westgate in the calculations.

At trial, several child support calculation worksheets were entered into evidence. Each calculated child support after factoring for several different variables. Based upon our above conclusion that Rogers' income from Diamond Head and Eagle Ridge should be included in the child support calculations, we conclude in our de novo review that Marcovitz' child support obligation should be ordered in accordance with exhibit 111, which includes Rogers' additional income in its calculations. Exhibit 111 indicates that Rogers' monthly net income is $14,705.08 and that Marcovitz' monthly net income is $2,405.11. Pursuant to that worksheet, we modify the decree and order Marcovitz to pay child support in the amount of $362.74 per month for the support of four minor children, $334.32 for the support of three minor children, $279.16 for the support of two minor children, and $191.24 for the support of one minor child.

Next, Marcovitz claims that his child support obligation should be adjusted downward because of the "liberal" amount of visitation accorded to him by the decree. Paragraph J of the guidelines allows a court, at its discretion, to adjust child support when visitation substantially exceeds alternating weekends and holidays. Marcovitz contends that his child support should be adjusted downward by at least 50 percent because of his "extensive weekend parenting time, religious holiday parenting time and summer parenting time." Brief for appellant at 37.

Marcovitz' visitation schedule consists of three general types of visitation. First, Marcovitz has weekend visitation every other weekend from 5 p.m. Thursday to 7:30 a.m. Monday and has visitation on Thursday evening from 5 to 8:30 p.m. during the weeks when there is no scheduled weekend visitation. Second, the court made provisions for visitation for a number of specific secular and Jewish holidays, although Marcovitz has visitation for only approximately half of those holidays in any year. Third, Marcovitz has visitation for one-half of the children's summer vacation, and if he has the children for 4 continuous weeks during the summer, his child support obligation is reduced by 50 percent. This is the only adjustment for child support that the district court made.

[15] Generally, child support payments should be set according to the guidelines. *Bondi v. Bondi*, 255 Neb. 319, 586 N.W.2d 145 (1998). We have previously entertained, and rejected, an argument that a parent's visitation schedule called for the calculation of child support pursuant to a joint custody arrangement rather than a sole custody arrangement. See *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001). In this case, Rogers was granted sole custody of the parties' children. In addition, Marcovitz' visitation schedule is not appreciably different from the visitation schedules mentioned in *Heesacker* and the cases cited therein. Thus, we conclude the district court did not abuse its discretion in declining to reduce Marcovitz' child support obligation based on his visitation schedule.

The decree also ordered Marcovitz to maintain health insurance for the benefit of the children and to pay 32 percent of the children's medical expenses not covered by insurance. This term of the decree is consistent with the version of paragraph O of the guidelines in effect prior to September 1, 2002. However, a different version of paragraph O was in effect on December 2, 2002, the date the district court entered the final decree in this case. Paragraph O currently provides:

> Children's health care expenses are specifically included in the guidelines amount of up to $1,200 per family unit per year. Children's health care needs are to be met by requiring either parent to provide health insurance as required by state law. All nonreimbursed reasonable and necessary children's

health care costs in excess of $1,200 per family unit per year shall be allocated to the obligor parent as determined by the court, but shall not exceed the proportion of the obligor's parental contribution (worksheet 1, line 6).

Accordingly, we further modify the decree and order Marcovitz to pay 14 percent of the children's uncovered medical expenses in excess of $1,200.

DIVISION OF PROPERTY

With respect to the district court's division of property, Marcovitz argues that the court erred in (1) considering the terms of the postnuptial agreement and (2) setting off to Rogers as nonmarital property the parties' residence.

POSTNUPTIAL AGREEMENT

Marcovitz argues that "[t]he only allowable postnuptial agreements in Nebraska are those made in contemplation of death, wherein NEB. REV. STAT. § 30-2316 [(Reissue 1995)] authorizes waiver by contract of a surviving spouse's 'right of election.' In re Estate of [Kopecky], 6 Neb. App. 500, 505, 574 N.W.2d 549, 553 (1998)." Brief for appellant at 28. He also contends that the postnuptial agreement is "invalid and unenforceable because there was inadequate disclosure, no consideration and such agreements at the time allegedly made were against public policy of this state." (Emphasis omitted.) Brief for appellant at 27.

Marcovitz errs in evaluating the validity of the postnuptial agreement under Nebraska law. The terms of the postnuptial agreement expressly dictated that it be interpreted under Michigan law, where one of the parties alleges it was executed in 1992. The Michigan Court of Appeals has addressed the validity of postnuptial agreements in *Rockwell v. Estate of Leon Rockwell*, 24 Mich. App. 593, 180 N.W.2d 498 (1970), which is the most recent published opinion from Michigan addressing that issue. The court stated:

> Post-nuptial agreements are not invalid *per se*. . . .
>
> There are several situations in which Michigan Law recognizes the validity of agreements such as the one involved in the instant case. Post-nuptial agreements made during an existing separation are thought to further judicial policy favoring settlement of controversies over litigation. . . . In

> addition, Michigan is one of the majority of jurisdictions that approve post-nuptial agreements in which a wife releases her interest in her husband's property on his death . . . if it is a fair and voluntary one for a fair consideration. . . . However, objections are validly raised to post-nuptial agreements where those agreements seek to effectuate a separation or contemplate a future separation.

(Citations omitted.) *Id.* at 596-97, 180 N.W.2d at 500.

Under *Rockwell*, the postnuptial agreement in this case is valid. In the agreement, each party released any interest he or she might have in the estate of the other if one should die, and each party also waived any interest in the separate property of the other upon separation or divorce. While Michigan has invalidated postnuptial agreements "where those agreements seek to effectuate a separation or contemplate a future separation," that rule is not applicable here. *Id.* at 597, 180 N.W.2d at 500. The *Rockwell* court, in upholding a postnuptial agreement, said that "[t]here is nothing in this record to suggest that the agreement was calculated to bring about a separation" or that "a separation was contemplated by the parties." *Id.* The *Rockwell* court distinguished another case in which a postnuptial agreement was held invalid because there, "the parties contemplated a separation in the near future." *Id.*, citing *Day v. Chamberlain*, 223 Mich. 278, 193 N.W. 824 (1923). In our case, there is likewise no evidence that Marcovitz and Rogers were contemplating separation or divorce at the time they executed the agreement. The agreement itself recites that "this Agreement is made without either party having the intention to separate or initiate a divorce or dissolution proceeding." Under Michigan law, the postnuptial agreement is valid.

Marital Residence and Other Property

Marcovitz also argues that the district court erred in awarding the marital residence to Rogers as her separate property. The residence was jointly titled. Pursuant to the postnuptial agreement, "[a]ny property . . . acquired hereafter in their joint names" shall be considered the joint and marital property of the parties. Although Rogers testified that in her opinion, the "Commingling" clause of the postnuptial agreement would allow her to recover whatever money she put into the residence, the clause itself belies

her belief. It states in part that "[i]t is the parties' intention that such commingling or pooling of assets not be interpreted to imply any abandonment of the terms and provisions of this Agreement and that *the provision contained herein addressing the parties' interests in jointly-held property be applied*." (Emphasis supplied.) The marital residence was the joint property of the parties, and the district court erred in awarding it to Rogers as her separate property. The house was valued at the time of trial at $225,000. We therefore order Rogers to pay Marcovitz one-half of the value of the house ($112,500).

Attorney Fees

In his penultimate assignment of error, Marcovitz contends that the $12,000 attorney fee award to him was insufficient. He argues that a larger award is warranted because he incurred approximately $30,000 in legal fees during the course of this action.

[16,17] In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). 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. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002). In our de novo review, we conclude that the district court did not abuse its discretion in awarding Marcovitz $12,000 in attorney fees.

Nonmarital Property

[18] In his final assignment of error, Marcovitz argues that the district court erred in failing to award him any of Rogers' nonmarital property. When awarding property in a dissolution of marriage, the property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). An exception to the rule applies where both of the spouses have contributed to the improvement or operation of the property which

one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage. *Id.*

We have recognized that in cases where this exception was applied, we have required evidence of the value of the contributions and evidence that the contributions were significant. *Id.* In this case, Marcovitz has failed to produce evidence of the value of his contributions. This assignment of error is without merit.

CONCLUSION

We affirm the district court's decision to grant custody of the parties' minor children to Rogers. We also affirm the district court's award of attorney fees to Marcovitz.

We modify the decree in the following respects: (1) Rogers is ordered to pay alimony to Marcovitz in the amount of $2,000 per month for 10 years, which obligation shall terminate upon the death of either Rogers or Marcovitz or upon Marcovitz' remarriage; (2) we order Marcovitz to pay child support in the amount of $362.74 per month for the support of four minor children, $334.32 for the support of three minor children, $279.16 for the support of two minor children, and $191.24 for the support of one minor child; (3) we order Marcovitz to pay 14 percent of the children's uncovered medical expenses in excess of $1,200; and (4) we order Rogers to pay Marcovitz $112,500 as one-half the value of the house.

AFFIRMED AS MODIFIED.

CONNOLLY, J., not participating.

QUALITY PORK INTERNATIONAL, APPELLEE, V. RUPARI FOOD SERVICES, INC., A FOREIGN CORPORATION, APPELLANT.

675 N.W.2d 642

Filed March 5, 2004. No. S-01-1203.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's.

2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
4. **Pleadings: Jurisdiction.** Before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector.
5. **Pleadings: Proof.** Confronted with a special appearance, a plaintiff has the burden to establish facts which demonstrate the court's personal jurisdiction over the defendant.
6. **Pleadings: Jurisdiction: Affidavits: Proof.** In a hearing on a special appearance, an affidavit may be used to prove or disprove the factual basis for a court's assertion or exercise of personal jurisdiction over a defendant.
7. **Jurisdiction: Statutes.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), is to be interpreted broadly in view of the rationale and philosophy underlying its adoption.
8. **Constitutional Law: Jurisdiction.** Neb. Rev. Stat. § 25-536 (Reissue 1995) expressly extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation with Nebraska as far as the U.S. Constitution permits.
9. **Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must first determine whether a statutory standard of the long-arm statute is satisfied.
10. **Due Process: Jurisdiction: States.** If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
11. ____: ____: ____. Due process for personal jurisdiction over a nonresident defendant requires that the defendant's minimum contacts with the forum state be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.
12. ____: ____: ____. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
13. **Jurisdiction: States.** Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.
14. **Jurisdiction: States: Contracts: Parties.** To determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a court is to consider the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing.
15. **Jurisdiction: States.** Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with Nebraska are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state.

16. ____: ____. Where a defendant who has purposefully directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other consideration would render jurisdiction unreasonable.
17. **Sales: Words and Phrases.** Acceptance of goods occurs when the buyer does any act inconsistent with the seller's ownership.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and CARLSON and MOORE, Judges, on appeal thereto from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Dave J. Skalka, of Law Offices of W. Patrick Betterman, for appellant.

Michael S. Degan and Angela M. Lisec, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Quality Pork International (Quality Pork) petitioned for further review of the decision of the Nebraska Court of Appeals which reversed the district court's judgment in favor of Quality Pork and remanded the cause with directions to dismiss. See *Quality Pork Intern. v. Rupari Food Services, Inc.*, No. A-01-1203, 2003 WL 21057297 (Neb. App. May 13, 2003) (not designated for permanent publication). The Court of Appeals concluded that the district court lacked personal jurisdiction over Rupari Food Services, Inc. (Rupari). *Id.*

SCOPE OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's. *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003).

BACKGROUND

Quality Pork (a Nebraska corporation which customizes pork products to order for its customers) sued Rupari (a Florida corporation involved in the importing, exporting, and manufacturing of food service and retail meat products) to recover the cost of goods sold under an alleged oral contract. The oral contract, which was arranged through a Colorado corporation, Midwest Brokerage (Midwest), provided that Quality Pork would ship products to Star Food Processing, Inc. (Star), a Texas food distributor. Rupari was to pay for the products shipped to Star. In November 1999, Midwest placed three orders with Quality Pork for products to be shipped to Star. According to Quality Pork, Rupari paid for the first two orders, but failed to pay for the third.

Quality Pork filed a petition on March 23, 2000, to recover the cost of the goods shipped under the third order. Rupari filed a special appearance challenging the district court's personal jurisdiction over it.

At a May 16, 2000, evidentiary hearing on Rupari's special appearance, Quality Pork offered the affidavit of Larry Lubeck, the chief executive officer of Quality Pork. Lubeck stated that beginning in March 1997, Quality Pork had established an ongoing business relationship in which Star purchased pork products from Quality Pork. In October 1997, Star's account became delinquent and Quality Pork discontinued selling to Star.

According to Lubeck, in November 1999, Midwest arranged an oral contract between Quality Pork and Rupari. Quality Pork agreed to again do business with Star only because Rupari agreed to pay for all products that Star ordered from Quality Pork. Under the terms of the contract, Midwest placed the orders with Quality Pork for Star, the orders were delivered to Star, and Rupari was sent the invoices for the orders.

With regard to the three orders at issue, Lubeck stated that Rupari "partially performed under the oral agreement with Quality Pork by making payments" of $43,736.84 and $47,467.80, and copies of the "check stubs" were attached to Lubeck's affidavit. Lubeck averred that Rupari failed to make the third payment for products ordered by Star and failed to abide by the terms of the contract.

Lubeck stated that he had spoken with Robert Mintz, the president of Rupari, and another Rupari representative on several occasions and had been assured that the delinquent amount would be paid. When Quality Pork made written demand upon Rupari for payment, Rupari failed to pay the $44,051.98 that was due.

The affidavit of Mintz stated that he was the president of Rupari at all times relevant to the proceedings and that Rupari was a corporation organized and existing by virtue of the laws of the State of Florida and headquartered in Deerfield Beach, Broward County, Florida. Mintz stated that Rupari is a food service company that sells and resells food products such as pork to retail operations and food brokers.

According to Mintz, Rupari never made any sales directly to or into the State of Nebraska, nor did it apply to become a foreign corporation authorized to do business in Nebraska. It did not have offices located in Nebraska, it did not own property in Nebraska, and at no time did any Rupari officer or employee visit Nebraska during the course of his or her employment with Rupari. Rupari is not a subsidiary or parent company of a subsidiary located or organized in Nebraska.

In a journal entry dated June 6, 2000, the district court overruled Rupari's special appearance.

On April 4, 2001, Quality Pork filed a second amended petition. On May 4, Rupari answered this petition, reserving its objection that the district court had no personal jurisdiction and raising the statute of frauds as an affirmative defense. Following a jury trial, the district court entered judgment for Quality Pork in the amount of $44,051.98 plus court costs. Rupari timely appealed.

COURT OF APPEALS' OPINION

The Court of Appeals reversed the judgment of the district court and remanded the cause with directions to dismiss, concluding that the district court erred in determining that it had personal jurisdiction over Rupari. The Court of Appeals also concluded that Quality Pork had failed to prove the existence of a writing which would satisfy the statute of frauds and had failed to demonstrate Rupari's acceptance of the goods, which would therefore excuse the writing requirement of the statute of frauds.

ASSIGNMENTS OF ERROR

In its petition for further review, Quality Pork asserts, summarized and restated, that the Court of Appeals erred in concluding that Rupari did not have sufficient contacts with the State of Nebraska to allow Nebraska courts to exercise personal jurisdiction over Rupari, in concluding that writings transmitted to Quality Pork by Rupari's agent did not satisfy the statute of frauds, and in concluding that Rupari did not accept each of the three shipments purchased from Quality Pork within the meaning of Neb. U.C.C. § 2-201(3) (Reissue 2001).

ANALYSIS

JURISDICTION

[3,4] We first address whether the Court of Appeals erred in concluding that the district court lacked personal jurisdiction over Rupari. Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). Before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector. *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

[5,6] Confronted with a special appearance, a plaintiff has the burden to establish facts which demonstrate the court's personal jurisdiction over the defendant. *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). In a hearing on a special appearance, an affidavit may be used to prove or disprove the factual basis for a court's assertion or exercise of personal jurisdiction over a defendant. *Id.* When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's. *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003).

Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), provides in relevant part:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;

. . . .

(2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

[7,8] Section 25-536 suggests a broad application of the exercise of personal jurisdiction by the courts of this state, an application which is supported by case law. It was the intention of the Legislature to provide for the broadest allowable jurisdiction over nonresidents. *State on behalf of Yankton v. Cummings*, 2 Neb. App. 820, 515 N.W.2d 680 (1994). Nebraska's long-arm statute is to be interpreted broadly in view of the rationale and philosophy underlying its adoption. *General Leisure Products Corp. v. Gleason Corporation*, 331 F. Supp. 278 (D. Neb. 1971). Section 25-536 expressly extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation with Nebraska as far as the U.S. Constitution permits. *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998).

[9,10] In *Williams*, we discussed the procedure that must be followed in determining whether a court can exercise jurisdiction under Nebraska's long-arm statute. Before a court can exercise personal jurisdiction over a nonresident defendant, the court must first determine whether a statutory standard of the long-arm statute is satisfied. *Id.* If the long-arm statute has been satisfied, the court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Id.*; *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 520 N.W.2d 216 (1994).

We conclude that the requirements of the long-arm statute were satisfied in this case because Rupari was transacting business in Nebraska. Lubeck's affidavit stated that in November 1999, Midwest arranged an oral contract between Quality Pork and Rupari whereby Rupari agreed to pay for all pork products ordered from Quality Pork by Star. Under the agreement, orders placed by Midwest were delivered to Star and Rupari was sent the invoices. With regard to the orders at issue, payments in the amounts of $43,736.84 and $47,467.80 were made by Rupari. Rupari did not pay for the third order, in the

amount of $44,051.98, and it is the subject of this action. This evidence establishes that Rupari, through Midwest, was transacting business in Nebraska. See § 25-536(1)(a).

[11] We next consider whether minimum contacts exist between Rupari and the State of Nebraska such that personal jurisdiction may be exercised without offending due process. Due process for personal jurisdiction over a nonresident defendant requires that the defendant's minimum contacts with the forum state be such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" See *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). See, also, *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989); *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987).

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), the Court explained the protection afforded by due process as it relates to personal jurisdiction:

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U. S., at 319. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," [citation omitted] the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 297 (1980).

The Court held that

> this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U. S. 770, 774 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U. S. 408, 414 (1984).

Burger King Corp., 471 U.S. at 472-73. Parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other state for the consequences of their activities. See *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S. Ct. 927, 94 L. Ed. 1154 (1950).

Burger King Corp. stated several considerations that enter into the determination of whether a forum may legitimately exercise personal jurisdiction over a nonresident who has purposefully directed his activities toward residents of the forum. A state has a " 'manifest interest' in providing its residents with a convenient forum" for redress. *Burger King Corp.*, 471 U.S. at 473. It would be unfair to allow a nonresident to escape having to account for consequences that arise proximately from such activities. *Id.* "[T]he Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King Corp.*, 471 U.S. at 474. In addition, modern transportation and communication have made it much less burdensome for a party to defend himself in a state where he engages in economic activity. *Id.*

[12] The constitutional touchstone is whether the defendant purposefully established minimum contacts in the forum state. *Id.* " '[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), quoting *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . ." *Burger King Corp.*, 471 U.S. at 475. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998).

Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the particular case: general

personal jurisdiction or specific personal jurisdiction. These concepts were discussed in *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 520 N.W.2d 216 (1994). There, the Court of Appeals pointed out that a state may exercise either general or specific personal jurisdiction, so long as the defendant has sufficient contact with the forum state, citing *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state, provided that the defendant has engaged in "continuous and systematic general business contacts" with the forum state. See *Hall*, 466 U.S. at 416. If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert "'specific jurisdiction'" over the defendant depending on the quality and nature of such contact. *Hall*, 466 U.S. at 414 n.8. Accord *Dunham, supra.*

[13] Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "'fair play and substantial justice.'" *Burger King Corp.*, 471 U.S. at 476. These considerations include "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'" *Burger King Corp.*, 471 U.S. at 477, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Such considerations "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King Corp.*, 471 U.S. at 477.

In the case at bar, the Court of Appeals was presented with the question of whether there were sufficient minimum contacts between Rupari and the State of Nebraska to assert either general personal jurisdiction or specific personal jurisdiction over

Rupari. As to the exercise of general personal jurisdiction, the Court of Appeals found that Rupari's activities did not qualify as substantial or continuous and systematic. The court stated that "[t]he most that can be said is that Rupari allegedly engaged in business with Quality Pork" by having Quality Pork ship products to Texas and that "Rupari sent two payments to Quality Pork in Nebraska." See *Quality Pork Intern. v. Rupari Food Services, Inc.*, No. A-01-1203, 2003 WL 21057297 at *4 (Neb. App. May 13, 2003) (not designated for permanent publication). The court also concluded that the record did not indicate that Rupari's activities qualified as a purposeful availment that would satisfy the requirements of specific personal jurisdiction.

[14,15] We disagree with the Court of Appeals' determination as to purposeful availment. To determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a court is to consider the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing. *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998), citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with the forum state are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state. See, *Burger King Corp., supra*; *Williams, supra.*

In this case, Rupari induced Quality Pork to ship products to Star. Quality Pork had previously ceased doing business with Star because of its poor credit. Based upon Rupari's promise to pay for products shipped to Star, Quality Pork filled orders valued at $43,736.84, $47,467.80, and $44,051.98 respectively.

Quality Pork's claim arose out of Rupari's contacts with a company located in Nebraska. Therefore, in evaluating whether the exercise of specific personal jurisdiction is reasonable, we conclude that it would not be unduly burdensome for Rupari to

defend an action in Nebraska. Quality Pork had a valid interest in obtaining convenient and effective relief which supported the bringing of its action in this state. By purposefully conducting business with Quality Pork, Rupari could reasonably anticipate that it might be sued in Nebraska if it failed to pay for products ordered from Quality Pork.

[16] Where a defendant who has purposefully directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other consideration would render jurisdiction unreasonable. *Burger King Corp., supra.* Rupari has failed to present such a case. The affidavit of Rupari's president merely set forth that it is a food servicing company which sells and resells food products such as pork and that it does not have employees, offices, or property in the State of Nebraska. Under the facts of this case, the lack of physical presence in Nebraska is not a compelling reason that would cause the assertion of jurisdiction to be unreasonable.

We conclude that Rupari had sufficient minimum contacts with Nebraska to satisfy the due process requirements for the exercise of specific personal jurisdiction. The district court had specific personal jurisdiction over Rupari, and the Court of Appeals erred in holding that it did not.

STATUTE OF FRAUDS

Rupari's answer to Quality Pork's second amended petition and Rupari's motion for directed verdict asserted that the oral contract between Quality Pork and Rupari was unenforceable under the statute of frauds because it was an oral agreement and Rupari did not accept the goods from Quality Pork. In its petition for further review, Quality Pork asserts that the Court of Appeals erred in concluding that writings transmitted to Quality Pork by Rupari's agent did not satisfy the statute of frauds and in concluding that Rupari did not accept each of the three shipments within the meaning of § 2-201(3).

The statute of frauds provides:

> Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract

> for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

§ 2-201(1).

Although the purchase orders bore the caption "Star Food Processing, Inc.," and requested shipment of the products to Star in San Antonio, Texas, the Court of Appeals found nothing on the purchase orders that would satisfy the requirement that the writing be "signed by" Rupari. See § 2-201(1). The court concluded that Quality Pork had failed to demonstrate the existence of a sufficient writing to satisfy the statute of frauds and had failed to demonstrate that Rupari accepted the goods, which would excuse the writing requirement.

Section 2-201(3) provides for situations in which an oral contract is enforceable in the absence of an adequate writing:

> A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
>
> . . . .
>
> (b) if the party against whom enforcement is sought admits in his or her pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
>
> (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 2-606).

Neb. U.C.C. § 2-606 (Reissue 2001) provides:

> (1) Acceptance of goods occurs when the buyer
>
> . . . .
>
> (b) fails to make an effective rejection (subsection (1) of section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
>
> (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

In its second amended petition, Quality Pork claimed that Rupari accepted the products, because the products were not rejected within a reasonable time after delivery. Rupari asserted in its answer that it never received or accepted the products from Quality Pork.

[17] The question of whether the oral contract between Quality Pork and Rupari was sufficient to satisfy the statute of frauds is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003). We conclude that the record before us establishes that Rupari accepted the goods, which acceptance would excuse the fact that the purchase orders were not "signed by" Rupari. Acceptance of goods occurs when the buyer does any act inconsistent with the seller's ownership. § 2-606(1)(c).

At trial, Lubeck, the chief executive officer of Quality Pork, testified that the business typically does not use formal written agreements to conduct transactions, but, rather, uses purchase orders. Quality Pork shipped truckloads of pork to Star on November 8, 11, and 17, 1999, pursuant to the oral contract with Rupari. Prior to each shipment, a representative of Midwest faxed a written purchase order to Quality Pork specifying the type and quantity of meat ordered and specifying delivery to Star. The purchase orders described the product, the price, the name of the vendor, the shipping location, and the date of delivery.

In addition, at no time did any representative of Star or Rupari voice an objection to the quality or quantity of goods delivered by Quality Pork pursuant to the purchase orders. The record establishes that Rupari sent an invoice to Star for each truckload delivered. These invoices reflect a markup above the prices charged by Quality Pork. Rupari also paid Midwest a commission on each of the three shipments.

The following transactions are reflected in the record: On November 8, 1999, Midwest sent an invoice to Rupari for a commission based upon 41,620 pounds of pork at .005 cents per pound. Quality Pork sent an invoice to Rupari on November 9 in the amount of $43,736.84 for 41,620 pounds of pork shipped November 8. Rupari sent an invoice to Star on November 16 in

the amount of $45,810.60 for 41,620 pounds of pork. Star wrote a check to Rupari for $45,810.60 on November 24, and in turn, Rupari paid Quality Pork for this first shipment.

On November 10, 1999, Midwest sent an invoice to Rupari for a commission based upon 44,988 pounds of pork shipped to Star at .005 cents per pound. On November 15, Quality Pork sent an invoice to Rupari in the amount of $47,467.80 for 44,988 pounds of pork shipped November 11. Rupari sent an invoice to Star on November 17 in the amount of $51,158.76 for 44,988 pounds of pork. Rupari subsequently paid Quality Pork for this second shipment.

On November 22, 1999, Midwest sent an invoice to Rupari for a commission based upon 42,062 pounds of pork at .005 cents per pound shipped to Star. The record reflects that Quality Pork sent an invoice to Rupari on December 2 in the amount of $44,051.98 for 42,062 pounds of pork and that Rupari sent an invoice to Star on December 1 in the amount of $47,644.14 for 42,062 pounds of pork.

On February 1, 2000, Brian Trimbach of Rupari sent a fax to Lubeck of Quality Pork, stating:

> Hello Larry —
>
> My employer has authorized me to write this communique regarding Rupari's withholding of payments due Quality Pork International.
>
> Following our representative's visit to Star Foods['] plant and meetings with the owner of Star, we feel confident that payment due Rupari is forthcoming. That is, Star's problem appears to be of a cash flow nature and not insolvency.
>
> Based on this, we anticipate a relatively short continuation of what we all agree to be unpleasant and look foreward [sic] to full payment from Star and the consequent issuance of monies due your company.

The invoices sent by Rupari to Star requesting payment for the product that had been shipped by Quality Pork demonstrate acts inconsistent with Quality Pork's ownership of the product. See § 2-606(1)(c). In addition, the invoice from Rupari to Star dated December 1, 1999, evidences Rupari's acceptance of the third shipment and "indicate[s] that a contract for sale has been made between the parties." See § 2-201(1). Thus, Quality

Pork's evidence was sufficient to satisfy the requirements of the statute of frauds. See, *Commonwealth Propane Co. v. Petrosol Internat., Inc.*, 818 F.2d 522 (6th Cir. 1987) (party resold propane, which was act so inconsistent with seller's ownership as to constitute acceptance within meaning of Ohio Rev. Code Ann. § 1302.64(A)(3) (Anderson 1979)); *Matter of Pennsylvania Tire Co.*, 26 B.R. 663 (N.D. Ohio 1982) (when contract buyer has performed act inconsistent with seller's ownership of specific goods by offering to resell those goods, such act constitutes acceptance of goods).

CONCLUSION

For the reasons set forth herein, the decision of the Court of Appeals is reversed, and the cause is remanded with directions to reinstate the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., dissenting.

I disagree with the conclusion that Rupari had sufficient contacts with Nebraska to allow Nebraska courts to exercise personal jurisdiction. I would affirm the decision of the Nebraska Court of Appeals and remand the cause with directions to dismiss.

The evidence presented at the special appearance consisted of only two affidavits. Robert Mintz, the president of Rupari, located in Florida, averred that Rupari had never made sales in Nebraska, was not a Nebraska corporation, did not have offices in Nebraska, and its employees had never visited Nebraska in the scope of their employment. Larry Lubeck, the chief executive officer of Quality Pork, averred that Quality Pork had established an ongoing business relationship with Star, located in Texas. Star became delinquent on its account, and Quality Pork discontinued selling products to Star. Lubeck averred that Midwest, located in Colorado, had arranged an oral agreement between Quality Pork and Rupari whereby Rupari agreed to pay for pork products ordered by Star. The record at the special appearance is silent about how the contract was arranged or whether Rupari ever directly called Quality Pork to agree to the contract. The orders were delivered to Star in Texas, and Rupari was invoiced for them. Rupari made two payments and then failed to pay. Quality Pork spoke to a representative of Rupari on several occasions

after the default. The affidavits do not state who initiated the communications. Thus, the record at the special appearance shows that Rupari's only clear contact with Nebraska was writing two checks to Quality Pork and orally agreeing through a broker to pay for purchases made by another entity.

The burden of proof rests upon the plaintiff confronted with a special appearance to demonstrate the court's personal jurisdiction over the defendant. *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998).

Before a court can exercise personal jurisdiction over a nonresident defendant, the court must first determine whether the long-arm statute is satisfied. If the long-arm statute is satisfied, the court must then determine whether minimum contacts exist between the defendant and the forum, allowing a court to exercise personal jurisdiction without offending due process. See, *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998); Neb. Rev. Stat. § 25-536 (Reissue 1995). The long-arm statute expressly extends Nebraska's jurisdiction over nonresidents to the extent permitted by the U.S. Constitution. *Crete Carrier Corp., supra*; *Castle Rose, supra*; § 25-536(2). Thus, I consider only whether Rupari had sufficient minimum contacts with Nebraska so that the exercise of personal jurisdiction would not offend constitutional principles of due process. See *Crete Carrier Corp., supra.*

The consideration of due process involves two steps. First, it must be determined whether the defendant has sufficient minimum contacts. Second, if such minimum contacts are established, the contacts may be considered in the light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice. *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *Crete Carrier Corp., supra.* Such factors include the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Crete Carrier Corp., supra.*

The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Crete Carrier Corp., supra*; *Castle Rose, supra*. This analysis requires that we consider the quality and nature of the defendant's activities to determine whether the defendant has the necessary minimum contacts with the forum to satisfy due process. *Crete Carrier Corp., supra*, citing *Internat. Shoe Co., supra*.

Due process does not require a defendant's physical presence in the forum before jurisdiction is exercised. *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992); *Crete Carrier Corp., supra*. However, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *Burger King Corp., supra*; *Crete Carrier Corp., supra*; *Castle Rose, supra*. Rather, the claim must arise out of or relate to the defendant's forum-related activities. *Burger King Corp., supra*. Additionally, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws. *Burger King Corp., supra*; *Crete Carrier Corp., supra*; *Castle Rose, supra*. These requirements ensure that a defendant will not be subject to litigation in a jurisdiction solely because of random, fortuitous, or attenuated contacts. *Id.* Thus, action by Rupari, itself, must have created a "'substantial connection'" with the forum. See *Bell Paper Box, Inc. v. Trans Western Polymers*, 53 F.3d 920, 922 (8th Cir. 1995), quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957).

We have specifically stated that a contract with a party in Nebraska does not, in and of itself, provide the necessary contacts for personal jurisdiction. *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998). See, also, *Burger King Corp., supra*. When dealing with contracts, it is the prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, that must be evaluated in determining whether a defendant purposely

established minimum contacts within the forum. *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998).

" 'Merely entering into a contract with a forum resident does not provide the requisite contacts between a [nonresident] defendant and the forum state.' " *Bell Paper Box, Inc.*, 53 F.3d at 922. "This is particularly true when the nonresident defendant is a buyer, rather than a seller." *Id.* See, also, *Vetrotex Certainteed v. Consolidated Fiber Glass*, 75 F.3d 147, 152 (3d Cir. 1996) (contacts of mere " 'passive buyer' " insufficient to satisfy due process).

When the defendant is a buyer, contacts with the forum are often too attenuated to satisfy the exercise of personal jurisdiction. Unlike situations involving sellers—who often directly solicit buyers in a forum and perform a large portion of a contract in the forum through delivery—buyers often do little more than place an order; communicate via telephone, facsimile, or e-mail; and send payment for the product. Courts have held that such contacts are ancillary and are insufficient to satisfy due process. See, *Vetrotex Certainteed, supra*; *Bell Paper Box, Inc., supra*; *Nicholas v. Buchanan*, 806 F.2d 305 (1st Cir. 1986); *Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc.*, 786 F.2d 1055 (11th Cir. 1986); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1983); *Lakeside Bridge & Steel v. Mountain State Const.*, 597 F.2d 596 (7th Cir. 1979); *TRWL Financial Estab. v. Select Intern.*, 527 N.W.2d 573 (Minn. App. 1995). See, generally, *Bellboy Seafood v. Kent Trading Corp.*, 484 N.W.2d 796 (Minn. 1992); *Quelle Quiche v. Roland Glass Foods*, 926 S.W.2d 211 (Mo. App. 1996), *overruled on other grounds, Chromalloy American v. Elyria Found.*, 955 S.W.2d 1 (Mo. 1997).

As one court has noted:

> "The cases have distinguished . . . between the quality of contacts of buyers and sellers. The distinction is based primarily on the traditional scenario in which the seller is the aggressor in the interstate relationship; the seller solicits customers, advertises, or otherwise initiates the dealings. Where the buyer is the aggressor, however, its buyer status will not protect it."

TRWL Financial Estab., 527 N.W.2d at 577. For the buyer to be the aggressor, it must be the dominant party in pursuing the transaction. See *id.*

Courts have further held that performance of contractual obligations by the seller cannot serve as a sufficient contact to confer jurisdiction over the out-of-state purchaser when the contract does not require the purchaser to perform in the forum state. Payment for goods in the forum state is generally not sufficient in and of itself to create the contacts necessary to assert personal jurisdiction. See, e.g., *Borg-Warner Acceptance Corp., supra*; *Hydrokinetics, Inc., supra*; *Lakeside Bridge & Steel, supra.* When negotiation for the contract took place over the telephone and delivery occurred outside the forum, courts have found insufficient contacts to satisfy due process. See, e.g., *TRWL Financial Estab., supra*; *Nicholas, supra*. In addition, contacts made after a failure to pay or rejection of goods are generally considered ancillary and cannot act to confer jurisdiction. See, e.g., *Borg-Warner Acceptance Corp., supra.*

In *Bell Paper Box, Inc. v. Trans Western Polymers*, 53 F.3d 920 (8th Cir. 1995), Bell Paper Box, Inc. (Bell), a South Dakota corporation that manufactures printed cartons, used a broker in California who solicited business from Trans Western Polymers, Inc. (Trans Western), a California corporation. Bell and Trans Western communicated by telephone, facsimile, and mail, with some communications routed through the broker. Trans Western sent Bell a purchase order and films that were necessary for Bell to manufacture cartons for Trans Western. The parties agreed that the contract would be construed in accordance with South Dakota law. Trans Western canceled the purchase order, and Bell filed suit in South Dakota.

The district court held that Trans Western lacked sufficient minimum contacts with South Dakota. The Eighth Circuit affirmed on appeal. The court noted that Trans Western did not itself have substantial contacts with the forum. Instead, Bell employed a broker in California who solicited the purchase order, and delivery of the product was to occur outside of South Dakota. Although films were sent, no raw materials were shipped into the forum, Trans Western had no physical presence in the forum, and Trans Western only communicated through interstate communications. The court did not find the choice-of-law clause persuasive. Thus, the court concluded that the use of interstate facilities such as telephone or mail was a " 'secondary

or ancillary' factor" that alone could not provide the necessary minimum contacts. *Id.* at 923.

In *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1983), the plaintiff Hydrokinetics, Inc., was a manufacturer in Texas. The defendant Alaska Mechanical, Inc., an Alaska corporation, was contacted by Alaska Winter, a manufacturer's representative, who initially brokered all communications between the parties. Using telex, telephone, and letter, the parties negotiated a contract for Alaska Mechanical to purchase products manufactured by Hydrokinetics. The contract stipulated that it would be governed by Alaska law. Two officers of Alaska Mechanical twice visited Hydrokinetics in Texas. The products were shipped to Washington and then to Alaska. Alaska Mechanical rejected the goods, and Hydrokinetics filed suit in Texas.

The district court concluded that Texas could not assert personal jurisdiction over Alaska Mechanical. On appeal, Hydrokinetics argued that Alaska Mechanical purposely availed itself of the benefits of Texas laws because (1) it agreed to purchase specific goods manufactured in Texas, (2) payment was to take place in Texas, (3) there were extensive communications between the parties, (4) an officer visited Hydrokinetics in Texas, and (5) the contract was accepted in Texas.

The Fifth Circuit affirmed. The court noted that although Alaska Mechanical agreed to purchase products manufactured in Texas, no performance of the contract by Alaska Mechanical was to take place in Texas with the exception of payment. The court stated that it did not weigh heavily the fact that checks might have been mailed to Texas. Instead, the court viewed the activity in Texas as unilateral activity by Hydrokinetics. The court also discounted the interstate communications between the parties. Although officers of Alaska Mechanical visited Hydrokinetics twice and accepted the contract there, the court concluded that the significance of the visits was diminished because the case involved a single transaction with a contract governed by Alaska law.

In comparison to *Bell Paper Box, Inc. v. Trans Western Polymers*, 53 F.3d 920 (8th Cir. 1995), and *Hydrokinetics, Inc., supra*, cases which have found sufficient contacts to assert personal jurisdiction over a buyer include more substantial contacts.

For example, in *Command-Aire v. Ontario Mechanical Sales & Service*, 963 F.2d 90 (5th Cir. 1992), the case involved (1) a lengthy course of dealing between the parties, (2) the president of the defendant buyer corporation traveling to the forum for the purpose of specifically tailoring the manufacture of products to its needs, and (3) the buyer's taking possession of the goods in the forum so that title passed there. Distinguishing the case from *Hydrokinetics, Inc., supra*, the court held that the contacts were no longer mostly unilateral on the part of the plaintiff and that the contacts were sufficient to confer jurisdiction.

Likewise, where the plaintiff seller had to retool machinery to custom make a product and entered into a contract contemplating a long-term and ongoing business relationship, contacts have been deemed sufficient to assert personal jurisdiction over an out-of-state buyer. *Precision Lab. Plastics v. Micro Test*, 96 Wash. App. 721, 981 P.2d 454 (1999).

Here, Quality Pork has failed to meet its burden of proof to show that Rupari had sufficient contacts with Nebraska to satisfy due process. Rupari's only clear contacts with Nebraska were its agreement to pay for pork products to be sent to a third party in Texas, its act of mailing two checks to Nebraska, and two telephone communications with a representative of Quality Pork after the default.

The majority concludes that there were sufficient contacts because "Rupari induced Quality Pork to ship products to Star" when it agreed to pay for the products. The majority next concludes that Quality Pork's claim arose out of Rupari's contacts with a Nebraska company and that it would not be unduly burdensome for Rupari to defend an action in Nebraska. But the record is silent about who pursued the contract or who was the aggressor. All that is known is that an oral contract was arranged through a broker in Colorado and that Star placed orders for products for which Rupari was invoiced. An order for products and promise to pay is not the type of "inducement" that the case law envisions could create sufficient minimum contacts. See, e.g., *Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc.*, 786 F.2d 1055 (11th Cir. 1986); *Lakeside Bridge & Steel v. Mountain State Const.*, 597 F.2d 596 (7th Cir. 1979); *TRWL Financial Estab. v. Select Intern.*, 527 N.W.2d 573 (Minn. App. 1995). If the view of

the majority is followed, a mere purchaser, by simply agreeing to pay, would always be subject to suit in the seller's state. Such a concept is unsupported by the case law. See *id.*

The record from the special appearance hearing shows that Rupari was nothing more than a mere purchaser, and even then, an attenuated purchaser, because the products were sent to a third party. The case law does not support the exercise of jurisdiction in such a situation. Indeed, in cases with clearer and substantially more contacts, courts have found that personal jurisdiction could not be satisfied without offending due process.

Further, Quality Pork has failed to show that the contract was formed, accepted, or required performance by Rupari in Nebraska other than sending payment. A broker in Colorado arranged the contract. The record is silent about where the actual contract formation took place, but the inference is that it was by telephone or other interstate communication. Outside of payment, Rupari had no contact with Nebraska to perform under the contract. The product was delivered to a company in Texas, and Rupari never traveled to Nebraska to complete or perform the contract. It is Rupari's actions in the forum that must be considered. Quality Pork's actions of performing the contract in the forum cannot confer jurisdiction over Rupari, who primarily acted outside the forum. See *Bell Paper Box, Inc. v. Trans Western Polymers*, 53 F.3d 920 (8th Cir. 1995). Two telephone calls were made after Rupari failed to pay. Those contacts were ancillary and cannot support the exercise of personal jurisdiction. See *Borg-Warner Acceptance Corp., supra.*

Finally, the majority's conclusion that it would not be unduly burdensome for Rupari to defend the action in Nebraska is irrelevant. The burden on the defendant to defend the suit is not part of the minimum contacts analysis. Instead, if minimum contacts are shown, then the burden on the defendant is one of the factors considered to determine whether the exercise of jurisdiction comports with notions of fair play and substantial justice. Because there were not sufficient minimum contacts, the burden on Rupari to appear and defend the suit is irrelevant.

This is not a case where the seller met the burden of proof by showing that a buyer was the main aggressor in the transaction or one involving custom products that required additional work by

the seller in the forum state. See *Command-Aire v. Ontario Mechanical Sales & Service*, 963 F.2d 90 (5th Cir. 1992). Nor did Quality Pork show that the parties contemplated a long-term relationship with numerous interstate communications. See *Precision Lab. Plastics v. Micro Test*, 96 Wash. App. 721, 981 P.2d 454 (1999). See, generally, *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998).

Instead, Rupari's contacts with Nebraska are attenuated and ancillary. Case law does not support the exercise of personal jurisdiction under the facts as presented at the special appearance. I find no support for the exercise of personal jurisdiction. Accordingly, I would affirm the decision of the Court of Appeals and remand the cause with directions to dismiss.

IN RE ESTATE OF WARREN G. MATTESON, DECEASED.
MARY ANNE MATTESON, BY TERESA A. MATTESON
AND JAY RUNYAN, COCONSERVATORS, APPELLEE, V.
TODD W. MATTESON, PERSONAL REPRESENTATIVE OF THE
ESTATE OF WARREN G. MATTESON, DECEASED, APPELLEE,
AND JUDITH A. MCCORMACK, APPELLANT.

675 N.W.2d 366

Filed March 5, 2004. No. S-02-981.

1. **Decedents' Estates: Appeal and Error.** An appeal from the county court's allowance or disallowance of a claim in probate will be heard as an appeal from an action at law and, further, in reviewing an action at law, an appellate court reviews the evidence in the light most favorable to the prevailing party.
2. ____: ____. In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. ____: ____. In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
4. **Decedents' Estates: Divorce: Jurisdiction.** A county court has subject matter jurisdiction to resolve a claimed liability of a decedent arising out of a marital dissolution decree.
5. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the County Court for Douglas County: STEPHEN M. SWARTZ, Judge. Affirmed.

Roger R. Holthaus, of Holthaus Law Office, for appellant.

Mark J. Milone, of Govier & Milone, L.L.P., for appellee Todd W. Matteson.

James D. Sherrets, Bradford A. Updike, and Brian J. Mathey, of Sherrets & Boecker, L.L.C., for Teresa A. Matteson and Jay Runyan as coconservators for appellee Mary Anne Matteson.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Judith A. McCormack, a devisee of the estate of Warren G. Matteson (Warren), appeals from an order of the county court for Douglas County finding that Mary Anne Matteson (Mary), the former spouse of the deceased, had a valid claim against the estate.

FACTS

The district court for Douglas County entered a decree on October 13, 1976, dissolving the marriage of Warren and Mary. The decree awarded Warren "as his sole and separate property . . . . all life insurance policies or annuity policies presently owned and in the name of [Warren] and cash surrender value of said policies or annuities." The decree further provided that Warren "shall continue to maintain said policies in full force and effect and shall continue to designate [Mary] as the primary beneficiary and the children as contingent beneficiaries under said life insurance policies until the death or remarriage of [Mary]."

The decree also required Warren to pay alimony in the sum of $100 per month, commencing on October 15, 1976. Such payments were to terminate upon the death of either party, remarriage of Mary, or further order of the court. Custody of the parties' minor children was awarded to Warren, subject to Mary's reasonable visitation rights. The court awarded possession of the marital residence to Warren until both of the minor children of the parties reached the age of majority, married, or became

emancipated. At that time, the residence was to be sold and the net proceeds divided equally between the parties.

On April 23, 1980, the decree was modified due to a stipulated material change in circumstances, and Warren's alimony obligation was reduced to $1 per month from and after the date of the modification order. All other terms and conditions of the divorce decree were specifically stated to remain in full force and effect.

On June 4, 1990, Mary filed a "Satisfaction of Judgement," which provided: "COMES NOW MARY ANNE MATTESON, Respondent herein, and shows to the Court that she has received all monies due to her pursuant to the Property Settlement and the Decree of Dissolution, more specifically being the proceeds for her interest in the [marital] residence . . . ."

Warren died on December 12, 2000, and Todd W. Matteson was appointed the personal representative of his estate. On March 7, 2001, Teresa A. Matteson and Jay Runyan were appointed coconservators for Mary. On April 2, the coconservators filed a claim against Warren's estate on Mary's behalf. The claim alleged that Warren failed to maintain the life insurance policies as specified in the decree, failed to pay alimony due under the decree, and retained certain furniture and personal property belonging to Mary. The personal representative filed a notice of disallowance of the claim on June 14.

On August 9, 2001, the coconservators filed a petition for allowance of claim, alleging that the life insurance policies at issue were valued at $39,000. The personal representative filed a response in which he denied the allegations in the petition and affirmatively alleged that it was barred by laches and equitable estoppel. The response further alleged that the purpose of the life insurance policies was to secure payment for alimony and property settlement amounts and that because the satisfaction of judgment filed June 4, 1990, demonstrated that the property settlement had been satisfied, the life insurance security was no longer necessary.

An evidentiary hearing on the petition was held on May 28, 2002, at which the personal representative, the coconservators, and McCormack appeared personally and through counsel. Various exhibits, including a certified copy of the divorce decree, were offered and received with no objection by any party.

On July 29, 2002, the county court entered an order finding that the undisputed evidence demonstrated that Warren owned life insurance policies totaling $39,000 at the time of the decree. It further found:

> [Mary] is still living, and has not remarried, and thus neither of those conditions, which would have cancelled the decedent's obligation to maintain the life insurance, has occurred. No modification of the decree of dissolution has occurred which has affected that obligation. Consequently, the clear and unrebutted evidence is that the estate of the decedent is obligated to fulfill the obligation [that] was judicially imposed upon him, by paying to [Mary] the sum of $39,000.00, said sum representing the death benefits that [Mary] would have received had the decedent fulfilled his obligation under the decree of the dissolution.

The court also determined that Warren owed delinquent alimony and accrued interest in the sum of $974.55 as of October 23, 2001. The court determined that there was insufficient evidence to support Mary's claims to personal property located at the residence of the decedent.

The personal representative did not appeal, but McCormack filed this timely appeal pursuant to Neb. Rev. Stat. § 30-1601(2) (Cum. Supp. 2002) as a party affected by the final judgment. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

McCormack assigns, restated, that the county court (1) erred in finding that the estate owed Mary $39,000 in lieu of the life insurance proceeds pursuant to the decree; (2) erred in finding that the estate owed Mary $974.55 in alimony pursuant to the decree and the modification; (3) exceeded its jurisdiction by modifying the terms of the property division in the divorce decree; (4) erred in finding that Warren's house could be used to satisfy Mary's claims, even though the house was a specific bequest to McCormack; (5) erred by effectuating a lien on the residence because the claims were barred by timeliness and res judicata; and (6) lacked jurisdiction to enter its order.

STANDARD OF REVIEW

[1,2] An appeal from the county court's allowance or disallowance of a claim in probate will be heard as an appeal from an action at law and, further, in reviewing an action at law, an appellate court reviews the evidence in the light most favorable to the prevailing party. *In re Estate of Wagner*, 253 Neb. 498, 571 N.W.2d 76 (1997). In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003); *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002).

[3] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Martin, supra*; *In re R.B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003).

ANALYSIS

In their brief, the coconservators assert that this court "may not have jurisdiction" because McCormack's original notice of appeal "did not properly perfect an appeal to the proper court." Brief for appellee Mary Anne Matteson at 1. The notice of appeal recites an intent to prosecute an appeal to the "District Court of Douglas County," but the typewritten words "District Court" have been stricken and replaced by "Court of Appeals" in handwriting. It appears that this notice, as amended, was timely filed with the county court, and thus the appeal was properly perfected.

[4] We next consider McCormack's argument that the county court lacked jurisdiction to enter the order from which the appeal is taken. The Nebraska Probate Code identifies the county court as the court in this state "having jurisdiction in matters relating to the affairs of decedents." Neb. Rev. Stat. § 30-2209(5) (Cum. Supp. 2002). This jurisdiction extends to "all subject matter relating to . . . estates of decedents." Neb. Rev. Stat. § 30-2211(a) (Reissue 1995). A "Claim" against an

estate includes the liabilities of the decedent, whether arising in contract, tort, or otherwise. § 30-2209(4). The Nebraska Probate Code makes no exclusion for "claims" based on liabilities arising from dissolution of marriage. Thus, a county court has subject matter jurisdiction to resolve a claimed liability of a decedent arising out of a marital dissolution decree.

McCormack argues, however, that the county court lacked jurisdiction to effect what she claims was a modification of the property division in the decree of dissolution as it existed on the date of Warren's death. It is an established principle that a property division in a dissolution of marriage decree from which no appeal is taken is not subject to modification and, ordinarily, will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity. *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003); *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979). However, the applicability of this principle depends upon whether the relief sought with respect to a final decree would constitute a modification or simply an enforcement of the provisions of the property division. See *Davis v. Davis, supra*. With this distinction in mind, we consider McCormack's arguments that the county court erred in determining that the estate was liable to Mary in the amount of $39,000, representing the value of life insurance proceeds to which Mary would have been entitled had Warren fulfilled his obligations under the terms of the decree of dissolution.

McCormack argues that Warren's obligation under the original decree to maintain life insurance for the benefit of Mary and his children was subsequently extinguished by (1) the 1980 modification order and (2) the satisfaction of judgment executed by Mary in 1990. McCormack contends that by determining that the estate was liable for the insurance benefits which would have been payable to Mary had the insurance been kept in force, the county court in effect modified the decree of dissolution as it existed on the date of Warren's death. The record does not support this argument. The 1980 modification order reduced the alimony payable under the original decree from $100 to $1 per month, but specifically provided that all other terms and conditions of the decree remained "in full force and effect." The decree does not state, nor does any other portion of the record

establish, that the life insurance requirement was intended to secure Warren's obligation to pay alimony. Thus, the modification of the latter did not affect the former. Similarly, the satisfaction of judgment executed by Mary in 1990 acknowledged receipt of her share from the deferred sale of the marital residence, as ordered in the original decree, but made no reference to the life insurance provisions of the decree. Pursuant to those provisions, no life insurance proceeds would be due Mary unless and until she survived Warren. Thus, the language in the satisfaction of judgment that Mary had "received all monies due to her pursuant to the Property Settlement and the Decree of Dissolution," more specifically described as proceeds from the sale of the marital residence, cannot be construed as a waiver of any subsequent entitlement to life insurance proceeds from the policies which Warren was required to keep in force.

The record therefore supports the finding of the county court that there had been no modification of the decree which affected Warren's obligation, as set forth in the original decree, with respect to life insurance. That being so, the county court correctly concluded that Warren's estate was obligated to fulfill the obligation which was judicially imposed upon him to maintain life insurance naming Mary as the primary beneficiary during his lifetime. The judgment of the county court did not modify this obligation, but simply enforced it. The same is true with respect to the judgment for alimony and accrued interest which was unpaid at the time of Warren's death. The county court's power to enforce judicially imposed obligations which existed on the date of Warren's death flows from its statutory grant of jurisdiction over "all subject matter relating to . . . estates of decedents." § 30-2211(a). For these reasons, we conclude that McCormack's first, second, third, and sixth assignments of error are without merit.

[5] In her fourth assignment of error, McCormack contends that the county court erred in finding that Warren's residence, which was specifically devised to her, could be used to satisfy the obligations of the estate. This assignment of error is not argued in her brief, and therefore need not be considered on appeal. See *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003) (to be considered by appellate court, alleged error

must be both specifically assigned and specifically argued in brief of party asserting error).

In her fifth assignment of error, McCormack contends that the county court erred in its order by effectuating a lien on the residence because Mary's claims were barred by timeliness and principles of res judicata and/or collateral estoppel. McCormack's argument in this regard is premised upon Neb. Rev. Stat. § 42-371(4) (Cum. Supp. 2002), which provides that alimony and property settlement award judgments cease to be a lien on real or registered personal property after 10 years. We understand her to argue that because such statutory liens expire after 10 years, any claim based upon a property award in a decree would likewise expire. The fact that a statutory lien has expired does not defeat the validity of the underlying obligation. McCormack's arguments with respect to res judicata and timeliness are based upon the premise that the decree was final and that the county court's order somehow impermissibly modified it. As noted above, however, the county court did not modify but only enforced the obligations arising from the decree which were in effect at the time of Warren's death. McCormack's fifth assignment of error is without merit.

CONCLUSION

Based on the record before it, the county court did not err in concluding that there had been no modification of the provisions of the decree which required Warren to maintain the life insurance policies naming Mary as primary beneficiary and to pay her $1 per month in alimony. In the proper exercise of its jurisdiction over the estate of the decedent, the county court enforced these judicial obligations by holding the estate liable for their satisfaction. We affirm the judgment of the county court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HERMAN D. BUCKMAN, APPELLANT.

675 N.W.2d 372

Filed March 5, 2004. No. S-03-627.

1. **Statutes: Intent.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
2. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature.
3. **Statutes: Legislature: Intent.** A preamble or policy statement in a legislative act is not generally self-implementing, but may be used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part.
4. **Motions for New Trial: Legislature: DNA Testing.** In the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002), the Legislature provided (1) an extraordinary remedy, vacation of the judgment, for the compelling circumstance in which actual innocence is conclusively established by DNA testing and (2) an ordinary remedy, a new trial, for circumstances in which newly discovered DNA evidence would have, if available at the former trial, probably produced a substantially different result.
5. **Words and Phrases.** To "exonerate" is to relieve, especially of a charge, obligation, or hardship, or clear from accusation or blame.
6. **Motions to Vacate: DNA Testing: Appeal and Error.** The court should set aside and vacate a conviction under the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002), only where (1) the DNA testing results exonerate or exculpate the person and (2) the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged.
7. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.
8. **Statutes: Legislature: Presumptions: Judicial Construction.** When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it.
9. **Motions for New Trial: DNA Testing.** To warrant a new trial, the court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002), must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.
10. **Motions to Vacate: DNA Testing.** The DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002), establishes a clear procedural framework for movants seeking relief pursuant to the DNA Testing Act. First, a movant may obtain DNA testing if, inter alia, the testing may produce noncumulative, exculpatory evidence relevant to

the claim that the person was wrongfully convicted or sentenced. Second, the court may vacate and set aside the judgment in circumstances where the DNA testing results are either completely exonerative or highly exculpatory—when the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value. Third, in other circumstances where the evidence is merely exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.

11. **Motions for New Trial: DNA Testing: Appeal and Error.** A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002), is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Herman D. Buckman was charged with and subsequently found guilty of, pursuant to jury verdict, the first degree murder of Denise Stawkowski, and use of a weapon to commit a felony. He was also determined to be a habitual criminal. On March 2, 1989, Buckman was sentenced to life imprisonment on the murder conviction and to 20 to 60 years' imprisonment on the weapons charge, as enhanced by the habitual criminal statute, to be served consecutively to the sentence imposed for the murder. We affirmed Buckman's convictions and sentences on direct appeal, and later affirmed the district court's denial of Buckman's motion for postconviction relief. See *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991) (direct appeal), and *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000) (postconviction).

The present appeal arises from a request for deoxyribonucleic acid (DNA) testing brought by Buckman pursuant to the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002). An evidentiary hearing was held following DNA testing of certain forensic evidence from Buckman's trial, but the district court denied Buckman's motion to vacate and set aside his convictions, brought under § 29-4123(2), and his motion for new trial based on newly discovered evidence, brought under § 29-4123(3) and Neb. Rev. Stat. § 29-2101 et seq. (Cum. Supp. 2002). Buckman appeals from the denial of those motions, arguing that the district court erred in denying each of his motions.

I. BACKGROUND

1. Trial Evidence

The victim was found dead during the early morning hours of February 19, 1988, when a passer-by noticed her green, four-door Chevrolet in a roadside ditch in northwest Lincoln. The victim was found lying across the front seat of the car, dead from two gunshot wounds to the head. In *State v. Buckman*, 259 Neb. at 927-28, 613 N.W.2d at 469-70, we summarized the record established at Buckman's trial as follows:

> The record shows that at the time of her death on February 19, 1988, the victim was a 25-year-old wife and mother of four children. She was a drug dealer and a drug user who sold drugs to several people.
>
> The victim's husband testified that the victim began selling small quantities of methamphetamine to Buckman and Goldie Fisher in December 1987. The victim kept a record of her drug transactions in a blue trifold ledger, along with the drugs, money, and razor blades for dividing the drugs. In January 1988, Buckman and Fisher began to purchase cocaine from the victim. Buckman and Fisher paid for the drugs with cash or offered merchandise in exchange for the drugs.
>
> Shortly before the murder, Buckman became dissatisfied with either the quantity or quality of the drugs he was buying from the victim. On at least one occasion, Buckman threatened to steal any drugs the victim might have had.

The morning before the day of the murder, Buckman and Fisher traded a VCR for the balance due on an "eight-ball" of drugs received earlier in the week from the victim. Later that day, they were trying to sell leather jackets and baby clothes to get money to pay Fisher's babysitter. A few hours before the murder, they tried to sell or trade a ".38 Special" gun to the victim's husband for drugs. The same caliber gun was used to kill the victim.

It was established that when the victim was with Fisher at approximately 1 a.m. on February 19, 1988, the victim's purse contained roughly $2,000 and three eight-balls of cocaine. None of these items were found with the victim's body when it was discovered at approximately 3:20 the same morning. On February 19, after the murder, Buckman and Fisher spent large amounts of cash in Lincoln, but when they were arrested, the baby clothes and leather coats were still in Buckman's car. At that time, Buckman had $656 in cash in his possession.

Karen Niemann testified that she picked up Fisher, who was alone on a road near the location of the murder, at approximately 1:30 a.m. This was within the timeframe for the victim's death as set by the pathologist. Other evidence placed Fisher with Buckman immediately before and after the murder.

Certain evidence placed Buckman at the scene of the murder. There were bloodstains on his clothing and on the steering wheel cover and floormats in his car. A Kool cigarette butt was found in the victim's car, and a package of Kool cigarettes and brown slippers were found near the murder scene. A cellmate of Buckman's testified that Buckman bragged that he had killed the victim in the presence of Fisher and that he had used the money he stole from the victim to pay debts.

As part of the original investigation of the murder, the bloodstains mentioned above were tested by Dr. Reena Roy, who has a Ph.D. in molecular biology and biochemistry and postdoctoral training in proteins, enzymes, and nucleic acids. Roy was a forensic serologist with the Nebraska State Patrol and was the

supervisor of the forensic serology section. The cigarette butts were tested by Dr. Moses Schanfield, who has a Ph.D. in human genetics and postdoctoral training in immunology. Schanfield was certified as a clinical laboratory director and was director of a biogenetics laboratory.

Pursuant to Buckman's request under the DNA Testing Act, the bloodstains and cigarette butts were sent to the University of Nebraska Medical Center (UNMC), where they were tested at the human DNA identification laboratory. Further details concerning each of these items, including the trial testimony and results of subsequent DNA testing, are set forth below.

2. DNA-Tested Evidence

(a) Black Leather Jacket

Buckman's clothing was seized when he was arrested, including his black leather jacket. Dr. Roy saw what she believed was blood on the jacket and cut out those areas of the fabric for analysis. Roy found blood on the jacket and concluded that the blood could not have come from Buckman, but could have come from the victim. Roy testified that she removed all the suspected bloodstains from the jacket and that she consumed all of the samples during her testing.

In the instant case, UNMC tested the jacket, and cuttings from the jacket, for hemoglobin. UNMC was unable to detect any blood on the jacket or the cuttings. As a result, no DNA testing was attempted on the jacket. DNA testing was attempted on the cuttings, but no DNA profile was recovered.

(b) Yellow Sweater

A yellow sweater was seized from Buckman when he was arrested, and scrapings from possible bloodstains were tested. Dr. Roy found blood she concluded was not Buckman's, but could have been the victim's. Roy also found another area on the sweater that she believed was blood; the area tested positive for blood, but no further testing was conducted at the time. The scrapings were entirely consumed by the testing.

In the instant case, UNMC tested the sweater for hemoglobin and found none. DNA testing was performed on two stains on the sweater, but no DNA profile was found.

(c) Black Jeans

Buckman's black jeans were seized when he was arrested and scrapings from possible bloodstains were presented to Dr. Roy, who opined that Buckman could be excluded as the source of the blood, but that the victim could not. All of the scrapings were consumed by the testing.

In the instant case, UNMC tested the jeans for hemoglobin, but found none. As a result, no DNA testing was attempted.

(d) Black Leather Cap

Buckman's black leather cap was seized when he was arrested. Dr. Roy found blood on the cap, but the amount was too small to conduct further testing.

In the instant case, UNMC tested three areas on the leather cap for hemoglobin, but because the dye from the leather was the same color as the positive control for the blood tests, the results of the tests were uninterpretable. DNA testing was nonetheless performed, but no DNA profile was detected.

(e) Brown Slippers

Investigators searched the area where the victim's car was found and discovered two brown suede slippers. One brown slipper was found on the shoulder of the road south of where the car was found, and the other was located in a nearby field. Evidence at trial suggested that Buckman was known to often wear slippers in public. Cuttings were taken from each brown slipper and tested by Dr. Roy, who excluded Buckman as the source of the blood, but found that the victim could not be excluded as the source of the blood. All the material extracted from the brown slippers was consumed during the testing.

In the instant case, UNMC tested the cuttings from each of the brown slippers for hemoglobin. The test on the cutting from the left brown slipper was negative, but the test for the cutting from the right brown slipper was a weak positive. DNA testing was performed on each of the cuttings, but no DNA profile was found.

At the original trial, Roy's opinion regarding the jacket, sweater, jeans, and brown slippers was based on her findings that the blood was blood group A and enzyme AK 2-1. It should be noted that identical bloodstains, containing blood group A

and enzyme AK 2-1, were found on the steering wheel cover and floormats of Buckman's Cadillac.

(f) Cigarette Butts

A search of the victim's automobile revealed two smoked cigarette butts on the rear floorboard behind the passenger seat. One of the cigarette butts was identified as being a Kool cigarette, while the other was later identified as a Camel cigarette. In a field near the vehicle, investigators found a pair of blue house slippers, which were near an open package of Kool cigarettes, opened from the bottom. Evidence at trial indicated that Buckman smoked Kool cigarettes and opened his cigarette packages from the bottom. Testimony at trial also indicated that Fisher was known to often wear blue bedroom slippers, even in public.

Dr. Schanfield tested the cigarette butts as part of the original investigation. Schanfield tested the two cigarette butts and two control-group cigarettes, also Kool and Camel brand, for four different qualities: (1) A2M immunoglobin allotype, (2) KM immunoglobin allotype, (3) ABH blood group, and (4) Lewis blood group substance. These findings were compared to samples from Buckman, Fisher, and Eric Beckwith, the resident of the apartment outside which Fisher and Buckman were arrested.

The results of these tests were complicated by the possibility that each of the cigarettes might have been smoked by more than one person. Schanfield concluded that Buckman could not be excluded as the person who smoked the Kool and that if the Kool was smoked by only one person, Beckwith and Fisher were excluded as that person. Schanfield testified that the frequency of the qualities for which the cigarette butts were tested, listed above, was such that the qualities found on the Kool were found in 0.7 percent of the white population of the United States and 4.8 percent of the black population of the United States. With respect to the Camel cigarette, Schanfield was able to determine only that the victim and Beckwith were excluded as the smoker of the Camel, but that Fisher and Buckman were not.

In the instant case, the cigarette butts were presented to UNMC for testing in a plastic bag labeled as "Exhibit 114" at Buckman's original trial. At the trial, the bag had contained the two cigarette butts from the victim's car and the two control-group cigarettes.

When received by UNMC in the instant case, the bag contained seven commingled items, which were organized by UNMC and labeled as items 4A through 4G. UNMC attempted to extract DNA from each of the items, and a partial DNA profile was obtained from two of the items: 4B, a cigarette butt consisting of paper and a partial filter, and 4C, a cigarette butt consisting only of paper. No DNA profile was obtained from any of the other items. Because DNA testing had already been ordered and completed, the State did not argue, pursuant to § 29-4120(5), that the cigarette butts had not been retained under circumstances likely to safeguard the integrity of their original physical composition.

Item 4B appears to have come from a smoked cigarette, but it is impossible to determine if it came from the Kool or Camel cigarette. UNMC's testing indicated that the DNA on item 4B came from more than one individual. Buckman could have been a contributor of some of the alleles detected, but could not have been a contributor of some of the others. Dr. Ronald Rubocki, the director of the UNMC's human DNA identification laboratory, at one point opined that Buckman was not a contributor to the DNA found on item 4B. Rubocki later retreated from that opinion and characterized the results of the testing as "inconclusive."

Item 4C is from a Kool cigarette, apparently unsmoked—probably the control-group Kool cigarette. How the control-group cigarette would have come to have DNA on it is unknown, but could have resulted from the handling or storage of the contents of exhibit 114. The test results for item 4C were consistent with a partial profile from the victim, but also with a possible mixture from more than one individual. Buckman could have contributed some of the alleles found on item 4C, but could not have contributed some others. As with item 4B, the results of the testing of item 4C are best summarized as inconclusive.

3. District Court Findings

The district court found, with respect to Buckman's jacket, sweater, and jeans, and the brown slippers, that it was questionable whether UNMC's findings were favorable to Buckman or material to the issue of his guilt. The court found no reasonable probability that any of the evidence from UNMC's testing of these items would have, if presented at trial, led to a different result.

Because UNMC was unable to derive any results from testing of the leather cap, the court found that there was no newly discovered evidence with respect to this item.

With respect to the cigarette butts, the court discussed the inconclusive nature of UNMC's results. The court found that although it was possible that UNMC's test results from cigarette butts 4B and 4C were favorable to Buckman and material to the issue of his guilt, there was no reasonable probability that presentation of that evidence to a trier of fact would have ended in a different result.

The court concluded that none of the evidence resulting from UNMC's testing exonerated, exculpated, or proved the innocence of Buckman; therefore, the court denied Buckman's motion to vacate and set aside his convictions. The court also concluded there was no reasonable possibility that presentation of UNMC's testing results at trial would have produced a different result. Thus, the court also denied Buckman's motion for a new trial.

II. ASSIGNMENT OF ERROR

Buckman assigns, consolidated, that the district court erred in refusing to vacate his convictions and grant a new trial as provided in the DNA Testing Act and § 29-2101 et seq.

III. ANALYSIS

1. Statutory Framework of DNA Testing Act

The factual findings of the district court are not disputed by the parties. Rather, the parties disagree about the legal significance of those findings. Buckman's motions for relief are brought pursuant to § 29-4123, which provides:

> (1) The results of the final DNA or other forensic testing ordered under subsection (5) of section 29-4120 shall be disclosed to the county attorney, to the person filing the motion, and to the person's attorney.
>
> (2) Upon receipt of the results of such testing, any party may request a hearing before the court when such results exonerate or exculpate the person. Following such hearing, the court may, on its own motion or upon the motion of any party, vacate and set aside the judgment and release the person from custody based upon final testing results exonerating or exculpating the person.

> (3) If the court does not grant the relief contained in subsection (2) of this section, any party may file a motion for a new trial under sections 29-2101 to 29-2103.

Our disposition of this appeal is governed by the principles we recently articulated in *State v. Bronson, ante* p. 103, 672 N.W.2d 244 (2003). At oral argument, however, Buckman took issue with our holding in *Bronson*. Because Buckman's appearance at oral argument was his only opportunity to address our decision in *Bronson*, we choose to consider and respond to his arguments in that regard. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

Buckman argues that *Bronson* interpreted the DNA Testing Act too restrictively, making it too difficult for a movant under the DNA Testing Act to obtain relief based on the results of DNA testing. Buckman's argument, as we understand it, is that a movant should be entitled to have his conviction vacated and set aside whenever the results of DNA testing show a reasonable probability that had the DNA evidence been available at trial, the result of the proceeding would have been different. Compare *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (establishing standard for when constitutional due process is violated by prosecutorial failure to disclose evidence favorable to accused). However, Buckman's argument is not consistent with the legislative scheme established by the DNA Testing Act and does not account for the Legislature's express provision of separate remedies based upon differing results of DNA testing.

The initial step toward obtaining relief under the DNA Testing Act is for a person in custody to file a motion requesting forensic DNA testing of biological material. See § 29-4120. Forensic DNA testing is available for any biological material that is related to the investigation or prosecution that resulted in the judgment; is in the actual or constructive possession of the state, or others likely to safeguard the integrity of the biological material; and either was not previously subjected to DNA testing or can be retested with more accurate current techniques. See *id.* Once these thresholds are met, the court may order testing upon a determination that such testing was not effectively available at the time of trial, that the biological material has been retained

under circumstances likely to safeguard its integrity, and that the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced. See *id.* See, generally, *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003).

The most significant part of this process, for purposes of the current analysis, is the requirement that the testing "may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced." See § 29-4120(5). Exculpatory evidence is defined as evidence favorable to the person in custody and material to the issue of the guilt of the person in custody. § 29-4119. Contrary to Buckman's suggestion, this requirement is relatively undemanding for a movant seeking DNA testing and will generally preclude testing only where the evidence at issue would have no bearing on the guilt or culpability of the movant. See, generally, *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

Once DNA testing is conducted, and results are obtained, the question is whether the evidence obtained exonerates or exculpates the movant. Based on the test results, the movant may obtain relief in one of two ways, each of which requires a different quantum of proof. As previously noted, when the test results exonerate or exculpate the movant, the court may "vacate and set aside the judgment and release the person from custody." § 29-4123(2). However, if the court does not vacate and set aside the judgment, the movant may file a motion for new trial based upon "newly discovered exculpatory DNA or similar forensic testing obtained under the DNA Testing Act." See § 29-2101(6).

[1] It would make little sense to conclude that the Legislature provided two separate remedies, but intended those remedies to be redundant. In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). Rather, the Legislature explained that the DNA Testing Act is intended to respond to two different circumstances. "Because of its scientific precision and reliability, DNA testing can, *in some cases*, conclusively establish the guilt or innocence of a criminal defendant. *In other cases*, DNA may not conclusively establish guilt or

innocence but may have significant probative value to a finder of fact." (Emphasis supplied.) § 29-4118(2). The Legislature further explained that DNA testing "can in some circumstances prove that a conviction which predated the development of DNA testing was based upon incorrect factual findings," but in other circumstances, "can provide a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial." § 29-4118(4).

[2-4] In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature. *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). A preamble or policy statement in a legislative act is not generally self-implementing, but may be used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part. See *Southern Neb. Rural P.P. Dist. v. Nebraska Electric*, 249 Neb. 913, 546 N.W.2d 315 (1996). When read in pari materia, both the language and expressed intent of the DNA Testing Act support the conclusion that the Legislature provided (1) an extraordinary remedy, vacation of the judgment, for the compelling circumstance in which actual innocence is conclusively established by DNA testing and (2) an ordinary remedy, a new trial, for circumstances in which newly discovered DNA evidence would have, if available at the former trial, probably produced a substantially different result. See *State v. Bronson, ante* p. 103, 672 N.W.2d 244 (2003).

[5,6] Section 29-4123(2) provides that a court may vacate and set aside a judgment based on test results that "exonerate or exculpate" an accused. This is a greater remedy than merely granting a new trial and is logically intended to apply to those cases in which DNA test results "conclusively establish the guilt or innocence of a criminal defendant." See § 29-4118(2). This is reflected in the Legislature's use of the word "exonerate," which means "to relieve[,] esp. of a charge, obligation, or hardship . . . clear from accusation or blame." Webster's Third New International Dictionary of the English Language, Unabridged 797 (1993). Accord 5 The Oxford English Dictionary 548 (2d ed. 1989) (to "exonerate" is "to free from blame"). Clearly, the Legislature expected that a judgment would be vacated and set aside only

where the results of DNA testing either completely exonerated the movant or were highly exculpatory. In order to effectuate the Legislature's intent, we held in *Bronson, supra*, that the court should set aside and vacate a conviction only where (1) the DNA testing results exonerate or exculpate the person and (2) the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged.

[7] But as the Legislature noted, in other cases, "DNA may not conclusively establish guilt or innocence but may have significant probative value to a finder of fact." See § 29-4118(2). For those cases, where the evidence obtained is merely exculpatory, the Legislature provided a lesser but still effective remedy: a motion for new trial under § 29-2101 et seq. Section 29-2101 is the operative version of the statute governing new trials in criminal cases that has been in effect for well over a century. Compare Gen. Stat. ch. 58, § 490, p. 831 (1873). It is equally well established that a criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result. See, e.g., *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994). Compare *Ogden v. The State*, 13 Neb. 436, 438, 14 N.W. 165, 166 (1882) ("general rule as to newly discovered evidence may be stated thus: That if, with the newly discovered evidence before them, the jury should not have come to the same conclusion, a new trial will be granted").

[8,9] At the same time it enacted the DNA Testing Act, the Legislature amended § 29-2101 to provide that "[a] new trial, after a verdict of conviction, may be granted, on the application of the defendant" based upon "(6) newly discovered exculpatory DNA or similar forensic testing evidence obtained under the DNA Testing Act." When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). See, also, *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994). Because the

Legislature specifically provided that motions for new trial based on newly discovered exculpatory DNA evidence were to be brought under § 29-2101, we presume that the Legislature intended for our long-established interpretation of § 29-2101 to apply to those motions. Consequently, we held in *State v. Bronson, ante* p. 103, 672 N.W.2d 244 (2003), that to warrant a new trial, the district court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.

[10] In short, the DNA Testing Act, and our decision in *Bronson, supra*, establish a clear procedural framework for movants seeking relief pursuant to the DNA Testing Act. First, a movant may obtain DNA testing if, inter alia, the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced. See § 29-4120(5). Second, the court may vacate and set aside the judgment in circumstances where the DNA testing results are either completely exonerative or highly exculpatory—when the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. See, § 29-4123(2); *Bronson, supra*. This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value. Third, in other circumstances where the evidence is merely exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result. See, §§ 29-4123(3) and 29-2101(6); *Bronson, supra*.

Having considered Buckman's arguments, we decline his invitation to reconsider our holdings in *Bronson, supra*, and conclude that the principles articulated in *Bronson* are controlling in the instant case. Based on those principles, we in turn address Buckman's arguments with respect to each of his motions in the district court.

2. MOTION TO VACATE AND SET ASIDE JUDGMENT

We explained in *Bronson, supra*, that a motion to vacate and set aside the judgment pursuant to § 29-4123(2) is similar to a motion to dismiss in a criminal case and that therefore, a standard comparable to that which is applied to a motion to dismiss in a criminal case should apply with respect to a motion under § 29-4123(2). We held that

> a court may properly grant a motion to vacate and set aside the judgment under § 29-4123(2) when (1) the DNA testing results exonerate or exculpate the person and (2) the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value.

State v. Bronson, ante p. 103, 111, 672 N.W.2d 244, 250-51 (2003).

It is evident, without unnecessary elaboration, that none of the DNA testing results in this case meet the standard articulated in *Bronson, supra*. As did the district court, we question whether any of the DNA testing results can be said to exonerate or exculpate Buckman. But it is clear that those results, when considered with the evidence of the case resulting in Buckman's convictions, do not show a complete lack of evidence to establish any element of the crimes charged. The evidence from Buckman's trial, as summarized above, remains sufficient to establish all the elements of Buckman's convictions. As will be explained in further detail below, the DNA testing performed in this case does not serve to falsify or even undermine any of the evidence upon which Buckman's convictions were based. The district court correctly denied Buckman's motion to set aside or vacate the judgment against him pursuant to § 29-4123(2).

3. MOTION FOR NEW TRIAL

[11] As previously stated, to warrant a new trial, the district court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act must be of such a nature that if it had been offered and admitted at the former

trial, it probably would have produced a substantially different result. *Bronson, supra.* A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed. *Bronson, supra.*

We first address the testing of bloodstains on Buckman's clothing. We note the similarity between the circumstances presented here and those presented in *Bronson, supra.* In *Bronson,* the defendant's fingerprint was found, apparently left in blood, on a vase located at the scene of a murder. Dr. Roy conducted a presumptive test for blood, which she testified was positive. Pursuant to the defendant's motion for DNA testing, the substance on the vase was tested by UNMC. The substance generated partial DNA profiles, but results regarding the contributors to those profiles were inconclusive. See *id.*

On appeal, the defendant in *Bronson* asserted that the DNA testing of the fingerprint failed to prove that it was made in his blood or the victim's blood, or even that the substance was human blood. We rejected the defendant's argument, stating in part:

> With respect to the vase, the DNA testing did not establish that the substance was not human blood. Furthermore, the DNA-tested evidence is not inconsistent with the evidence presented at trial which indicated that the substance likely was blood. . . .
>
> . . . .
>
> In sum, the DNA testing results do not warrant the relief [the defendant] seeks. The evidence obtained under the DNA Testing Act is not of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.

Bronson v. State, ante p. 103, 114-15, 672 N.W.2d 244, 253 (2003).

In the instant case, UNMC's testing of Buckman's clothing was unable to discern the presence of blood. But this is entirely consistent with Dr. Roy's testimony that the scrapings of blood she obtained were entirely consumed by the testing conducted during the original investigation. UNMC's results do not verify the testimony and evidence adduced at Buckman's trial regarding

the bloodstains, but neither do they serve to discredit or falsify that testimony and evidence. The evidence obtained pursuant to the DNA Testing Act is not such that if it had been presented at Buckman's trial, it probably would have produced a substantially different result.

We now turn to the claim upon which Buckman primarily relies: that the DNA testing of the cigarette butts warrants a new trial. Buckman argues that Dr. Schanfield's opinion at his original trial was premised on the assumption that only one person smoked the Kool cigarette and that since the cigarettes that were tested for DNA each showed genetic material from multiple contributors, Schanfield's opinion is "now basically worthless." Brief for appellant at 24.

This argument overstates the reliability and import of the results from UNMC's testing of the cigarette butts. First, Buckman's argument is premised on an unproven assumption: that the genetic material found on the cigarette butts by UNMC accurately reflects the condition of the evidence when it was tested by Schanfield for the original investigation. This is not a safe assumption, however, given the method with which the evidence was stored and the inability to even identify the items tested by UNMC with reference to the exhibits from trial. Simply stated, by the time the cigarette butts reached UNMC, it had become impossible to tell which cigarette butt was which. Moreover, since the cigarette butts were all stored together, it cannot be assumed that the genetic material found on each cigarette was deposited there by a smoker. Testimony from Drs. Schanfield and Rubocki indicated that simply handling evidence can result in cross-contamination of genetic material.

Furthermore, even if we accept Buckman's contentions that more than one person smoked the cigarettes and that the cigarettes tested were the same cigarettes found in the victim's car, the most that can be definitively concluded is that at least one person other than Buckman contributed genetic material to the cigarettes. Schanfield testified at Buckman's trial that his testimony about the percentage of the population who could have smoked the cigarette, based on the percentage of the population who shared the immunoglobin allotypes and blood group substances found on the Kool cigarette, was premised on the assumption that only one

person smoked the cigarette. Schanfield testified that if more than one person smoked the cigarette, that interpretation would change. In other words, the jury at Buckman's trial was informed of the assumption that only one person smoked the cigarette, the possibility that more than one person smoked the cigarette, and the meaning attached to that possibility.

Finally, like the district court, we note the extremely inconclusive nature of UNMC's test results. The best assessment of those results is that Buckman can neither be included or excluded as being a contributor of some of the genetic material found on the tested cigarettes. The test results, especially when considering the problems created by the commingling of the evidence, defy meaningful interpretation.

In short, UNMC's inconclusive test results, obtained after the deterioration of the evidence, do not significantly undermine Dr. Schanfield's opinion at trial, which was based on test results obtained before the deterioration of the evidence. When viewed in relation to the evidence adduced at Buckman's trial, we cannot say that the district court abused its discretion in concluding that UNMC's test results, had they been offered and admitted at Buckman's trial, would probably not have produced a substantially different result. Buckman's assignment of error is without merit.

IV. CONCLUSION

The district court did not err in denying Buckman's motion to vacate and set aside the judgment, and did not abuse its discretion in denying Buckman's motion for a new trial. The judgment of the district court is affirmed.

AFFIRMED.

WARREN STRONG, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

676 N.W.2d 15

Filed March 12, 2004. No. S-02-292.

1. **Motor Vehicles: Licenses and Permits: Revocation: Equity: Appeal and Error.** In an appeal of a revocation of a motor vehicle operator's license, the district court hears the appeal as in equity without a jury and determines anew all questions raised before the director of the Department of Motor Vehicles.
2. **Administrative Law: Motor Vehicles: Appeal and Error.** An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Criminal Law: Bail Bond: Words and Phrases.** An appearance bond is generally defined as a type of bail bond required to insure the presence of the defendant in a criminal case.
5. **Motor Vehicles: Licenses and Permits: Convictions: States: Words and Phrases.** Under article III(b) of the Driver License Compact, the "conduct" to which the compact refers is the conduct which occurred in the party state, which conduct led to the proceedings in the party state resulting in a "conviction" under the compact.
6. **Motor Vehicles: Licenses and Permits: Revocation: States: Final Orders: Collateral Attack.** Under the Driver License Compact, in a proceeding to revoke a commercial driver's license in the driver's home state based on out-of-state conduct leading to a "conviction" under the compact, such conviction is final and conclusive and generally not subject to collateral attack in Nebraska.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Scotts Bluff County, RANDALL L. LIPPSTREU, Judge. Judgment of Court of Appeals affirmed.

Bell Island, of Island & Huff, Attorneys at Law, P.C., L.L.O., for appellant.

Don Stenberg, Attorney General, Milissa D. Johnson-Wiles, and, on brief, Hobert B. Rupe for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The commercial driver's license of Warren Strong, appellant, was administratively revoked by the Department of Motor Vehicles, appellee, based on the determination of the department that Strong's conduct and legal proceedings in Wyoming amounted to a "conviction" under the Driver License Compact (Compact), 2A Neb. Rev. Stat. app. § 1-113 (Reissue 1995). The case in Wyoming commenced on May 14, 2001, when Strong was issued a citation for driving under the influence of alcohol. The Scotts Bluff County District Court sustained the administrative revocation of Strong's commercial driver's license. The Nebraska Court of Appeals affirmed the district court's order. *Strong v. Neth*, No. A-02-292, 2003 WL 21523796 (Neb. App. July 8, 2003) (not designated for permanent publication). Strong filed a petition for further review of the decision of the Court of Appeals. We granted the petition for further review. We affirm.

STATEMENT OF FACTS

The facts, which are essentially undisputed, are as follows: On May 14, 2001, Strong was operating a commercial vehicle in Goshen County, Wyoming, when he came into contact with Trooper David Cunningham of the Wyoming State Patrol at a weigh station. As a result of that contact, Cunningham administered a preliminary breath test (PBT). The PBT revealed that Strong's blood alcohol concentration exceeded Wyoming's 0.04-percent legal limit for commercial drivers. As a result of the PBT, Cunningham issued Strong a citation for driving under the influence. The citation is not part of the record on appeal.

In an affidavit Strong filed with the district court and contained in the bill of exceptions, he states that he "received a ticket" on May 14, 2001. He further states that at the time he received the ticket, he did not post a bond, bail, or security to guarantee his appearance in court on the ticket. He also asserts in his affidavit that he did not sign any document guaranteeing any type of bond, bail, or security to secure his appearance. In his affidavit, he states that "he sent in a fine in lieu of appearing in court."

A copy of the "Abstract of Court Record" from the State of Wyoming is found in the transcript on appeal. The abstract

identifies Strong as the "Defendant," provides "Statute No: 31-18-701a" under the offense information, and gives a description for the offense as ".04% Alcohol Viol Reg." The abstract identifies the court in which the action took place as "CCTOR" and "Judge: Arp/ Randal." Elsewhere in the abstract, there is a stamp certifying the abstract, and the stamp identifies the court as the Circuit Court for the Eighth District in Goshen County and the judge as Randal R. Arp. The abstract also sets forth that there was no trial. The abstract reflects that there was a "Finding of Forfeiture Entered on" June 7, 2001. The abstract provides that Strong paid a "Forfeiture" in the amount of $130, plus "Costs" in the amount of $30, for a total payment of $160. The abstract provides a space to enter the amount of a "Fine," if any, and in this space, the abstract indicates that the fine was "$0.00."

As a result of receiving notice from the State of Wyoming concerning the Wyoming proceeding, on June 29, 2001, the Nebraska Department of Motor Vehicles revoked Strong's commercial driver's license for 1 year. Strong appealed the department's decision to the Scotts Bluff County District Court, which sustained the revocation.

Strong appealed the district court's order to the Court of Appeals. For his single assignment of error before the Court of Appeals, Strong asserted that the district court erred "when it determined that the Wyoming offense properly complied with the [Compact], and therefore, required a revocation of Strong's Commercial Drivers License."

The Compact, which has been adopted by both Nebraska and Wyoming, provides in pertinent part:

> ARTICLE I
> Definitions
>
> As used in this compact:
>
> . . . .
>
> (c) Conviction means a conviction of any offense related to the use or operation of a motor vehicle which is prohibited by state law . . . or a forfeiture of bail, bond, or other security deposited to secure appearance by a person charged with having committed any such offense, and which conviction or forfeiture is required to be reported to the licensing authority.

ARTICLE II
Reports of Conviction

The licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee. Such report shall clearly identify the person convicted; describe the violation specifying the section of the statute . . . violated; identify the court in which action was taken; indicate whether a plea of guilty or not guilty was entered, or the conviction was a result of the forfeiture of bail, bond or other security; and shall include any special findings made in connection therewith.

ARTICLE III
Effect of Conviction

. . . .

(b) [T]he licensing authority in the home state shall give such effect to the conduct as is provided by the laws of the home state.

See 2A Neb. Rev. Stat. app. § 1-113.

Relying in part upon this court's four-part analysis in *Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993), the Court of Appeals concluded that under the Compact, the Wyoming proceeding could be used by the department as the basis for the revocation of Strong's commercial driver's license issued in Nebraska if certain requirements were met. See *Strong v. Neth*, No. A-02-292, 2003 WL 21523796 (Neb. App. July 8, 2003) (not designated for permanent publication). Those requirements are as follows:

(1) The Wyoming proceeding met the Compact's definition of a "conviction,"

(2) the conviction was one which Wyoming law required to be reported to the state licensing authority,

(3) the Wyoming abstract contained the information required under the Compact, and

(4) Nebraska law provided that Strong's conduct could be used to revoke Strong's commercial driver's license.

The Court of Appeals analyzed each of these four requirements. First, referring to Strong's admission that he " 'sent a fine in lieu of appearing in court' " and the language in the abstract

that indicated that $130 was allocated to "forfeiture," the Court of Appeals concluded that the Wyoming proceeding met the Compact's definition of a "conviction." *Strong v. Neth*, 2003 WL 21523796 at *2. Second, the Court of Appeals reviewed relevant provisions of Wyoming's driving under the influence laws and determined that "the Goshen County Court was required . . . to report Strong's conviction to the Wyoming licensing authority." *Id.* Third, the Court of Appeals examined the abstract and concluded that it contained the information required under the Compact. Finally, based upon Neb. Rev. Stat. § 60-4,168 (Reissue 1998), the Court of Appeals concluded that Strong's conduct in Wyoming could also be used in Nebraska to revoke his commercial driver's license. Section 60-4,168 provides that

> a person shall be disqualified from driving a commercial motor vehicle for one year:
>
> . . . .
>
> . . . Upon a first administrative determination . . . that such person while driving a commercial motor vehicle in this or any other state . . . had a concentration of . . . four-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath . . . .

Based upon this reasoning, the Court of Appeals affirmed the district court's decision sustaining the department's revocation order. *Strong v. Neth, supra*. Strong filed a petition for further review, which we granted. We affirm.

ASSIGNMENT OF ERROR

In his petition for further review, Strong claims that the "Court of Appeals erred in determining the conviction from Wyoming properly complied with the . . . Compact for purposes of allowing a [revocation] under Nebraska Law."

STANDARDS OF REVIEW

[1,2] In an appeal of a revocation of a motor vehicle operator's license, the district court hears the appeal as in equity without a jury and determines anew all questions raised before the director of the Department of Motor Vehicles. See, Neb. Rev. Stat. § 60-4,105(3) (Cum. Supp. 2000); *Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993). An appellate court's review of a

district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record. *Jacobson, supra.*

[3] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Estate of Breslow*, 266 Neb. 953, 670 N.W.2d 797 (2003).

ANALYSIS

In his petition for further review, Strong does not challenge the Court of Appeals' reliance on the four-part analysis derived from *Jacobson* to the effect that the Wyoming proceeding must satisfy four requirements under the Compact in order to be used by the department as the basis to revoke his commercial driver's license. Rather, on further review, Strong claims that the Court of Appeals erred in concluding that the Wyoming proceeding met two of those requirements. First, he claims that the Court of Appeals erred when it concluded that the Wyoming proceeding met the Compact's definition of a "conviction." Second, Strong claims the Court of Appeals erred in concluding that under Nebraska law, Strong's conduct in Wyoming could be used to revoke his commercial driver's license in Nebraska.

Strong's Wyoming Forfeiture as "Conviction" Under Compact.

On further review, Strong claims for his first argument that the Wyoming abstract fails to show a "conviction" as defined under the Compact. We disagree.

Under article I(c) of the Compact, "Conviction means a conviction of any offense related to the use or operation of a motor vehicle which is prohibited by state law . . . or a forfeiture of bail, bond, or other security deposited to secure appearance by a person charged with having committed any such offense." For the reasons cited below, we conclude Strong effectively forfeited a bond under Wyoming law and, therefore, there was a "conviction" as "conviction" is used in article I(c) of the Compact.

Pursuant to Neb. Rev. Stat. § 25-12,101 (Reissue 1995), we take judicial notice of the fact that the offense listed in the

Wyoming abstract with which Strong was charged is a misdemeanor under Wyoming law. See Wyo. Stat. Ann. § 31-18-701(a) (Lexis 2003). Pursuant to Wyo. R. Crim. P. 3(b)(2) (rev. 2001), a "citation may be issued as a charging document for any misdemeanor." (This language is currently found at rule 3(b)(3) as amended.) The parties agree that Cunningham issued Strong a "citation."

Under Wyoming law, when a citation is issued, the person charged may sign a promise to appear later in court to answer the citation. Wyo. R. Crim. P. 3.1(b)(1) (rev. 2001). The person may "satisfy a promise to appear" by paying to the court "the amount of the fine and court costs." *Id.* at 3.1(d)(1).

[4] An appearance bond is generally defined as a "[t]ype of bail bond required to insure [the] presence of [the] defendant in [a] criminal case." Black's Law Dictionary 178 (6th ed. 1990). Under Wyoming law, a promise to appear serves the office of a bond in securing the defendant's appearance in court. Under rule 3.1(d)(1), a forfeiture occurs when the defendant pays "the amount of the fine and court costs" in lieu of making an actual appearance in court. In this case, Strong paid the amount of the fine but did not appear and, therefore, there was a "forfeiture."

Strong argues that when he received his citation, he did not promise to pay any "bond, bail, or other security" to secure his appearance in court. Brief for appellant at 7. Strong admits in his affidavit, however, that he paid money in lieu of appearing in court, and as a matter of law, this payment of money satisfies the definition of a "forfeiture" under Wyoming law. See rule 3.1(d)(1). Strong's payment in lieu of an appearance amounted to a forfeiture of a bond, and the Compact's definition of a "conviction" includes a "forfeiture" of a bond. Thus, Strong's Wyoming forfeiture constituted a "conviction" as used in the Compact. Accordingly, we conclude that Strong's first argument is without merit.

Conduct in Wyoming Resulting in Commercial Driver's License Revocation in Nebraska.

For his second argument, Strong claims the Court of Appeals erred when it concluded that under Nebraska law, Strong's conduct in Wyoming could be used to revoke his commercial driver's license in Nebraska. Strong refers the court to *State v.*

Klingelhoefer, 222 Neb. 219, 382 N.W.2d 366 (1986), which states that in general, PBT's are admissible for limited purposes only. We recognize that under Nebraska law, a PBT standing alone does not satisfy the requirements for a conviction for driving under the influence. *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). Strong asserts that the Wyoming conviction based on a PBT cannot be used in Nebraska as a basis to administratively revoke Strong's commercial driver's license in Nebraska. In this way, Strong attempts to relitigate the Wyoming proceedings in a Nebraska court. This attempt is unavailing.

[5] Article III(b) of the Compact provides that "the licensing authority in the home state shall give such effect to the conduct as is provided by the laws of the home state." Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Estate of Breslow*, 266 Neb. 953, 670 N.W.2d 797 (2003). We conclude that under article III(b) of the Compact, the "conduct" to which the Compact refers is the conduct which occurred in the party state, which conduct led to the proceedings in the party state resulting in a "conviction" under the Compact. Our reading of "conduct" in article III(b) is in accord with Compact authority elsewhere. For example, in *Rigney v. Edgar*, 135 Ill. App. 3d 893, 897-98, 482 N.E.2d 367, 370, 90 Ill. Dec. 548, 551 (1985), it was observed under comparable Compact language that the "Compact clearly expresses the legislative intent to discipline [home state] licensed drivers for conduct occurring in another State" and that the "Compact gives [the home state] authority to treat the out-of-State conduct of [a home state] licensed driver as if it occurred in [the home state]." Thus, under the Compact, Nebraska must give the same effect to the conduct of driving a commercial vehicle under the influence of alcohol in Wyoming as if that conduct had occurred in Nebraska.

[6] Notwithstanding the language of article III(b) of the Compact, Strong collaterally challenges the sufficiency of the evidence derived from Wyoming's method of testing blood alcohol concentration where such method is disfavored in Nebraska. In *Johnston v. Department of Motor Vehicles*, 190 Neb. 606, 608, 212 N.W.2d 342, 343-44 (1973), a Compact case, this court

"observe[d] the licensee cannot relitigate the question of his guilt [as determined by another state] in Nebraska." Furthermore, it is generally recognized in Compact cases that a licensee cannot attack the validity of the result of the foreign proceeding when the licensee's home state commences an action to revoke the operator's license based on the out-of-state proceeding. See Annot., 87 A.L.R.2d 1019 (1963), and Annot., 85-87 A.L.R.2d Later Case Service 573 (2001 & Supp. 2003). See, e.g., *Earp v. Fletcher*, 183 Ga. App. 593, 594, 359 S.E.2d 456, 457 (1987) (stating in Compact case that motorist cannot collaterally attack underlying conviction unless it is "void on its face"); *Fetters v. Degnan*, 250 N.W.2d 25, 31 (Iowa 1977) (concluding in Compact case that trial court decision which permitted collateral attack on foreign proceeding was "erroneous as a matter of law"); *Fetty v. Com., Dept. of Transp.*, 784 A.2d 236 (Pa. Commw. 2001) (stating in Compact case that if no appeal is taken in foreign proceeding, motorist cannot collaterally attack validity of that proceeding in subsequent home state revocation proceeding). Thus, under the Compact, in a proceeding to revoke a commercial driver's license in the driver's home state of Nebraska based on out-of-state conduct leading to a "conviction" under the Compact, the outcome of the out-of-state proceeding is final and conclusive and generally not subject to collateral attack in Nebraska. See *Johnston, supra.*

In the instant appeal, the "conduct" referred to under the Compact is Strong's driving a commercial vehicle while his blood alcohol concentration was in excess of Wyoming's 0.04-percent legal limit for commercial drivers. Under the Compact, Nebraska is required to give the same effect to this conduct as if the conduct had occurred in Nebraska. Indeed, under Nebraska law, this conduct would result in the revocation of a commercial driver's license for a period of 1 year. See § 60-4,168. Thus, we conclude there is no merit to Strong's second argument on further review that the Court of Appeals erred in determining that under Nebraska law, Strong's conduct in Wyoming could be used to revoke his commercial driver's license in Nebraska.

CONCLUSION

For the reasons stated above, we conclude that the Wyoming proceeding met the Compact's definition of a "conviction." We

further conclude that Strong's conduct of driving a commercial vehicle in Wyoming while under the influence of alcohol could be used to revoke his commercial driver's license in Nebraska. We affirm the decision of the Court of Appeals which affirmed the district court's decision sustaining the department's order revoking Strong's commercial driver's license for 1 year.

AFFIRMED.

RONALD D. MEFFERD, APPELLANT, V. SIELER AND COMPANY, INC., DOING BUSINESS AS CAPRI MOTEL, APPELLEE, AND UNION INSURANCE COMPANY, GARNISHEE-APPELLEE.

676 N.W.2d 22

Filed March 12, 2004. No. S-02-885.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
3. **Insurance: Breach of Contract: Notice.** An insurer cannot assert a breach of a policy's notice and cooperation provision as a policy defense in the absence of a showing of prejudice or detriment to the insurer.
4. **Summary Judgment: Evidence: Proof.** A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
5. ____: ____: ____. After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents summary judgment as a matter of law shifts to the party opposing the motion.
6. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.
7. **Insurance: Notice: Proof.** Prejudice is established by examining whether the insurer received notice in time to meaningfully protect its interests.

Appeal from the District Court for Hamilton County: MICHAEL OWENS, Judge. Affirmed.

Rubina S. Khaleel and David J. Feeney, of Copple & Rockey, P.C., and Jim K. McGough for appellant.

Robert W. Shively and Scott E. Tollefsen, of Shively Law Offices, P.C., L.L.O., for garnishee-appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Ronald D. Mefferd was injured when he fell from a balcony at the Capri Motel. Seeking compensation for his injuries, Mefferd filed suit against Sieler and Company, Inc., doing business as Capri Motel (SCI). SCI did not acknowledge or respond to the summons, and Mefferd obtained a default judgment in the amount of $422,872.03. Thereafter, Mefferd instituted garnishment proceedings against SCI's insurer, Union Insurance Company (Union), to collect on the default judgment. On Union's motion for summary judgment, the district court determined that SCI failed to comply with the notice and cooperation provision of the insurance policy and granted summary judgment in favor of Union. Mefferd's appeal requires us to determine whether, as a matter of law, SCI breached the notice and cooperation provision of the policy, and if so, whether Union was prejudiced by the breach.

FACTUAL AND PROCEDURAL BACKGROUND

On September 12, 1996, Mefferd was injured when he fell from a balcony at the Capri Motel. At that time, Union insured SCI under a commercial lines policy. On January 27, 1997, Union received notice of the incident and LaWayne Nissen, a claims specialist, commenced an investigation into the accident. During his investigation, Nissen learned that at the time of the accident, Mefferd had a blood alcohol content of .230 grams of alcohol per 100 milliliters of blood. In addition, Nissen learned that Mefferd had incurred medical bills in excess of $10,000 and that he had retained the services of legal counsel. Nissen completed his investigation in March 1997, concluding that any claim by Mefferd for

damages would be without merit under Nebraska's comparative negligence statute. At that time, Mefferd had yet to file a claim against SCI. Nissen instructed the manager of the Capri Motel to refer any questions or matters concerning the incident to Union.

On December 1, 1999, Mefferd filed suit against SCI in the district court. On December 2, Barbara Sieler, the president and registered agent of SCI, was served with summons and a copy of Mefferd's petition. SCI failed to respond to the petition, and on February 9, 2000, Mefferd filed a motion for default judgment against SCI. Sieler was served with a copy of Mefferd's motion the same day. SCI failed to contest the motion, and the district court entered an order of default judgment against SCI in the amount of $422,872.03. Thereafter, Sieler received notice of the order of default judgment against SCI.

On September 27, 2000, shortly after the date on which the statute of limitations would have run on Mefferd's claim, Nissen contacted Sieler to confirm that no lawsuit had been filed. Nissen stated that this was his first contact with SCI since the completion of his investigation in March 1997 and that neither he nor Union had any knowledge of Mefferd's suit prior to this telephone call. According to Nissen, it was during this conversation that Sieler informed him of the default judgment against SCI. In response, Nissen stated that he told Sieler that Union was likely to deny coverage because the policy required SCI to notify Union when the suit was filed.

On May 23, 2001, Mefferd instituted garnishment proceedings against Union. Union answered and, subsequently, filed a motion for summary judgment against Mefferd. Essentially, Union argued that SCI failed to comply with certain policy conditions, thereby voiding Union's responsibility to provide insurance coverage to SCI for the accident. Specifically, Union asserted that SCI failed to provide it with notice of the suit and failed to cooperate in the defense of the suit and that said failures prejudiced Union because it was unable to raise, inter alia, Mefferd's contributory negligence as a bar to his claim.

The district court granted summary judgment in favor of Union. The court determined that SCI breached the policy conditions with respect to notice of the suit and cooperation in

defense of the suit and that the breach prejudiced Union. Mefferd filed a timely appeal.

ASSIGNMENT OF ERROR

Mefferd's sole assignment of error is that the district court erred in granting summary judgment in favor of Union because "genuine issues of material facts existed."

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003).

ANALYSIS

[2] An insurance policy is a contract. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003). Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002).

At issue here is Union's claim that SCI breached the notice and cooperation provision of the policy. The disputed provision states, in relevant part:

> **Section IV - COMMERCIAL GENERAL LIABILITY CONDITIONS**
>
> . . . .
>
> **2. Duties In The Event Of Occurrence, Offence, Claim or Suit.**
>
> . . . .
>
> **b.** If a claim is made or "suit" is brought against any insured, you must:
>
> **(1)** Immediately record the specifics of the claim or "suit" and the date received; and
>
> **(2)** Notify us as soon as practicable.

> You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
>
> **c.** You and any other involved insured must:
>
> **(1)** Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
>
> . . . .
>
> **(3)** Cooperate with us in the investigation, settlement or defense of the claim or "suit". . . .

As defined in the policy, "[s]uit means a civil proceeding in which damages because of 'bodily injury', 'property damage', 'personal injury' or 'advertising injury' to which this insurance applies are alleged."

[3] The parties agree that an insurer cannot assert a breach of a policy's notice and cooperation provision as a policy defense in the absence of a showing of prejudice or detriment to the insurer. See *MFA Mutual Ins. Co. v. Sailors*, 180 Neb. 201, 141 N.W.2d 846 (1966). Accord, *Wright v. Farmers Mut. of Neb.*, 266 Neb. 802, 669 N.W.2d 462 (2003); *Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998); *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Pupkes v. Sailors*, 183 Neb. 784, 164 N.W.2d 441 (1969). Therefore, in order to be entitled to summary judgment, Union was required to establish, as a matter of law, that (1) SCI breached the policy's notice and cooperation provision and (2) said breach prejudiced Union.

BREACH

[4] Mefferd's main argument on appeal is that a genuine issue of material fact exists as to whether SCI notified Union of Mefferd's lawsuit. As it did in the district court, Union argues that SCI breached the notice and cooperation provision of the policy because it failed to notify Union that a suit had been filed and to forward the legal papers that had been served upon it. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003). Nissen's deposition testimony, if uncontroverted, would establish that SCI breached the notice and cooperation provision of the policy by failing to notify

Union that Mefferd had filed suit and to forward copies of the legal papers served upon SCI. For example, Nissen stated that his conversation with Sieler on September 27, 2000, had been his first contact with Sieler or any other representative of SCI since he finished his investigation in March 1997. In addition, Nissen stated that neither he nor Union had any knowledge of Mefferd's suit prior to when he called Sieler on September 27. Moreover, Nissen's file memorandum, dated March 1, 2001, confirms the substance of his deposition testimony, i.e., that SCI failed to notify Union of the suit and that Union had no knowledge of the suit prior to Nissen's conversation with Sieler on September 27. Union established its prima facie case.

[5] After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents summary judgment as a matter of law shifts to the party opposing the motion. *Id.* We conclude that Mefferd failed to rebut the prima facie case established by Union and, therefore, no genuine issue of material fact exists as to whether SCI notified Union that Mefferd had filed suit.

Mefferd's sole evidence that SCI notified Union of the suit is Sieler's deposition testimony. Specifically, Mefferd points to Sieler's statement, during recross, that she could not remember the exact timeframe of a conversation she had had with a Union representative in which they discussed Mefferd's suit, i.e., whether the conversation took place before or after she received notice of the court's order of default judgment. It is Mefferd's contention that this statement creates a factual issue as to whether Union received timely notice of the suit.

[6] We conclude that Sieler's statement is insufficient to create a genuine issue of a material fact. Sieler's statement is simply a piece of equivocal testimony, which, because of its uncertainty, does not stand contrary to Nissen's assertion that neither he nor Union had notice of the suit prior to his conversation with Sieler. See *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997) (conclusions based upon guess, speculation, conjecture, or choice of possibilities do not create material issues of fact for purposes of summary judgment).

Moreover, the remainder of Sieler's deposition testimony makes it clear that the conversation Sieler remembers having with

a Union official was actually the conversation she had had with Nissen on September 27, 2000, after the order of default judgment had been entered. First, Sieler stated that the conversation took place because a Union official contacted her. Second, Sieler stated that her only conversation with a Union official was when she told the official that she had received notice that a default judgment had been entered against SCI. Third, Sieler stated that during this conversation, the Union representative told her that "the time that [Union] could do something was over." These facts corroborate Nissen's deposition testimony that (1) his only contact with Sieler was when he called her on September 27; (2) during this conversation, Sieler informed him that a default judgment against SCI had been entered; and (3) upon learning that a default judgment had been entered, the Union representative told Sieler that Union was likely to deny coverage for failing to notify it of the suit.

Furthermore, a review of Sieler's deposition testimony shows that Sieler had originally, and unequivocally, stated that she failed to notify Union of the lawsuit prior to receiving notice that a default judgment had been entered.

> [Counsel]: So, from the time you were served a copy of the lawsuit until the time you received a notice that a judgment had been entered, you didn't notify anybody at the insurance company that the lawsuit had been filed; is that correct?
>
> [Sieler]: That's correct.
>
> [Counsel]: And you didn't tell anyone at the insurance agent's agency that the lawsuit had been filed at any time prior to receiving notice that a judgment had been entered; is that correct?
>
> [Sieler]: That's correct.

Simply put, what Mefferd contends has created a contested issue of material fact has, at best, merely served to call Sieler's testimony into question. Moreover, when placed in the context of Sieler's entire deposition testimony, the statement serves only to buttress Nissen's recollection of events. We conclude that the statement is insufficient to create a genuine issue of material fact.

Contrary to Mefferd's assertion, Nissen's preliminary investigation on behalf of Union does not alter this result. During his investigation, Nissen learned that Mefferd had sustained medical

expenses of over $10,000 and was represented by counsel. However, such knowledge is not tantamount to knowing that a suit had been filed, nor does it alter the duty the policy placed on SCI to notify Union when a "suit" was filed. Under the policy, "suit" was defined as "a civil proceeding in which damages because of 'bodily injury', 'property damage', 'personal injury' or 'advertising injury' to which this insurance applies are alleged." Therefore, by merely providing notice of the initial incident or occurrence, SCI did not comply with the policy. See *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998) (noting difference between notice of incident and notice that suit had been filed).

PREJUDICE

As stated above, in order for Union to assert a breach of the notice and cooperation provision as a defense, it must prove that the breach resulted in prejudice or detriment. See *MFA Mutual Ins. Co. v. Sailors*, 180 Neb. 201, 141 N.W.2d 846 (1966). Union argues that it was prejudiced because SCI's failure to notify Union of the suit deprived it of the opportunity to (1) raise Mefferd's contributory negligence as a bar to his claim and (2) attack alleged inconsistencies in the testimony presented at the hearing on the motion for default judgment.

[7] We have stated that prejudice is established by examining whether the insurer received notice in time to meaningfully protect its interests. *Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998). See, also, *Deprez v. Continental Western Ins. Co.*, 255 Neb. 381, 584 N.W.2d 805 (1998). Obviously, SCI's failure to notify Union of Mefferd's suit until after a default judgment had been entered prevented Union from protecting its interests. As noted elsewhere:

> [I]t would be difficult to conceive of greater prejudice, and of a confiscatory result being reached, than a demand for payment of a default judgment of which a defendant is totally ignorant, and which, through the failure of the assured to comply with the terms of the contract and forward the process and pleadings to the insurer, it has been deprived of its right to defend the action.

Hallman v. Marquette Casualty Company, 149 So. 2d 131, 135 (La. App. 1963). Thus, it is clear that SCI's inaction prejudiced Union as a matter of law.

ARGUED BUT NOT ASSIGNED

Mefferd also argues that the district court erred by (1) construing the notice and cooperation provision as a condition precedent to coverage and (2) failing to recognize that the policy does not adequately explain when an insured must provide notice of a suit because neither the policy nor industry standard defines the phrase "as soon as practicable." Mefferd, however, failed to assign the court's alleged misinterpretations as error, and therefore, his arguments are not appropriate for appellate review. See *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000) (errors argued but not assigned are not appropriate for appellate review).

CONCLUSION

Because there is no genuine issue of material fact as to SCI's failure to notify Union of Mefferd's suit or the resulting prejudice upon Union, the district court's grant of summary judgment in favor of Union is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DEBRA M. SWANSON, RESPONDENT.

675 N.W.2d 674

Filed March 12, 2004. No. S-02-979.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
3. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.

5. ____. Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the Nebraska Supreme Court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
6. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
7. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.

Original action. Judgment of disbarment.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

Debra M. Swanson was formally charged with violations of the Code of Professional Responsibility and her oath of office as an attorney. After a hearing, the referee filed a report and recommended that Swanson be disbarred from the practice of law. Swanson filed exceptions to the referee's report and recommendation.

BACKGROUND

Swanson was admitted to the practice of law in the State of Nebraska on April 12, 1994, and at all times relevant to these proceedings was engaged in a solo private practice in York, Nebraska.

On February 12, 2003, we sustained a motion by the Counsel for Discipline of the Nebraska Supreme Court requesting leave to file amended formal charges, and pursuant thereto, the Counsel for Discipline filed seven counts against Swanson.

Count I alleged that in February 2000, Swanson was paid $500 to represent Patsy Van Ness in a dissolution of marriage action. In early March, Van Ness withdrew funds from bank accounts she held jointly with her husband and gave $2,290 in cash to Swanson

for safekeeping. Swanson did not deposit these funds into a trust account, nor did she keep an accounting of the funds as they were distributed to Van Ness or on her behalf. Van Ness also removed approximately $3,850 in bonds from a safe deposit box and gave this and other personal property to Swanson for safekeeping.

When Van Ness moved out of the family home, she took most of the furnishings. Van Ness' complaint alleged that Swanson took some of the furniture to apply toward attorney fees but did not provide an accounting to Van Ness for the value of the furniture.

Van Ness terminated Swanson's services in June 2000 and requested that Swanson return the remaining funds which she had been holding for Van Ness. Van Ness also requested that Swanson return attorney fees that had not yet been earned.

The Counsel for Discipline alleged that the above acts and omissions constituted a violation of Swanson's oath of office as an attorney, see Neb. Rev. Stat. § 7-104 (Reissue 1997), and that such actions were in violation of, among others, the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> . . . .
>
> (B) A lawyer shall:
>
> . . . .
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.

As to count I, the referee found that during her representation of Van Ness, Swanson received money for safekeeping and did

not deposit the money in an identifiable bank or savings and loan association account. When she distributed the money as Van Ness requested, Swanson did not keep a record of the disbursements. The referee found that Swanson had returned all of the property given to her by Van Ness for safekeeping.

Count II charged that on November 3, 2000, Rick Siemsen contacted Swanson about representing him in a civil matter. The parties met at Swanson's home office on November 4, at which time Swanson explained that she billed her time at $100 per hour. Siemsen gave her $500 in cash as an advance fee payment and stated he would contact her in a few days. Swanson did not place the money in her trust account.

It was alleged in count II that Siemsen became dissatisfied with the progress of his case and made an appointment to pick up certain documents from Swanson in order to retain a different attorney. Swanson did not keep this appointment. Swanson refused to return Siemsen's documents to him but agreed to forward them to his new attorney. Swanson also refused to return any portion of the $500, claiming that she had earned the entire amount. Count II further alleged that Swanson created a billing statement after Siemsen's grievance was filed with the Counsel for Discipline. It was also alleged that in her billing statement, Swanson falsely claimed to have spent 3 hours doing research at the University of Nebraska-Lincoln law library and also billed Siemsen 1.75 hours for her travel time to the library. When Swanson's deposition was taken, she could not identify any research she had done concerning Siemsen's case, nor could she produce photocopies of cases she had made or notes she had taken while at the library.

On May 6, 2002, Siemsen sued Swanson in small claims court. A judgment was subsequently entered against Swanson in the amount of $500 plus costs. Swanson had not paid any portion of the judgment against her as of January 2003.

The Counsel for Discipline alleged that the above acts and omissions constituted a violation of Swanson's oath of office as an attorney and were in violation of, among others, the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.

. . . .

(5) Engage in conduct that is prejudicial to the administration of justice. . . .

(6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

. . . .

DR 2-110 Withdrawal from Employment.

(A) In general.

. . . .

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

. . . .

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows . . . .

At the hearing before the referee, Swanson claimed that the $500 was a nonrefundable retainer and that she expected to be paid for time over 5 hours. Siemsen stated that he had negotiated a flat fee of $500 to file the lawsuit. The referee found by clear and convincing evidence that the arrangement was a flat fee of $500 to file the lawsuit. The referee found that Siemsen had called Swanson and had terminated the relationship, complaining that Swanson had not taken any action. When Siemsen requested to pick up his documents, Swanson refused to give them directly to him and would give the documents only to another attorney.

The referee also found that Swanson had not completed any work on Siemsen's behalf and that Swanson's claimed billing statement was not a legitimate, contemporaneously generated, or accurate account of her efforts on Siemsen's behalf. The referee found that Swanson had lied to him and to others when she said she had completed work and had sent a bill to Siemsen. The referee found that Swanson had not returned any part of Siemsen's fee and had not paid the $500 judgment.

Count III alleged that in July 1999, Swanson represented a client in a dissolution of marriage action. At some time late in 1999 or early in 2000, Swanson began a sexual relationship with the client while she was still representing him. The Counsel for Discipline alleged that such conduct constituted a violation of Swanson's oath of office as an attorney and violated, among others, the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> DR 7-101 Representing a Client Zealously.
> (A) A lawyer shall not intentionally:
> . . . .
> (3) Prejudice or damage his or her client during the course of the professional relationship, except as required under DR 7-102(B).

The referee found by clear and convincing evidence that Swanson had engaged in an improper sexual relationship with a client during a divorce case which involved a custody dispute over the minor children of the parties.

As to count IV, the referee found that there was no clear and convincing evidence as to the facts and circumstances involved. Counts V and VI were dismissed and are not at issue.

Count VII alleged that on or about April 7, 1998, Nyla Anderson retained Swanson to represent her in a dissolution of marriage action. Anderson paid Swanson an advance fee of $9,865. In July, Swanson was discharged by Anderson, who obtained another attorney. The new attorney wrote Swanson, asking for an accounting of her time while representing Anderson and for a refund of any unearned portion of the advance fee. Swanson claimed no refund was due and asserted that Anderson owed Swanson an additional $14,000 for services rendered.

Anderson sued Swanson to recover the advance fee paid to her, and Swanson cross-petitioned, alleging that Anderson owed her over $14,000. Swanson was deposed but refused to answer any questions by Anderson's attorney. Swanson was ultimately sanctioned by the York County District Court in the amount of

$399.80 and ordered to answer the questions. A default judgment was later entered against Swanson in the amount of $9,365 for the advance fee paid to Swanson but not earned. Swanson has not paid the sanction or the judgment against her as of May 2003.

The Counsel for Discipline alleged that the foregoing acts and omissions constituted a violation of Swanson's oath of office as an attorney and were in violation of, among others, the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> . . . .
>
> (B) A lawyer shall:
>
> . . . .
>
> (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

The referee found that in April 1998, Swanson deposited Anderson's payment of $9,865 into a trust account which immediately before this deposit contained $5.24. On the same day, Swanson transferred $3,200 out of the account, which she claimed was for time spent on Anderson's behalf in April. In May, Swanson transferred $1,500 from her trust account to her business account and from there transferred the $1,500 but did not remember where or to whom. In May 1998, she transferred $2,560 out of her trust account into her business account. When Swanson received a letter from Anderson's new attorney advising that he was taking over Anderson's representation and asking for a refund of the advance, Swanson knew that there was a dispute regarding the advance fee, including the balance she still had in her trust account.

Swanson received a second letter from the office of Anderson's new attorney demanding an accounting of the advance fee. Swanson testified that prior to that date, she had provided Anderson with a written statement of fees charged and that she had maintained a copy in the computer. Swanson claimed that she sent a letter to Anderson's attorney on September 16, 1998, and enclosed a purported earlier letter to him dated August 13, 1998, which in turn enclosed a "statement" to Anderson.

The referee found that Swanson's September 16, 1998, letter was intended to create the appearance that Swanson had previously sent a letter with an enclosed statement to Anderson's attorney on August 13. The referee also found the evidence was undisputed that Swanson had removed money from the trust account which belonged to Anderson and that Swanson's purported bill for expended professional time on Anderson's behalf in the amount of $23,865 was not credible.

The referee found that Swanson's billing statement was entirely lacking as a credible accounting of her time spent on behalf of Anderson if, indeed, she spent any time at all. The referee concluded that the billing statement sent by Swanson was an after-the-fact composition in an attempt to justify her retention of the advance fee. The referee found that Swanson had lied about the time she spent representing Anderson and that as a consequence of Swanson's misrepresentations and as a consequence of her failure to keep accurate records, Swanson engaged in conduct that was prejudicial to the administration of justice, in violation of Canon 1, DR 1-102(A)(5), and that Swanson had engaged in conduct that adversely affected her fitness to practice law, in violation of DR 1-102(A)(6).

Anderson sued Swanson, and on January 30, 2002, a default judgment was entered against Swanson in the amount of $9,365. The referee found that Swanson had violated Canon 9, DR 9-102(4), by not refunding Anderson the advance fee even though she was clearly entitled to it by virtue of a court judgment.

The referee also found that Swanson engaged in conduct prejudicial to the administration of justice when she refused without justification to answer questions at her deposition. She was subsequently sanctioned for her behavior, and she failed or refused to pay the court-ordered sanction. As a consequence of

all the foregoing, the referee found that Swanson violated DR 1-102(A)(1) and her oath of office as an attorney.

In his report, the referee concluded with regard to count I that Swanson's offenses were relatively benign and that they did not evidence an effort to conceal or to cheat any individual and that it appeared no money or property was lost. However, the referee found that Swanson's attitude was noteworthy in that she did not seem to appreciate the need for care in the handling of client property. The referee concluded that these violations did not in themselves cast serious doubt on Swanson's fitness to practice law but were part of a "larger mosaic which forms a darker picture."

The referee concluded as to count II that Swanson's conduct involved lies, deception, and ruses in order to keep money to which she was not entitled. Swanson's attitude was troubling to the referee in that she did not recognize that her behavior was improper. The referee found that Swanson had made earnest and involved efforts to deceive in hopes of keeping her client's money and her license to practice law.

The referee noted that count III was the one offense to which Swanson had admitted. He concluded as to count III that it did not appear that anyone was significantly hurt in the legal sense and that Swanson appeared to be appropriately contrite about this behavior, as compared to her attitude toward the other charges against her.

As to count VII, the referee concluded that Swanson's offenses were more serious. Taken together with her other offenses, the referee believed that they completed a "dark mosaic of a woman bereft of the practical and moral tools to practice the business of a profession based on good order, honor and integrity."

The referee determined that Swanson had displayed an indifference to the disciplinary process and to the administration of justice which reflected a disregard for the plight of her unhappy clients, her license, and her reputation. In summary, the referee concluded that Swanson lied to him about the work she did for Siemsen and for Anderson and that she used falsified billing statements to shore up her stories. The referee stated that "[a] lawyer who would engage [in] such an elaborate bodyguard of lies is one acting deliberately and with a specific intention to deceive." Swanson did not demonstrate to the referee that probation or

suspension would be effective in punishing and correcting her behavior. The referee concluded that Swanson had lied to anyone who would listen, had created fictitious documents, and had taken clients' money and refused to give it back, even though she had not earned it. The referee found that Swanson exhibited a disturbing indifference when confronted with allegations and accusations which would have been of great concern to other lawyers had they been confronted with such allegations.

Finally, the referee concluded that Swanson had not demonstrated any mitigating circumstances; had not demonstrated a sincere regret for her behavior, with the exception of her sexual relationship with a client; and had shown disrespect for her clients and the legal system. Given the nature of Swanson's offenses, the need to deter others from committing similar offenses, and Swanson's poor attitude, the referee recommended that Swanson be disbarred.

EXCEPTIONS

Swanson has filed exceptions to the referee's report and recommendation, wherein she asserts that the evidence was insufficient to support the charges in counts I, II, and VII and that the recommended sanction is unreasonable and excessive.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003).

[2] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. Special Counsel for Dis. v. Shapiro*, 266 Neb. 328, 665 N.W.2d 615 (2003).

[3] Disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Achola, supra.*

ANALYSIS

As to count I, the stipulation of the parties attests that Swanson never deposited the money given to her by her client into an attorney trust account. Instead, this money was kept in Swanson's office for "safekeeping." Swanson has stipulated that she never presented her client with a billing statement and that she failed to keep a contemporaneous record of the client's funds as they were disbursed to the client. As such, the Counsel for Discipline has submitted clear and convincing evidence that Swanson violated DR 1-102(A)(1), DR 9-102(A) and (B)(3), and her oath of office as an attorney.

As to count II, the Counsel for Discipline has presented clear and convincing evidence that the money Swanson received during her first visit with the client was never deposited into an attorney trust account. It is undisputed that this client obtained a default judgment against Swanson for the full amount Swanson had received during their first meeting. More troubling, Swanson stipulated that nearly 3 years after the entry of this default judgment, she had yet to pay the client any of the money that is owed to him. This evidence clearly and convincingly demonstrates that Swanson violated DR 1-102(A)(1), (5), and (6); Canon 2, DR 2-110(A)(3); DR 9-102(A); and her oath of office as an attorney.

As to count III, Swanson stipulated that she engaged in a sexual relationship with a client while she was representing him in a dissolution of marriage action. The evidence established that the case involved issues of child custody, and as such, we find that clear and convincing evidence was presented to show that Swanson violated DR 1-102(A)(1); Canon 7, DR 7-101(A)(3); and her oath of office as an attorney.

With regard to count VII, the Counsel for Discipline presented clear and convincing evidence that Swanson refused to answer questions by opposing counsel during a deposition. In addition, there is no dispute that Swanson continued to refuse to answer these questions, in direct violation of an order issued by the York County District Court, which subsequently led that court to order sanctions. The evidence was undisputed that a default judgment had been entered against Swanson for the return of funds that had been given to her as an advance fee by

a client. The Counsel for Discipline presented sufficient evidence to show that Swanson had failed to pay any portion of this judgment. We therefore conclude that there was clear and convincing evidence presented to establish that Swanson had violated DR 1-102(A)(1), (5), and (6); DR 9-102(B)(4); and her oath of office as an attorney.

[4,5] The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. James, ante* p. 186, 673 N.W.2d 214 (2004). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by this court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. *State ex rel. Counsel for Dis. v. James, supra.*

[6,7] Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *Id.* To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Mills, ante* p. 57, 671 N.W.2d 765 (2003). Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. *State ex rel. Counsel for Dis. v. Cannon*, 266 Neb. 507, 666 N.W.2d 734 (2003).

Based upon Swanson's actions and her attitude and conduct during the proceedings, the referee recommended disbarment as the appropriate sanction. Swanson claims that such punishment is excessive and unreasonable. We acknowledge that a judgment of disbarment is a most severe penalty; however, the charges against Swanson involve multiple incidents with various clients over a number of years. The evidence shows that Swanson has repeated the same questionable acts with different clients. With respect to counts I and II, she failed to deposit the money in an

appropriate trust account. More disturbing is the evidence concerning counts II and VII that Swanson failed to pay any portion of the two default judgments entered against her.

Most disturbing to this court is the referee's finding that Swanson lied in order to keep her clients' money without justification. While it was noted by the referee that Swanson's conduct regarding count I was relatively benign in that it did not evidence an effort to conceal or to cheat any individual, the referee found with regard to counts II and VII that Swanson's conduct involved lies, deception, and ruses in order to keep money to which she was not entitled. It is this type of behavior that caused the referee to question Swanson's fitness to continue in the practice of law. The referee also found that Swanson's indifference to the disciplinary process and to the administration of justice evidenced a disregard for her clients, her license, and her reputation.

When this court considers the cumulative nature of Swanson's actions, the need to protect the public, the need to deter others from similar conduct, the reputation of the bar as a whole, Swanson's fitness to practice law, and the lack of mitigating circumstances, we conclude that disbarment is the appropriate sanction.

CONCLUSION

It is the judgment of this court that Swanson should be and hereby is disbarred from the practice of law in the State of Nebraska, effective immediately. Swanson is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, she shall be subject to punishment for contempt of this court. Swanson is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

CHARLES V. AND DIXIE L. FRANCIS ET AL., APPELLANTS, V. CITY OF COLUMBUS, NEBRASKA, A MUNICIPAL CORPORATION, AND BOARD OF EQUALIZATION OF THE CITY OF COLUMBUS, NEBRASKA, APPELLEES.

676 N.W.2d 346

Filed March 12, 2004. No. S-02-1003.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Taxes: Declaratory Judgments: Injunction: Civil Rights: States.** When a litigant seeks declaratory or injunctive relief against a state tax under 42 U.S.C. § 1983 (2000), state courts, like their federal counterparts, must refrain from granting relief under § 1983 when there is an adequate legal remedy.
4. **Municipal Corporations: Civil Rights: Damages.** A plaintiff may seek damages in a 42 U.S.C. § 1983 (2000) claim against a municipality.
5. **Taxes: Civil Rights: Courts: Damages.** When a litigant seeks damages in a 42 U.S.C. § 1983 (2000) claim challenging a state or local tax, Nebraska courts must refrain from granting such relief, so long as state law offers an adequate legal remedy.
6. **Taxes: Civil Rights: Statutes.** In determining if a litigant may maintain a 42 U.S.C. § 1983 (2000) claim challenging a state or local tax, courts measure the adequacy of a state remedy by procedural, not substantive criteria.
7. ____: ____: ____. In determining if a litigant may maintain a 42 U.S.C. § 1983 (2000) claim challenging a state or local tax, the state remedy, to be adequate, need not be identical to § 1983 remedies. It need not be the best remedy available, the most convenient remedy, or equal to or comparable with federal remedies.
8. **Constitutional Law: Taxes: Civil Rights.** In determining if a litigant may maintain a 42 U.S.C. § 1983 (2000) claim challenging a state or local tax, a state remedy is adequate if it provides the taxpayer with the opportunity for a full hearing and judicial determination at which he or she may raise any and all constitutional objections to the tax.
9. **Constitutional Law: Special Assessments.** A special tax assessment which violates the federal Constitution is illegal, and thus a claim that a special tax assessment violates the federal Constitution can be raised and adjudicated in claims made under Neb. Rev. Stat. § 16-637 (Reissue 1997).
10. ____: ____. Neb. Rev. Stat. §§ 19-2422, 19-2423, and 19-2425 (Reissue 1997) provide a taxpayer with a means by which his or her constitutional challenges to a special tax assessment can be fairly and fully adjudicated.
11. **Taxes: States: Attorney Fees.** When an adequate state legal remedy exists for challenging a state or local tax, litigants cannot recover attorney fees under 42 U.S.C. § 1988(b) (Supp. V 1999).

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Lyle Joseph Koenig, of Koenig Law Firm, and William D. Sutter, Jr., of Stephens & Sutter, for appellants.

Dean Skokan for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellants own property in the City of Columbus, a city of the first class (City). After the City levied a special tax assessment for street improvements, the appellants filed a petition challenging the constitutionality of the special tax assessment. In their petition, the appellants sought relief under state law and 42 U.S.C. § 1983 (2000). The district court determined that state courts cannot entertain § 1983 claims challenging state or local taxes unless the state fails to provide an adequate legal remedy. After determining that state law provides an adequate legal remedy, the court entered summary judgment against the appellants on their § 1983 claims. We affirm.

I. BACKGROUND

The City created Special Improvement District No. 135 (SID 135) by ordinance in 1992. The appellants claim that each of them own real property located within SID 135. When the construction was completed in 1999, the City assessed and levied the costs of the project.

Most of the appellants paid the first installment of the tax under protest. They then filed this action naming the City and the board of equalization for the City (Board) as defendants. The appellants alleged that the City and the Board had violated their due process and equal protection rights by (1) failing to give them proper notice of their right to challenge the creation of SID 135; (2) misrepresenting the costs of the construction project and thereby inducing them to refrain from objecting to the creation of SID 135; (3) assessing as part of the costs of the construction project repair work done to a county road; (4) accepting a bid that exceeded the amount that the City's engineers estimated the

construction would cost when the City created SID 135; (5) imposing a special tax assessment that exceeded in value the benefits conferred on the property; and (6) transforming a street that runs through SID 135 from a residential street into a "major collector street" and imposing the costs of the transformation on the appellants when in the past, such projects were paid for through general obligation bonds.

The appellants' petition sought injunctive and declaratory relief and compensatory and punitive damages under § 1983, as well as attorney fees under 42 U.S.C. § 1988(b) (Supp. V 1999). The trial court also construed the appellants' petition as seeking a refund under Neb. Rev. Stat. § 16-637 (Reissue 1997).

The City and the Board subsequently moved for summary judgment, claiming that the court lacked jurisdiction over the appellants' § 1983 claims and that concerning their § 16-637 claims, the appellants had failed to abide by the statute's timing requirements.

The court granted the City and the Board summary judgment against all of the appellants on their § 1983 claims. The court interpreted *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995), to mean that in cases challenging state and local taxes, state courts cannot grant federal relief under § 1983 when there is an adequate state legal remedy. The court noted that § 16-637 allows a taxpayer to bring a civil suit to recover any illegal, inequitable, or unjust special tax assessment that a taxpayer has paid under protest. Reasoning that this was an adequate state remedy, the court granted the City and the Board summary judgment on the appellants' § 1983 claims.

Concerning the appellants' § 16-637 claims, the court granted summary judgment for the City and the Board against some, but not all, of the appellants.

To preserve the right to bring a suit under § 16-637, a taxpayer must pay the tax, under protest, "before the same shall become delinquent." The court determined that a question of fact existed whether the tax became delinquent on June 21, 2000, or July 20, 2000. None of the appellants had paid the tax under protest by June 21, but some had paid under protest on or before July 20. The court granted summary judgment to the City and the Board

against those appellants who had not paid under protest on or before July 20. But the court allowed the § 16-637 claims of those appellants who had paid under protest on or before July 20 to proceed.

After the court granted summary judgment in part to the City and the Board, all of the appellants filed this appeal. The order was certified as required by Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002).

II. ASSIGNMENTS OF ERROR

The appellants assign, restated, that the court erred in concluding that (1) they could not maintain their § 1983 claims because an adequate state legal remedy existed and (2) some of the appellants had failed to preserve their right to bring a claim under § 16-637.

III. STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Continental Cas. Co. v. Calinger*, 265 Neb. 557, 657 N.W.2d 925 (2003).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

IV. ANALYSIS

1. § 1983 Claims

(a) Limitations on § 1983 in State Tax Cases

The appellants seek damages and injunctive and declaratory relief under § 1983. "Generally speaking, section 1983 provides a cause of action in state or federal courts to redress federal constitutional and statutory violations by state officials." *General Motors Corp. v. City of Linden*, 143 N.J. 336, 341, 671 A.2d 560, 562 (1996). In its pertinent part, § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or

> causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

However, the availability of § 1983 to challenge a state or local tax is limited. The Tax Injunction Act, 28 U.S.C. § 1341 (2000), prohibits federal courts from entertaining § 1983 claims that seek injunctive or declaratory relief from a state tax "where a plain, speedy and efficient remedy may be had in the courts of such State." See, e.g., *California v. Grace Brethren Church*, 457 U.S. 393, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982); *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981). In addition to the limits placed on § 1983 by Congress, the U.S. Supreme Court has ruled that § 1983 must be read in light of the longstanding principle of federal noninterference in state tax systems. *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981) (Fair Assessment). Relying on this principle, the Court has held that federal courts cannot award damages in § 1983 claims challenging the administration of a state tax when the state provides a plain, adequate, and complete remedy. *Fair Assessment, supra.*

Following *Fair Assessment*, a divergence of opinion arose over whether state courts could grant relief in § 1983 claims challenging a state or local tax. Some courts ruled that the Tax Injunction Act and the U.S. Supreme Court's decision in *Fair Assessment* applied only to federal courts. See, e.g., *Kerr v. Waddell*, 183 Ariz. 1, 899 P.2d 162 (Ariz. App. 1994); *Murtagh v. County of Berks*, 535 Pa. 50, 634 A.2d 179 (1993). Other courts ruled that the principle of federal noninterference in state tax systems relied upon by the U.S. Supreme Court in *Fair Assessment* prohibited state courts from granting relief in a § 1983 claim, so long as the state offered an adequate remedy. See, e.g., *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991); *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985).

The conflict was settled in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 115 S. Ct. 2351, 132 L.

Ed. 2d 509 (1995). *National Private Truck Council, Inc.* involved an Oklahoma tax on motor carriers that were licensed in 25 other states. The petitioners had filed a § 1983 claim in Oklahoma state court, alleging that the tax violated the dormant Commerce Clause and the Privileges and Immunities Clause of U.S. Const. art. IV, § 2, cl. 1. The Oklahoma Supreme Court ruled that injunctive and declaratory relief was not available under § 1983 because state law offered an adequate legal remedy.

[3] The U.S. Supreme Court affirmed. It held, "When a litigant seeks declaratory or injunctive relief against a state tax pursuant to § 1983 . . . state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy." *National Private Truck Council, Inc.*, 515 U.S. at 592. In reaching this conclusion, the Court, as it did in *Fair Assessment*, relied upon the principle of federal noninterference in state tax systems.

National Private Truck Council, Inc. left open the question whether state courts could award damages in a § 1983 claim challenging the administration of a state or local tax. The issue was not before the Court because the defendants were a state agency and state officials acting in their official capacities. Earlier case law had established that damages are unavailable in a § 1983 claim against a state or a state official acting in his or her official capacity. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

[4] Here, however, the appellants seek damages from a municipality. A plaintiff may seek damages in a § 1983 claim against a municipality. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Thus, we must determine whether Nebraska courts may entertain a § 1983 claim for damages when the claim challenges the administration of a state or local tax by a municipality.

[5] The lesson of both *National Private Truck Council, Inc.* and *Fair Assessment* is that § 1983 must be construed in light of the background principle of federal noninterference in state and local tax schemes. In *Fair Assessment*, the U.S. Supreme Court recognized that a § 1983 claim for damages offers as much chance for interference as a § 1983 claim for injunctive or declaratory relief. The Court explained:

> The recovery of damages under the Civil Rights Act first requires a "declaration" or determination of the unconstitutionality of a state tax scheme that would halt its operation. And damages actions, no less than actions for an injunction, would hale state officers into federal court every time a taxpayer alleged the requisite elements of a § 1983 claim. We consider such interference to be contrary to "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts."

Fair Assessment, 454 U.S. at 115-16 (quoting *Matthews v. Rodgers*, 284 U.S. 521, 52 S. Ct. 217, 76 L. Ed. 447 (1932)). Although *Fair Assessment* was limited only to § 1983 claims in federal court, its concerns apply with equal force to § 1983 claims brought in state court. If such suits were allowed, litigants in state courts could use a federal remedy to grind to a halt state and local taxation schemes. We conclude that when a litigant seeks damages in a § 1983 claim challenging a state or local tax, Nebraska courts must refrain from granting such relief, so long as state law offers an adequate legal remedy. Accord, *Union Oil Co. of Cal. v. City of Los Angeles*, 79 Cal. App. 4th 383, 94 Cal. Rptr. 2d 81 (2000); *G.M.C. v. City and County of San Francisco*, 69 Cal. App. 4th 448, 81 Cal. Rptr. 2d 544 (1999); *Murtagh v. County of Berks*, 715 A.2d 548 (Pa. Commw. 1998); *Kerr v. Waddell*, 185 Ariz. 457, 916 P.2d 1173 (Ariz. App. 1996); *General Motors Corp. v. City of Linden*, 143 N.J. 336, 671 A.2d 560 (1996).

(b) Adequacy of Nebraska's Remedies

Because we have concluded that Nebraska courts cannot entertain a § 1983 claim challenging a state or local tax unless the state fails to provide an adequate legal remedy, the question becomes whether state law offers the appellants such a remedy.

[6-8] Courts measure the adequacy of a state remedy by procedural, not substantive criteria. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981). Thus, the "state remedy need not be identical to section 1983 remedies. . . . It need not be the best remedy available . . . the most convenient remedy . . . or equal to or comparable with federal remedies." (Citations omitted.) *General Motors Corp.*, 143 N.J. at 348, 671

A.2d at 566. Rather, a state remedy is adequate if it provides the taxpayer with the opportunity for a " ' "full hearing and judicial determination" ' at which [he or] she may raise any and all constitutional objections to the tax." *Rosewell*, 450 U.S. at 515 n.19. See, also, *Kerr, supra*; *General Motors Corp., supra.*

[9] Nebraska provides a taxpayer of a city of the first class at least two adequate methods for challenging a special tax assessment for street improvements. First, under § 16-637, a taxpayer can recover any part of a special tax that it believes to be illegal, inequitable, or unjust if it (1) pays the tax under protest before it becomes delinquent; (2) provides notice to the city treasurer that it intends to sue to recover the tax, giving enough detail to advise the city of the "exact nature" of the grievance; and (3) brings suit within 60 days of paying the tax and providing notice. A special tax assessment which violates the federal Constitution is illegal, and thus a claim that a special tax assessment violates the federal Constitution can be raised and adjudicated in § 16-637 claims. Further, that § 16-637 allows for only a refund and not injunctive or declaratory relief does not render it inadequate. *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995) ("[a]s long as state law provides a ' "clear and certain remedy," ' . . . the States may determine whether to provide predeprivation process (*e.g.*, an injunction) or instead to afford postdeprivation relief (*e.g.*, a refund)"). Nor does the relatively short timeframe within which the taxpayer has to determine whether to protest the tax and file suit render § 16-637 inadequate. This is so because "individuals who wish to challenge the assessment of a state tax are immediately aware of the precise nature and amount of their injury on the date the assessment is rendered." *Jade Aircraft Sales, Inc. v. Crystal*, 236 Conn. 701, 709-10, 674 A.2d 834, 838 (1996).

[10] In addition to the remedy provided by § 16-637, a taxpayer can challenge a special assessment for municipal improvements under Neb. Rev. Stat. §§ 19-2422, 19-2423, and 19-2425 (Reissue 1997). See *Reiser v. Hartzler*, 213 Neb. 802, 331 N.W.2d 523 (1983). Under these sections, an owner of real property who feels aggrieved by the levy of a special assessment made by any city of the first or second class or village may appeal to district

court the special assessment as to both validity and amount. See § 19-2422. The owner appealing the special assessment must (1) file a written notice of appeal with the city clerk within 10 days of the levy, (2) post a bond of $200, and (3) file a petition on appeal and transcript with the district court within 30 days of the levy of the special assessment. See §§ 19-2423 and 19-2425. Like with § 16-637, these statutes provide a taxpayer with a means by which his or her constitutional challenges to a special tax assessment can be fairly and fully adjudicated.

[11] Thus, Nebraska offers at least two adequate remedies for raising federal constitutional challenges to a special tax assessment for street improvements in cities of the first class. As a result, the district court could not entertain the appellants' § 1983 claims. In addition, because an adequate state remedy exists, no attorney fees were available to the appellants under § 1988(b). See, *Union Oil Co. of Cal. v. City of Los Angeles*, 79 Cal. App. 4th 383, 94 Cal. Rptr. 2d 81 (2000); *New England Legal Foundation v. Boston*, 423 Mass. 602, 670 N.E.2d 152 (1996).

2. Appellants' State Claims

The trial court construed the appellants' petition as seeking a refund under § 16-637. However, the court dismissed some of the appellants' § 16-637 claims because of their failure to comply with the procedural requirements of § 16-637.

As a prerequisite to bringing suit for a refund under § 16-637, a party must pay the tax under protest before it becomes delinquent. The court determined that a question of fact existed whether the tax became delinquent on June 21, 2000, or July 20, 2000. None of the appellants had paid the tax under protest by June 21, but some had paid on or before July 20. The court granted summary judgment to the City and the Board against those appellants who had failed to pay on or before July 20. But for those appellants who had paid on or before July 20, the court allowed their § 16-637 claims to proceed.

The appellants against whom the court entered summary judgment do not challenge the court's determination that they failed to pay their taxes under protest by July 20, 2000. Rather, as we understand it, they argue that they were not required to comply with the procedural requirements of § 16-637 because they also

raised claims under § 1983. We disagree. Their § 16-637 claims for refunds were separate and distinct from their § 1983 claims, and thus, to recover under § 16-637, they were required to comply with its procedural prerequisites.

V. CONCLUSION

The court correctly concluded that it could not entertain the appellants' § 1983 claims challenging the special tax assessment because state law offered them adequate legal remedies. The court also correctly concluded that it was undisputed that some of the appellants had failed to comply with the procedural requirements of § 16-637.

AFFIRMED.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. PMI FRANCHISING, INC., ET AL., APPELLEES.

675 N.W.2d 660

Filed March 12, 2004. No. S-02-1417.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Guaranty: Limitations of Actions.** The statute of limitations provided in Neb. Rev. Stat. § 25-205 (Reissue 1995) applies to an action on a contract of guaranty.
4. **Contracts: Guaranty: Limitations of Actions: Liability: Debtors and Creditors.** The statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues, and a guarantor's liability arises when the principal debtor defaults.
5. ____: ____: ____: ____: ____. In the absence of provisions to the contrary in the controlling documents, a cause of action does not accrue against a guarantor until the guarantor's liability has arisen and a guarantor's liability does not arise until the debtor defaults.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

Dana W. Roper, Lincoln City Attorney, and James D. Faimon for appellant.

Joel D. Nelson, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellees James E. Hershberger and Sandra M. Hershberger.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The City of Lincoln (the City) filed suit in the district court for Lancaster County against PMI Franchising, Inc. (PMI), James E. Hershberger, and Sandra M. Hershberger to recover money that was loaned to PMI pursuant to a financing agreement in aid of an economic development program sponsored by the City. The Hershbergers were guarantors on the loan to PMI. The Hershbergers moved for summary judgment. The district court concluded that the City's action against the Hershbergers was barred by the statute of limitations. The court, inter alia, granted summary judgment in favor of the Hershbergers and dismissed the petition. Following various procedural events recited in part below, the City appealed. We note that although PMI and the Hershbergers are all denominated as appellees, the substance of the City's argument shows that the City's appeal is limited to the court's determination that the City's action against the Hershbergers was time barred and to the court's corresponding order granting summary judgment and dismissing the City's action against the Hershbergers. We reverse, and remand for further proceedings.

STATEMENT OF FACTS

On June 8, 1993, the City and PMI entered into a "Project Financing Agreement" pursuant to which the City agreed to loan $49,500 to PMI and PMI agreed to repay the loan. Paragraph 5 of the agreement provided for monthly payments of interest only for the first 24 months and amortized payments of principal and interest over the following 60 months, for a total term of 7 years. Paragraph 16 of the agreement provided that in the event PMI

defaulted on its obligations, the City was to provide notice of such default to PMI and, in the absence of a cure, the City could thereafter terminate the agreement. Specifically, if PMI failed to correct the default within 30 days of receipt of written notice, then under paragraph 16, "the unpaid balance plus accrued interest to the date of termination [would] become due and payable in full immediately on the date of termination." The Hershbergers executed the agreement as officers of PMI. As part of the financing arrangement, each of the Hershbergers signed an individual guaranty for PMI's obligations under the agreement. Each guaranty provided that the guarantor would unconditionally repay funds loaned to PMI "when due, pursuant to the financing agreement."

According to the record, on July 7, 1993, the City disbursed $23,753.43 to PMI. In the Hershbergers' answer, they do not dispute that "approximately $23,000.00" was loaned. The next document in the record is a December 10, 1993, letter written by James Hershberger to the City, reporting on the progress of the project and seeking a deferral of payments. Evidently, there was a failure of payment at some point, because, in a February 28, 1995, letter contained in the record, the City wrote the Hershbergers declaring that PMI had defaulted under the minimum repayment terms of the agreement. The City's letter stated that if the default was not corrected, the agreement would be terminated and the entire unpaid principal balance of $23,753.43 plus accrued interest would be due and payable. On March 21, James Hershberger sent a letter to the City stating that he wanted to meet to "discuss [the] terms of [the] agreement and a Repayment schedule."

On September 20, 1999, the City filed a petition in the district court against PMI and the Hershbergers. The City filed a second amended petition on December 17, 1999, which is the operative petition. In the second amended petition, the City alleged that PMI had failed to repay the loan contrary to the provisions of the agreement and that the Hershbergers had failed to comply with the provisions of the guaranties. The City alleged that pursuant to the agreement, the City had sent a letter on February 28, 1995, declaring PMI to be in default. In the petition, the City alleged that the unpaid principal and accrued interest was due and payable. The City prayed for a judgment against PMI and the Hershbergers in the amount of the unpaid

principal of $23,753.43 plus accrued interest, as well as costs and attorney fees.

The Hershbergers filed an answer in which, inter alia, they admitted the loan of "approximately $23,000.00" and affirmatively alleged that the City's action against them was barred by the statute of limitations. The Hershbergers also filed a counterclaim alleging that the City breached the agreement by failing to loan PMI the full $49,500, thereby causing the business which was the subject of the agreement to fail.

Although PMI was served, no answer or other appearance was filed on behalf of PMI. Eventually, during the course of the proceedings before the district court, a default money judgment against PMI was entered.

The Hershbergers moved for summary judgment on the basis that the action against them was time barred. An evidentiary hearing on the Hershbergers' motion was held October 16, 2000. Various items of evidence, including correspondence, were admitted. The court agreed with the Hershbergers, and on January 31, 2001, dismissed the second amended petition as to the Hershbergers and, although it had not appeared, PMI. The court reasoned that the cause of action against the Hershbergers was barred by the 5-year statute of limitations pertaining to contracts contained in Neb. Rev. Stat. § 25-205 (Reissue 1995). Included in the court's reasoning was the statement that the City was required to bring its action "within five years after the agreement was signed on June 8, 1993." Because the City did not file its action until 1999, the court concluded that the action was time barred.

The City appealed the January 31, 2001, order of summary judgment to the Nebraska Court of Appeals. The Court of Appeals dismissed the appeal on the basis that the January 31, 2001, order was not a final, appealable order because it did not dispose of the Hershbergers' counterclaim against the City. See *City of Lincoln v. PMI Franchising*, 11 Neb. App. xxiii (No. A-01-269, June 10, 2002). Upon remand, the district court entered an order dismissing the Hershbergers' counterclaim. Further, upon remand, on December 3, 2002, the district court filed a nunc pro tunc order striking reference to PMI in the January 31, 2001, order and granted a default money judgment against PMI. The action having thus been concluded as to all parties and all causes of action,

the City filed a notice of appeal on December 6, 2002. A motion to dismiss the appeal as untimely filed was correctly denied by the Court of Appeals prior to the transfer of this case to this court's docket.

On appeal, the City claims the grant of summary judgment in favor of the Hershbergers and the corresponding dismissal were error.

ASSIGNMENTS OF ERROR

The City generally asserts that the district court erred in determining that the 5-year statute of limitations under § 25-205 barred the City's petition and in granting summary judgment in favor of the Hershbergers.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Section 25-205 provides that an action upon any agreement, contract, or promise in writing can only be brought within 5 years. The district court reasoned that the statute of limitations on the City's action against the Hershbergers began to run when the Hershbergers signed the guaranties on June 8, 1993. The court therefore concluded that the initial petition filed against the Hershbergers on September 20, 1999, was barred by the 5-year statute of limitations. Giving the City the favorable inferences from the record, we conclude that the court erred in determining that the statute of limitations barred the City's action against the Hershbergers. We reverse.

[3-5] The statute of limitations provided in § 25-205 applies to an action on a contract of guaranty. *Production Credit Assn.*

of the Midlands v. Schmer, 233 Neb. 749, 448 N.W.2d 123 (1989). We have stated that "[t]he statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues" and that "[a] guarantor's liability arises when the principal debtor defaults." *Id.* at 756, 448 N.W.2d at 128. Taking these principles together, and in the absence of provisions to the contrary in the controlling documents, a cause of action does not accrue against a guarantor until the guarantor's liability has arisen, and a guarantor's liability does not arise until the debtor defaults. Nothing in the guaranties in this case is to the contrary. Therefore, unlike the view of the district court, and assuming a default, the statute of limitations in the present case began to run when PMI defaulted and the Hershbergers' liability arose, rather than when the Hershbergers initially signed the guaranties.

The Hershbergers moved for summary judgment. As the moving party, they had the burden to demonstrate that they were entitled to judgment as a matter of law. See *Misle, supra*. Specifically, in order to succeed on their assertion that the City's case against them as guarantors was filed out of time, the Hershbergers had to show when a default by PMI occurred which triggered their liability and in turn triggered the running of the statute of limitations. The Hershbergers failed to do so.

In their brief, the Hershbergers state that PMI "never paid anything back to the City," brief for appellees the Hershbergers at 4, but elsewhere in their brief, the Hershbergers question "if" PMI defaulted "at all," *id.* at 10. As reflected in the Hershbergers' written argument on appeal, the record is unclear.

We are aware of the December 10, 1993, letter in the record in which James Hershberger requests a deferral of payments, and the letter suggests a default may have or was about to occur. On review, we are required to take inferences in favor of the City as the party against whom judgment was entered. See *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004). Although a default on or about December 10, 1993, may be inferred from the letter, that is not the only reasonable inference, and for statute of limitations purposes, it is not the inference most favorable to the City.

Other than the December 10, 1993, letter, the only material evidence in the record of a default and when it occurred is the City's letter of February 28, 1995, in which the City declares a default.

Whereas the December 10, 1993, letter offered by the Hershbergers establishes neither a default nor when it occurred, the City's February 28, 1995, letter, by its terms, indicates that a default occurred and, logically, that the default had occurred sometime prior to the writing of the letter. Because the City filed its action on September 20, 1999, a default occurring after September 20, 1994, would be within 5 years of September 20, 1999, and the action against the guarantors would not be time barred.

We further observe that the February 28, 1995, letter was written during the period when only interest was due. Under the terms of the agreement, and in the absence of a cure of default, the unpaid principal became due 30 days after the February 28 letter declaring default. Therefore, on the record before us, default in the payment of the unpaid principal that became due upon termination of the agreement appears to have occurred sometime after the February 28 letter, and the initial petition filed September 20, 1999, would thus have been filed within the 5-year limitations period. A suit seeking recovery of the principal from the guarantors would not appear to be time barred.

Given the record before us, the reasonable inferences are (1) that the Hershbergers' liability arising from default on interest payments arose at an unspecified time prior to the City's February 28, 1995, letter and (2) that pursuant to the agreement, the Hershbergers' liability arising from unpaid principal arose 30 days after the February 28 letter. At the hearing on their motion for summary judgment, the Hershbergers did not establish when their liability as guarantors arose and the statute of limitations commenced. We cannot determine from the record when the statute of limitations started. In sum, the Hershbergers did not establish their entitlement to judgment as a matter of law, see *Misle, supra*, and, therefore, they were not entitled to summary judgment based on an allegation that the City's action was time barred.

CONCLUSION

We conclude that the district court erred when it determined that the statute of limitations on the City's cause of action against the Hershbergers began to run when the Hershbergers signed the guaranties on June 8, 1993. Instead, the statute of limitations began to run when PMI defaulted and the Hershbergers' liability

arose. Viewing the evidence in the light most favorable to the City, we determine the Hershbergers failed to demonstrate when PMI defaulted and they therefore failed to demonstrate that the City's action was time barred in toto and that they were entitled to judgment as a matter of law. We therefore conclude that the court erred in granting summary judgment in favor of the Hershbergers and entering a corresponding dismissal. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

THOMAS POULTON AND KAREN POULTON, APPELLANTS, V. STATE FARM FIRE AND CASUALTY COMPANIES, APPELLEE.

675 N.W.2d 665

Filed March 12, 2004. No. S-02-1418.

1. **Insurance: Contracts: Appeal and Error.** The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
2. **Insurance: Contracts.** A specific perils policy excludes all risks not specifically included in the contract.
3. ____: ____. An all-risk or open perils policy provides coverage for all direct losses not otherwise excluded.
4. ____: ____. In order to recover under an insurance policy of limited liability, the insured must bring himself or herself within its express provisions.
5. ____: ____. A specific perils policy covers losses caused by specified perils; to the extent not specified, no coverage results.
6. ____: ____. In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.
7. **Insurance: Contracts: Intent: Appeal and Error.** In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
8. **Insurance: Contracts.** The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
9. **Contracts.** Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses.
10. ____. A party may not pick and choose among the clauses of a contract, accepting only those that advantage it.

11. **Insurance: Contracts.** Whether the language in an insurance policy is ambiguous presents a question of law.
12. **Insurance: Contracts: Words and Phrases.** A contract, such as an insurance policy, 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.
13. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
14. ____: ____. A policy will not be considered ambiguous merely because a word or phrase, isolated from its context, is susceptible to more than one meaning.
15. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

David A. Hecker, Angela D. Melton, and Richard P. Jeffries, of Kutak Rock, L.L.P., for appellants.

Joseph E. Jones and Andrea F. Scioli, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

NATURE OF CASE

Due to mold and fungi in their home, Thomas Poulton and Karen Poulton suffered a significant loss of personal property. Seeking compensation for their loss, the Poultons filed a claim with their insurer, State Farm Fire and Casualty Companies (State Farm). State Farm denied the claim, and the Poultons sued State Farm for coverage. The trial court determined the Poultons' insurance policy did not provide coverage and dismissed their petition. The issue on appeal is whether the Poultons' personal property is covered under the "resulting loss" provision of their policy.

FACTUAL AND PROCEDURAL BACKGROUND

On June 23, 2000, the Poultons purchased real estate in Omaha, Nebraska. Shortly thereafter, they noticed a mold and fungi infestation problem in their home. This problem, the Poultons claim, caused them to suffer the loss of all of the personal property that

they had placed inside of the home. Seeking compensation for the damage, the Poultons turned to their insurer.

The Poultons had insured their property under a homeowner's policy of insurance (the Policy) issued by State Farm. On September 25, 2000, the Poultons made a claim to State Farm for loss of their personal property caused by a mold and fungal infestation of their home. Upon receiving notice of the claim, State Farm sent an adjuster to investigate the Poultons' loss. After the investigation, State Farm sent a letter to the Poultons, dated October 6, 2000, denying coverage. The letter stated that State Farm was denying coverage because the Poultons' loss was not caused by 1 of the 16 named perils in the section of the Policy dealing with insured losses to personal property.

On November 29, 2000, the Poultons, via letter, sought reconsideration of State Farm's determination. The Poultons argued that coverage for their personal property existed under the plain language of the policy. In addition, the Poultons argued that their loss was the direct result of a mold and fungal infestation of their home and, therefore, was covered as a resulting loss under the Policy.

On December 19, 2000, State Farm denied coverage for a second time. State Farm repeated its position that the Poultons' loss was not caused by 1 of the Policy's 16 named perils and that therefore, the Policy did not cover their loss. In addition, State Farm argued that the resulting loss provision, properly interpreted, did not provide coverage for the loss of personal property.

The Poultons then filed a petition for declaratory relief in district court. The petition requested a declaration that the Policy covered the Poultons' loss and an order requiring State Farm to pay the Poultons for the damage sustained to their personal property. After State Farm answered, a trial on stipulated facts was held; thereafter, the district court entered a judgment in favor of State Farm. The court determined that (1) the Policy was a "specific risk" policy that did not provide coverage for damage to personal property caused by mold or fungi, (2) the resulting loss provision applied only to structural damage to the dwelling and not to personal property damage, and (3) the Policy was not ambiguous. The Poultons' petition was dismissed with prejudice, and they subsequently filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

The Poultons assign three errors, more properly restated as two: the district court erred in determining that (1) the Policy's resulting loss provision did not cover damage to their personal property and (2) the Policy is not ambiguous.

STANDARD OF REVIEW

[1] The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002).

ANALYSIS

Resulting Loss

Obviously, the focus of this appeal is the coverage provided under the Policy. Before examining the relevant provisions, however, a brief overview of the Policy will provide context for our subsequent analysis. The Policy's table of contents shows that the Policy is divided into five parts and a number of subparts. Here, the disputed provisions are found in Section I, which is entitled "**SECTION I - YOUR PROPERTY**." The table of contents, with respect to Section I, is as follows:

SECTION I - YOUR PROPERTY
COVERAGES 3
Coverage A - Dwelling 3
Coverage B - Personal Property 3
Coverage C - Loss of Use 4
Additional Coverages 5
Inflation Coverage 7
LOSSES INSURED 7
LOSSES NOT INSURED 9
LOSS SETTLEMENT 11
CONDITIONS 13

In the body of the Policy, under the provision entitled "COVERAGES," the Policy states that under "Coverage A," State Farm covers the "dwelling used principally as a private residence on the **residence premises** shown in the **Declarations**." As to personal property, the Policy states that under "Coverage

B," State Farm covers "personal property owned or used by an **insured** while it is anywhere in the world."

Under the provision entitled "**LOSSES INSURED**," the Policy divides itself into two categories of covered losses: (1) "**COVERAGE A - DWELLING**" and (2) "**COVERAGE B - PERSONAL PROPERTY**." They state:

> **COVERAGE A - DWELLING**
>
> We insure for accidental direct physical loss to the property described in Coverage A, except as provided in **SECTION I - LOSSES NOT INSURED**.
>
> **COVERAGE B - PERSONAL PROPERTY**
>
> We insure for accidental direct physical loss to property described in Coverage B caused by the following perils, except as provided in **SECTION I - LOSSES NOT INSURED**:
>
> 1. **Fire or lightning**.
> 2. **Windstorm or hail**. . . .
>
> . . . .
>
> 3. **Explosion**.
> 4. **Riot or civil commotion**.
> 5. **Aircraft** . . . .
> 6. **Vehicles** . . . .
> 7. **Smoke** . . . .
> 8. **Vandalism or malicious mischief** . . . .
> 9. **Theft** . . . .
> 10. **Falling objects**. . . . .
> 11. **Weight of ice, snow or sleet** . . . .
> 12. **Sudden and accidental discharge or overflow** of water or steam . . . .
> 13. **Sudden and accidental tearing asunder, cracking, burning or bulging** of a steam or hot water heating system . . . .
> 14. **Freezing** of a plumbing, heating, air conditioning or automatic fire protective sprinkler system . . . .
> 15. **Sudden and accidental damage** to electrical appliances, devices, fixtures and wiring . . . .
> 16. **Breakage of glass** . . . .

This action arises out of a claim for damage done to personal property; therefore, we turn to Coverage B - Personal Property.

As listed above, Coverage B sets forth 16 specific perils for which personal property damages are covered. Because the provision is clear that an insured's personal property is only covered for damages caused by the 16 listed perils, this provision of the Policy can be described as providing "specific perils" or "named perils" coverage. See 7 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 101:7 at 101-17 (1997).

[2-5] A specific perils policy "exclude[s] all risks not specifically included in the contract." *Id.* In other words, a specific perils policy provides coverage in accordance with the legal maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of the others), and is the converse of an all-risks or open perils policy, which provides coverage for all direct losses not otherwise excluded. See, 7 Russ & Segalla, *supra* at 101-17 to 101-18 (under all-risks policies "all risks are included in the coverage unless specifically excluded in the terms of the contract"); Annot., 30 A.L.R.5th 170 (1995) ("[a]ll-risks insurance is a special type of insurance extending to risks not usually contemplated, and generally allows recovery for all fortuitous losses, unless the policy contains a specific exclusion expressly excluding the loss from coverage"). Consequently, in order for there to be coverage for damage to personal property under the Policy, the damage to the personal property must arise out of one of the 16 listed perils. See, *Curtis O. Griess & Sons v. Farm Bureau Ins. Co.*, 247 Neb. 526, 530, 528 N.W.2d 329, 332 (1995) ("[i]n order to recover under an insurance policy of limited liability, the insured must bring himself or herself within its express provisions"); *Thorell v. Union Ins. Co.*, 242 Neb. 57, 492 N.W.2d 879 (1992); *Barish-Sanders Motor Co. v. Fireman's Fund Ins. Co.*, 134 Neb. 188, 278 N.W. 374 (1938). See, also, *Harrigan v. Liberty Mut. Fire Ins. Co.*, 170 A.D.2d 930, 566 N.Y.S.2d 755 (1991) (property insurance only provides coverage for harm caused by named perils); 10 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 148:48 at 148-84 (1998) (specific perils policy covers "losses caused by specified perils; to the extent not specified, no coverage results").

Here, both parties agree that mold is not a listed peril. Therefore, the Policy would not appear to provide coverage for damage to the Poultons' personal property. The Poultons,

however, argue that coverage still exists via one of the Policy's resulting loss provisions.

The disputed resulting loss provision is found in "**SECTION I - LOSSES NOT INSURED**," and states, in relevant part:

> 1. We do not insure for any loss *to the property described in Coverage A* which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through n. below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> . . . .
>
> i. mold, fungus or wet or dry rot;
>
> . . . .
>
> However, we do insure for any resulting loss from items a. through m. unless the resulting loss is itself a Loss Not Insured by this Section.

(Emphasis supplied.) The Poultons argue that although damage to the dwelling caused by mold is excluded under "i," coverage exists because (1) their loss of personal property was the result of the mold contamination of their insured dwelling and (2) the phrase "any resulting loss" suggests that all resulting losses, including losses to personal property, are covered. On the other hand, State Farm argues that under the Policy's plain language, the resulting loss provision provides coverage for loss to the dwelling (Coverage A) but does not provide coverage for loss to personal property (Coverage B).

[6-8] The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002). In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001). In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded

their plain and ordinary meaning. *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002). Furthermore, the language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

Although the parties cite numerous cases from other jurisdictions to support their respective arguments, our independent review leads us to conclude that the meaning of the Policy can be determined from its clear and unambiguous language. After reviewing the Policy, we conclude that under its plain language, the disputed "resulting loss" provision does not provide coverage for loss to personal property.

As noted previously, under the provision entitled "**LOSSES INSURED**," the Policy provides coverage for two main, and distinct, categories of losses: (1) to the dwelling (Coverage A) and (2) to personal property (Coverage B). We have already concluded that Coverage B is appropriately characterized as providing specific perils coverage for the Poultons' personal property. Our review of Coverage A leads us to conclude that this section of the Policy provides all-risks coverage for the dwelling, subject to a limited number of exclusions. Stated otherwise, under Coverage A, the Poultons' dwelling was insured against all risks except those specifically excluded in Section I - Losses Not Insured, and under Coverage B, the Poultons' personal property was insured against loss caused by the listed perils except as provided in Section I - Losses Not Insured.

Thus, we must turn to Section I - Losses Not Insured. This section is divided into three numbered paragraphs, and for clarity, the disputed paragraph is restated below:

> 1. We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through n. below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> . . . .
>
> i. mold, fungus or wet or dry rot;

. . . .

> However, we do insure for any resulting loss from items a. through m. unless the resulting loss is itself a Loss Not Insured by this Section.

We conclude that the plain language of paragraph 1 shows that the 14 listed exclusions ("a" through "n") apply only to the dwelling (Coverage A). In other words, the listed exclusions, including the exclusion for mold, were drafted to operate as exclusions to the all-risks coverage provided for the dwelling under Coverage A.

[9,10] Furthermore, we conclude that the plain language of the Policy shows that the resulting loss paragraph, which immediately follows the 14 exclusions, was intended to be limited to the dwelling (Coverage A). Obviously, the resulting loss provision should be read in the context of where it is located, i.e., as a subset of paragraph 1. See 2 Eric Mills Holmes & Mark S. Rhodes, Holmes's Appleman on Insurance § 5.1 (2d ed. 1996). Because the 14 exclusions referenced in, and immediately subsequent to, paragraph 1 are clearly limited to the dwelling (Coverage A), it would be illogical to conclude that the resulting loss provision, which follows and references the same exclusions, is not likewise limited. See 2 Holmes & Rhodes, *supra* at 20 ("[w]hatever the construction of a particular clause standing alone may be, it must be read in connection with other clauses . . ."). Simply put, the Poultons' interpretation must be rejected because they seek to expand the intended coverage of the Policy by plucking a provision out of the context in which it was meant to apply. See *Bedrosky v. Hiner*, 230 Neb. 200, 204, 430 N.W.2d 535, 539 (1988) ("party may not pick and choose among the clauses of the contract, accepting only those that advantage it").

Our reading of the Policy is further supported by the language used in the remaining two paragraphs of this section. As quoted above, paragraph 1 states that State Farm does "not insure for any loss to the property described in Coverage A." Paragraphs 2 and 3, however, are expressly not so limited: "2. We do not insure *under any coverage* for any loss which would not have occurred in the absence of one or more of the following . . . . 3. We do not insure *under any coverage* for any loss consisting of one or more of the items below." (Emphasis supplied.) Thus, while paragraph

1 is specifically limited to the dwelling (Coverage A), paragraphs 2 and 3 use the phrase "under any coverage" to refer to both, inter alia, the dwelling (Coverage A) and personal property (Coverage B). This distinction is important because it shows the resulting loss provisions which follow paragraphs 2 and 3 were intended to apply to both Coverages A and B, whereas paragraph 1 was intended to be expressly limited to Coverage A (the dwelling). In sum, we conclude that the Policy, under the resulting loss provision found in Section I - Losses Not Insured, paragraph 1, does not provide coverage for the Poultons' loss of personal property.

AMBIGUITY

As an alternative argument, the Poultons contend that coverage exists under the resulting loss provision because the phrase "any resulting loss" is ambiguous. The Poultons suggest that a reasonable insured would read the phrase and conclude that all resulting losses, including losses to personal property, are covered under the resulting loss provision. Therefore, according to the Poultons, the policy is ambiguous as to what the resulting loss provision covers, and the ambiguity should be construed against State Farm. See *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003) (ambiguous insurance policy will be construed against drafter).

[11-13] Whether the language in an insurance policy is ambiguous presents a question of law. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). A contract, such as an insurance policy, 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. *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002). Moreover, while an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 659 N.W.2d 823 (2003).

[14] Here, the policy is not ambiguous. We have already concluded that, properly read, the resulting loss provision applies only to the dwelling (Coverage A). Therefore, the phrase "any resulting loss" could not reasonably extend to the Poultons'

personal property, which is covered solely under Coverage B. See 2 Eric Mills Holmes & Mark S. Rhodes, Holmes's Appleman on Insurance § 5.1 at 21-22 (2d ed. 1996) ("[a] policy will not be considered ambiguous merely because a word or phrase, isolated from its context, is susceptible to more than one meaning").

[15] In sum, the Policy provided limited coverage for the Poultons' personal property. While the hardship that the loss of personal property has imposed upon the Poultons is regrettable, "[p]arties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute." *City of Scottsbluff v. Employers Mut. Ins. Co.*, 265 Neb. 707, 711, 658 N.W.2d 704, 708 (2003). Here, we are bound to enforce the contract in accordance with the plain meaning of the words of the contract, see *Trimble v. Wescom, ante* p. 224, 673 N.W.2d 864 (2004), and under the plain meaning of the words in the Policy, the Poultons' personal property was not insured against this type of loss.

CONCLUSION

For the foregoing reasons, we conclude that the Policy does not cover the Poultons' loss of personal property. The judgment of the district court is affirmed.

AFFIRMED.

MILLER-LERMAN, J., not participating.

ROBERT E. ROBINSON, APPELLEE, V.
COMMISSIONER OF LABOR, APPELLANT.

675 N.W.2d 683

Filed March 12, 2004. No. S-03-908.

1. **Employment Security: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record.
2. **Administrative Law: Judgments: Appeal and Error.** Judgments issued by a district court on a petition for review under the Administrative Procedure Act may be appealed to the Nebraska Court of Appeals under general civil procedure rules.

3. **Judgments: Appeal and Error.** A decision in the district court may be reversed, vacated, or modified by an appellate court for errors appearing on the record. The inquiry on appeal, however, is limited to whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Employment Security: Labor and Labor Relations.** The general test whether a person is available for work is whether the claimant is able, willing, and ready to accept suitable work which he or she does not have good cause to refuse.
5. ____: ____. After a person becomes unemployed, he or she must remain able to work to receive benefits.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed.

John H. Albin and Thomas A. Ukinski for appellant.

Patrick T. Carraher, of Legal Services of Southeast Nebraska, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The Commissioner of Labor (Commissioner) appeals the district court's order holding that Robert E. Robinson, who was incarcerated, was eligible for unemployment compensation. We determine that the record does not show that Robinson was available for employment and thus, he was ineligible to receive unemployment compensation. Accordingly, we reverse.

BACKGROUND

Robinson was incarcerated in October 2002 and was later approved for work release. At that time, he was employed by a local roofing company. Robinson was laid off work on January 14 or 15, 2003, and his employer stated that it expected to recall him in 4 to 6 weeks. Robinson applied for unemployment benefits and asked his girl friend to call and file his weekly claim for benefits. On January 29, an adjudicator at the Department of Labor discovered that Robinson was incarcerated. The adjudicator testified that she then spoke with a correctional officer who stated that Robinson was no longer on work release effective January 15.

Robinson testified, however, that the work release coordinator advised him to file for unemployment benefits and told Robinson

that he should be eligible because he was not required to seek other employment. Robinson stated that his work release privilege was temporarily suspended because he was laid off and that it was not revoked. He then stated: "A judge's order from the District Court in Lancaster County has been temporarily rescinded." The adjudicator determined that Robinson was not available for employment and issued a determination that he was ineligible for benefits.

Robinson appealed to the appeal tribunal of the Department of Labor. The tribunal determined that a work release authorization was not in place and that Robinson was unavailable to immediately accept employment; the tribunal affirmed the denial of benefits. Robinson appealed to the district court.

The district court reversed, finding that Robinson was available for employment because he was not required to seek additional employment to receive benefits and could return to his employer on work release after the layoff ended. The Commissioner appeals.

ASSIGNMENT OF ERROR

The Commissioner assigns, rephrased, that the district court erred when it found that Robinson was available for work and thus entitled to benefits.

STANDARD OF REVIEW

[1] In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record. *Vlasic Foods International v. Lecuona*, 260 Neb. 397, 618 N.W.2d 403 (2000).

[2,3] Judgments issued by a district court on a petition for review under the Administrative Procedure Act may be appealed to the Nebraska Court of Appeals under general civil procedure rules. *Id.* The decision in the district court may be reversed, vacated, or modified by an appellate court for errors appearing on the record. The inquiry on appeal, however, is limited to whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

The Commissioner contends that because Robinson was incarcerated, he was not available for employment. Availability is

required for eligibility to receive unemployment compensation benefits. Robinson argues that because he was an " 'attached' " employee who was not required to seek employment while he was laid off, he was available for employment. Brief for appellee at 7.

Neb. Rev. Stat. § 48-627(3) (Reissue 1998) provides that an unemployed individual is eligible for benefits only when "[h]e or she is able to work and is available for work."

[4,5] The general test whether a person is available for work is whether the claimant is able, willing, and ready to accept suitable work which he or she does not have good cause to refuse. See *George A. Hormel & Co. v. Hair*, 229 Neb. 284, 426 N.W.2d 281 (1988). After a person becomes unemployed, he or she must remain able to work to receive benefits. *Ponderosa Villa v. Hughes*, 224 Neb. 627, 399 N.W.2d 813 (1987).

Under Neb. Rev. Stat. § 47-401 (Reissue 1998), "[a]ny person sentenced to a city or county jail upon conviction for a misdemeanor, a felony, contempt, or nonpayment of any fine or forfeiture may be granted the privilege of leaving the jail during necessary and reasonable hours for . . . [w]orking at his or her employment." Neb. Rev. Stat. § 47-402 (Reissue 1998) provides:

> The privilege of leaving the jail as set forth in section 47-401 shall be granted only by written order of the sentencing court, after conferring with the chief of police, county sheriff, or such other person as may be charged with the administrative direction of the jail, specifically setting forth the terms and conditions of the privilege granted. The prisoner may petition the court for such privilege at the time of sentencing, or thereafter, and, in the discretion of the court, may renew his or her petition. The court may withdraw the privilege at any time by written order entered with or without prior notice.

Here, the record shows that Robinson was not required to look for new employment to be eligible for unemployment compensation. But he also had to be available for work which, under § 47-402, requires a written order from the sentencing court. At the hearing, Robinson stated that an order of the court had been temporarily rescinded. Thus, the record contains no evidence that an order was in effect that would allow Robinson to leave the jail to return to work. Without an order from the sentencing

court granting Robinson the privilege to leave the jail for work, he could not be "available" for work under § 48-627(3).

Because the record contains no evidence showing a work-related order was in effect, we determine that the district court's conclusion that Robinson was available for work did not conform to the law and was not supported by competent evidence. Accordingly, we reverse.

REVERSED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ELAINE A. WAGGONER, RESPONDENT.

675 N.W.2d 686

Filed March 12, 2004. No. S-03-1290.

Original action. Judgment of public reprimand and probation.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

Respondent, Elaine A. Waggoner, was admitted to the practice of law in the State of Nebraska on September 14, 1978, and at all times relevant hereto was engaged in the private practice of law in Lincoln, Nebraska. On November 13, 2003, formal charges were filed against respondent. The formal charges set forth three counts, including charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); Canon 6, DR 6-101(A)(3) (neglecting legal matter); and Canon 9, DR 9-102(A)(2) (failing to deposit client funds in trust account), as well as her oath of office as an attorney. Neb. Rev. Stat. § 7-104 (Reissue 1997).

On January 27, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002). In her conditional admission, respondent, in substance, knowingly admitted the facts essential to support the above formal charges; knowingly

admitted that she violated DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A)(2), as well as her oath of office as an attorney; and effectively waived all proceedings against her in connection with the formal charges in exchange for a judgment of a formal public reprimand and probation for 18 months with monitoring. Upon due consideration, the court approves the conditional admission and orders that respondent be publicly reprimanded and that respondent shall be subject to probation with monitoring as outlined *infra* for 18 months.

FACTS

In summary, the formal charges allege that during the course of her representation of two separate clients, respondent unduly delayed in completing certain legal matters entrusted to her on behalf of those clients. The formal charges further allege that as to a third client, respondent failed to deposit a retainer paid to her by the client in her attorney trust account. As noted above, respondent filed a conditional admission on January 27, 2004.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to the conditional admission, in addition to the public reprimand, respondent agreed that during her probationary period, she would be monitored subject to the following terms:

> Probation for 18 months with monitoring and costs taxed to respondent. The probation shall include the monitoring of respondent by Kathryn A. Olson . . . . Kathryn A. Olson shall not be compensated for her monitoring duties; however, she shall be reimbursed by respondent for actual expenses incurred. At the conclusion of the term of probation, the monitoring lawyer shall notify the Court of respondent's successful completion thereof.
>
> During the 18 month probationary period, respondent shall provide the monitor, at least monthly, a list of all cases for which the respondent is then responsible. During each of the first six months, respondent shall personally meet with the monitor to discuss the list of cases for which respondent is then responsible. The monitor shall also assist respondent in developing and implementing appropriate office procedures.
>
> The names of respondent's clients shall be kept confidential by way of a number assigned to each case. The list of cases shall include the following for each case:
>
> 1. Date attorney-client relationship began.
> 2. General type of case (i.e. divorce, adoption, probate, contract, real estate, civil litigation, criminal).
> 3. Date of last contact with client.
> 4. Last type and date of work completed on file (pleading, correspondence, document preparation, discovery, court hearing).
> 5. Next type and date of work that should be completed on case.
> 6. Any applicable statute of limitation and its date.
>
> The monitor shall have the right to contact respondent with any questions the monitor may have regarding the list. If at any time the monitor believes respondent has violated a disciplinary rule, or has failed to comply with the terms of probation, she shall report the same to the Counsel for Discipline.

Pursuant to rule 13, we find that respondent knowingly admits the essential relevant facts outlined in the formal charges and knowingly admits that she violated DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A)(2), as well as her oath of office as an attorney. We further find that respondent waives all proceedings against her in connection herewith. Upon due consideration, the court approves the conditional admission and enters orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A)(2), as well as her oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. It is further ordered that respondent be subject to probation with monitoring as outlined above for a period of 18 months, effective immediately. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF PUBLIC REPRIMAND AND PROBATION.

JILL A. ARTHUR AND NANCY WATERS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS, V. MICROSOFT CORPORATION, A WASHINGTON CORPORATION, APPELLEE.

676 N.W.2d 29

Filed March 19, 2004. No. S-01-1325.

1. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader.

3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
5. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
6. **Consumer Protection: Intent.** The purpose of the Consumer Protection Act is to provide consumers with protection against unlawful practices in the conduct of any trade or commerce which directly or indirectly affects the people of Nebraska.
7. ____: ____. The Consumer Protection Act was intended to be an antitrust measure to protect Nebraska consumers from monopolies and price-fixing conspiracies.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. On motion for rehearing, reargument granted. Original memorandum opinion withdrawn. Affirmed in part, and in part reversed and remanded for further proceedings.

Robert M. Hillis, Nicholas J. Lamme, and Timothy M. Schulz, of Yost, Schafersman, Lamme, Hillis, Mitchell & Schulz, P.C., L.L.O., for appellants.

Norman M. Krivosha, Robert M. Slovek, and Todd C. Kinney, of Kutak Rock, L.L.P., and David B. Tulchin, Joseph E. Neuhaus, Anastasia A. Angelova, and Richard C. Pepperman II, of Sullivan & Cromwell, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and CARLSON, Judge.

WRIGHT, J.

NATURE OF CASE

Jill A. Arthur and Nancy Waters, the plaintiffs, filed a class action against Microsoft Corporation in the district court for Dodge County. The plaintiffs brought the action on behalf of themselves and others similarly situated, alleging a violation of Nebraska's Consumer Protection Act (Act), Neb. Rev. Stat. § 59-1601 et seq. (Reissue 1998 & Cum. Supp. 2000), and Neb.

U.C.C. § 2-302 (Reissue 2001). The district court sustained Microsoft's demurrer and dismissed the action without leave to amend, finding that the plaintiffs failed to state a cause of action. On appeal, we affirmed by an equally divided court. Subsequently, we granted the plaintiffs' motion for rehearing. Today, we affirm in part, and in part reverse the judgment of the district court and remand the cause for further proceedings. The memorandum opinion filed June 25, 2003, is withdrawn.

SCOPE OF REVIEW

[1] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002).

[2] In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader. *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002).

FACTS

In their amended petition, the plaintiffs alleged that Microsoft is a for-profit corporation organized and existing under the laws of the State of Washington. It is the leading supplier of operating systems for personal computers, and it markets and licenses its Windows 98 operating system throughout the United States, including Nebraska.

For purposes of this action, a personal computer is a digital information-processing device for use by one person and includes desktop and laptop models. "Intel-based" personal computers, or computers designed for compatibility with Intel Corporation's "Pentium" family of microprocessors, are the dominant type of personal computers sold and used in the United States. Microsoft has licensed its Windows 98 operating system for Intel-based personal computers.

The plaintiffs' class is defined as all end-user licensees of Windows 98 residing in Nebraska for whom Microsoft has an electronic mail or surface address that is accessible by Microsoft.

The plaintiffs are informed and believe that the membership of the class is well in excess of 4,000, the exact number being known to Microsoft.

As of June 1998, more than 90 percent of new Intel-based personal computers had been shipped with a version of Windows preinstalled in the computer. The plaintiffs further alleged that Microsoft possesses a dominant and increasing share of the market for operating systems, which share over the decade leading up to the filing of the plaintiffs' petition exceeded 90 percent. During the 2 years leading up to the filing of the plaintiffs' petition, Microsoft's share was at least 95 percent, and it was projected that Microsoft's share would increase in the years immediately following the filing of the petition.

On June 7, 1999, Waters purchased a personal computer from Gateway Direct Computer Sales, a computer distributor. In addition to the computer hardware purchased from Gateway Direct Computer Sales, Waters acquired a license to use the Windows 98 operating system which had been placed on CD-ROM by Microsoft and copied to the hard drive of the computer. On June 4, 2000, Arthur acquired a Windows 98 operating system CD-ROM from CompUSA, a computer distributor, and installed it on her computer. As a precondition to loading and using the Windows 98 operating system, both Waters and Arthur were required to accept an end-user license agreement. The plaintiffs alleged that upon accepting the agreement, both Waters and Arthur became end-user licensees of Microsoft as to Windows 98.

The plaintiffs further alleged that Microsoft's pricing behavior demonstrated that it possessed monopoly power in the market for operating systems for Intel-based personal computers and that Microsoft unlawfully and willfully maintained its monopoly power by anticompetitive and unreasonably exclusionary conduct. They claimed that as a consequence of Microsoft's monopoly, it was able to exercise unfettered discretion in setting the price for a Windows 98 license. The plaintiffs contended that Microsoft licensed Windows 98 at a monopoly price in excess of the amount it would have been able to charge in a competitive market.

The plaintiffs brought their claim pursuant to the Act and § 2-302. The plaintiffs alleged that they and all others similarly situated incurred a monopoly price charged by Microsoft for the

use of Windows 98. The plaintiffs alleged that they were entitled to damages according to proof as to the difference between a competitive price and the monopoly price that they incurred as end-user licensees for their use of Windows 98.

Microsoft's demurrer to the plaintiffs' amended petition was sustained as to the antitrust claim. Relying upon *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), the district court held that the plaintiffs, as indirect purchasers, could not bring suit under the Act. The court then dismissed the plaintiffs' amended petition without leave to further amend, finding that the plaintiffs failed to state a cause of action for both the antitrust claim and the claim alleging an unconscionable contract. The plaintiffs timely appealed, and we affirmed, by an equally divided court, the judgment of the district court via a memorandum opinion filed June 25, 2003. We subsequently granted the plaintiffs' motion for rehearing.

ASSIGNMENTS OF ERROR

The plaintiffs assign that the district court erred (1) in holding that this case is controlled by *Illinois Brick Co.* and that the plaintiffs failed to state a cause of action, (2) in holding that the plaintiffs are indirect purchasers and thus failed to state a cause of action, and (3) in holding that the plaintiffs' claim based upon unconscionable contract terms and § 2-302 failed to state a cause of action.

ANALYSIS

STANDING

We first consider whether the plaintiffs have standing to bring a cause of action under the Act. The Act provides: "It shall be unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce." § 59-1604. "Any person who is injured in his business or property by a violation of sections 59-1602 to 59-1606 . . . may bring a civil action in the district court to enjoin further violations, to recover the actual damages sustained by him, or both, together with the costs of the suit . . . ." § 59-1609.

Federal antitrust law contains provisions corresponding to §§ 59-1604 and 59-1609: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (2000). Pursuant to 15 U.S.C. § 15(a) (2000), any person who shall be injured in his business or property because of a violation of the antitrust laws may bring a civil action for treble damages.

Neb. Rev. Stat. § 59-829 (Reissue 1998) provides: "When . . . any provision of Chapter 59 is the same as or similar to the language of a federal antitrust law, the courts of this state in construing . . . any provision of Chapter 59 shall follow the construction given to the federal law by the federal courts." In dismissing the plaintiffs' antitrust claim, the district court determined that § 59-829 required it to accept the construction of the federal courts in federal antitrust actions in determining who has standing to bring an action under the Act. The district court concluded that the issue of standing was controlled by *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), which held that under federal law, indirect purchasers are not entitled to sue for damages for a violation of the Sherman Act, 15 U.S.C. § 1 et seq. (2000).

In *Illinois Brick Co.*, the State of Illinois brought suit against concrete block manufacturers, alleging a violation of the Clayton Act. Pursuant to § 4 of the Clayton Act, codified at 15 U.S.C. § 12 et seq. (2000), any person injured by reason of anything forbidden in the antitrust laws may bring suit to recover damages sustained by him. The U.S. Supreme Court held that the state was an indirect purchaser because it did not buy concrete blocks directly from the manufacturers. The Court explained that the "direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' " within the meaning of § 4 of the Clayton Act. See *Illinois Brick Co.*, 431 U.S. at 729. Therefore, the Court concluded that federal antitrust law barred claims by indirect purchasers.

In *Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990), the Court reaffirmed *Illinois Brick Co.* by holding that indirect purchasers were barred from

bringing suit even though the direct purchasers (natural gas utilities) were required by law to pass on the entire amount of an overcharge to the consumers.

In the case at bar, the plaintiffs claim that indirect purchasers have standing to sue under the Act because its language is different from federal law. They argue that when considering the Act in its entirety, certain sections have no counterpart in federal law and that, therefore, this court is not required to follow the construction given to the Sherman Act by the federal courts in deciding whether to permit recovery by indirect purchasers.

The plaintiffs point out that § 59-1601(2) has no counterpart in federal antitrust law. Section 59-1601(2) defines trade and commerce as "the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska." Commerce is defined by federal law as "trade or commerce among the several States and with foreign nations." See 15 U.S.C. § 12. The plaintiffs claim that § 59-1601(2) differentiates the Act from federal antitrust law, and they contend that the plain language of the Act provides a cause of action for the benefit of any person who is damaged as a result of prohibited activity under the Act. They assert that they were damaged as a result of Microsoft's activity and therefore have standing to bring suit under the Act.

Microsoft argues that in construing the Act, the courts of Nebraska are required to follow federal court interpretations of similar provisions of federal antitrust law. It claims that § 59-1604, which is relied upon by the plaintiffs, is based upon § 2 of the Sherman Act, 15 U.S.C. § 2. Microsoft asserts that because the Act mirrors federal law and is the state version of the Sherman Act, see *Raad v. Wal-Mart Stores, Inc.*, 13 F. Supp. 2d 1003 (D. Neb. 1998), and *State ex rel. Douglas v. Associated Grocers*, 214 Neb. 79, 332 N.W.2d 690 (1983), § 59-829 requires that the construction given to federal law by federal courts be applied to the Act. Microsoft also claims that § 59-1609 is similar to 15 U.S.C. § 15.

Microsoft argues that the phrase "[t]rade and commerce," as it is defined in § 59-1601(2), does not provide standing to indirect purchasers because the terms "trade" and "commerce" do not appear in § 59-1609, which regulates who is injured and who may sue under the Act. Microsoft asserts that the terms

"trade" and "commerce" appear in the sections that address the substantive conduct governed by the Act, i.e., monopolization, and that, therefore, the terms define business conduct that is regulated but do not define who can sue. Microsoft claims that § 59-1601(2) uses the phrase "directly or indirectly" to define the scope of the Act's jurisdiction but does not define the class of persons entitled to bring an action under the Act. See, *Arnold v. Microsoft Corp.*, No. 2000-CA-002144-MR, 2001 WL 1835377 (Ky. App. Nov. 21, 2001); *Blewett v. Abbott Lab.*, 86 Wash. App. 782, 938 P.2d 842 (1997). Microsoft points out that courts in Washington and Kentucky have rejected plaintiffs' arguments regarding antitrust statutes which contain identical language defining the terms " 'trade' " and " 'commerce.' " See *Arnold*, 2001 WL 1835377 at *4.

[3] The issue presented is whether an indirect purchaser may bring a civil action under the Act. In our examination of this question, we are guided by several legal principles. When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002).

[4,5] In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Id.* It is a canon of statutory construction that " 'the primary source of insight into the intent of

the Legislature is the language of the statute.' " See *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 436 Mass. 53, 60, 762 N.E.2d 303, 310 (2002), quoting *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 443 N.E.2d 1308 (1983).

We believe that if this court were to construe the provisions of the Act such that only direct purchasers are injured parties, then the purpose of the Act would be defeated. Section 59-829 does not require us to hold that indirect purchasers have no standing under the Act if to do so would not support the Act's purpose. In construing the Act, we must look to the objective to be accomplished, the problem to be remedied, or the purpose to be served, and then give the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.

Section 59-1609 provides that any person injured by a violation may sue for damages. The clear purpose of the Act is to provide consumer protection against the monopolization of trade or commerce. In this action, it is alleged that over 4,000 consumers have been injured. The Act describes a very broad category of persons who are permitted to maintain an action for damages resulting from monopolistic conduct in trade or commerce. Therefore, we conclude that § 59-1609, as it relates to a cause of action for any person injured in violation of § 59-1604, contemplates an action by indirect purchasers.

In *California v. ARC America Corp.*, 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989), the Court held that state indirect purchaser laws were not preempted by federal law, notwithstanding the federal rule limiting federal antitrust recoveries to direct purchasers. The Court noted that *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), had construed federal antitrust law but did not hold that state law was preempted by federal antitrust law. The Court found no language in *Illinois Brick Co.* to suggest that it would be contrary to Congressional purpose for states to allow indirect purchasers to recover under their own state antitrust laws. State indirect purchaser laws did not interfere with accomplishing the federal law purposes identified in *Illinois Brick Co.*

We first considered the scope of the Act in *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000), in which an automobile buyer brought an action against a private seller, a corporation, and the corporation's president for fraudulent representation, fraudulent concealment, and violation of the Act. We addressed the standing of a private person to bring an action and whether the trial court correctly applied the Act to a private transaction between the parties.

In construing the Act, we recognized that § 59-1609 created a private right of action to persons injured by certain provisions of the Act, including violations of § 59-1602. We read the definition of the phrase "[t]rade and commerce" in § 59-1601(2) as limiting the disputes that fall within the ambit of § 59-1602 to unfair or deceptive acts or practices that affect the public interest.

We held that to be actionable under the Act, the unfair or deceptive act or practice must have an impact upon the public interest and that the Act is not available to redress a private wrong where the public interest is unaffected. We refused to apply the Act to isolated transactions between individuals that did not have an impact on consumers at large. In *Nelson*, the transfer of the automobile affected no one other than the parties to the transaction, and therefore, it had not been shown that there was a sufficient impact directly or indirectly on the public to qualify the transaction as an act or practice which was prohibited under § 59-1602.

The Supreme Court of Iowa addressed similar issues in *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002). In *Comes*, a group of computer consumers brought a class action against Microsoft, alleging a violation of the Iowa Competition Law. The trial court, relying on *Illinois Brick Co., supra*, granted Microsoft's motion to dismiss. It concluded that the indirect purchaser rule set forth in *Illinois Brick Co.* applied to the Iowa Competition Law. The trial court noted a similarity between the federal and state statutes and the statutory directive to harmonize state and federal laws. It concluded that the indirect purchasers had no standing to bring the action.

On appeal, the only issue was whether *Illinois Brick Co.* should be followed in interpreting the Iowa Competition Law. The plaintiffs argued that *Illinois Brick Co.* should not be applied

because Iowa law did not limit the class of plaintiffs who could bring a state antitrust suit. Microsoft argued that harmonization with federal law was required and that, therefore, only direct purchasers could recover damages for antitrust violations.

The court held that the Iowa Competition Law authorized a broad category of persons who could maintain a suit in state court for damages due to anticompetitive conduct. "[A] person who is injured . . . by conduct prohibited [by the Iowa Competition Law] may bring suit." Iowa Code Ann. § 553.12 (West 1997). Relying upon *California v. ARC America Corp.*, 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989), the Iowa court stated that neither the Sherman Act nor *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), prevented states from allowing indirect purchasers to bring antitrust actions even if this resulted in multiple recoveries. Therefore, the court found that states were authorized to provide a cause of action for indirect purchasers based on state antitrust laws.

The Iowa Supreme Court stated that the legislature did not specifically limit standing to direct purchasers, but, instead, authorized "'[a] person who is injured' to sue." *Comes*, 646 N.W.2d at 445. The court did not consider the legislative failure to explicitly authorize an indirect purchaser to maintain a suit for antitrust violations as an expression of its agreement with *Illinois Brick Co.* The court concluded that the Iowa Competition Law created a cause of action for all consumers regardless of their status as a direct or indirect purchaser.

Having so concluded, the court proceeded to address Microsoft's argument that indirect purchasers did not have standing as a result of the harmonization statute, which provided:

> "This chapter shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices."

(Emphasis omitted.) *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 446 (Iowa 2002). The court concluded that the harmonization

statute did not require Iowa courts to interpret the Iowa Competition Law in the same manner that federal courts have interpreted federal law.

The Iowa Supreme Court stated that given there was no federal preemption on this issue, it was required to construe the Iowa Competition Law in a manner to encourage the primary goal of the antitrust law, citing *Neyens v. Roth*, 326 N.W.2d 294 (Iowa 1982) (antitrust laws are remedial and should be broadly construed to effect their purposes). The court explained:

> The purpose behind both state and federal antitrust law is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct and what is not acceptable conduct. To achieve this uniformity or predictability, we are not required to define who may sue in our state courts in the same way federal courts have defined who may maintain an action in federal court. Rather, our guiding principle in interpreting the Iowa Competition Law is to do so in such way as to prohibit "restraints of economic activity and monopolistic conduct." Harmonizing our construction and interpretation of state law as to what conduct is governed by the law satisfies the harmonization provision.

Comes, 646 N.W.2d at 446. The court concluded that contrary to Microsoft's assertion, the harmonization provision of Iowa law was not aimed at defining who can sue under state antitrust law, but was designed to achieve uniform application of the state and federal laws prohibiting monopolistic practices.

[6] We find the Iowa court's reasoning instructive, and we adopt its rationale. In attempting to facilitate the consistent application of antitrust laws in state and federal courts, the Legislature has required state courts to harmonize their interpretation of state law with the interpretation of similar federal law by federal courts. The purpose of the Act is to provide consumers with protection against unlawful practices in the conduct of any trade or commerce which directly or indirectly affects the people of Nebraska. See *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000).

[7] The Act was intended to be an antitrust measure to protect Nebraska consumers from monopolies and price-fixing conspiracies. *Id.* The limitation that the Legislature placed on the Act

was that it could not be used to address a private wrong where the public interest was unaffected. See *id.*

Giving the language of the Act its plain and ordinary meaning while construing its provisions in pari materia to determine the intent of the Legislature, we conclude that the Act allows any person who is injured by a violation of §§ 59-1602 to 59-1606 which directly or indirectly affects the people of Nebraska to bring a civil action to recover damages.

We interpret the provisions of § 59-829 in a manner similar to the reasoning of the court in *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002). We do not interpret § 59-829 as a delegation of state authority to the federal government, but, rather, as having the purpose to achieve uniform application of the state and federal laws regarding monopolistic practices. The goal is to establish a uniform standard of conduct so that businesses will know what conduct is permitted and to protect the consumer from illegal conduct.

The plaintiffs alleged that Microsoft had at least 95 percent of the market share for operating systems for Intel-based personal computers. Direct purchasers that pass on overcharges may not need or seek the protection of the Act. Direct purchasers may not be inclined to jeopardize their major source of supply of the operating systems contained within the personal computers they manufacture and distribute. To deny the indirect purchaser, who in this case is the ultimate purchaser, the right to seek relief from unlawful conduct would essentially remove the word "consumer" from the Consumer Protection Act.

It is important to achieve and maintain a consistency in defining the types of business activity that are to be prohibited as unlawful. Harmonizing state law with federal law and its interpretation by federal courts will achieve uniformity and predictability as to the practices that are prohibited. As the Iowa Supreme Court succinctly stated: "Harmonizing our construction and interpretation of state law as to what conduct is governed by the law satisfies the harmonization provision." *Comes*, 646 N.W.2d at 446.

Section 59-1609 provides both a private right of action and a public right. We find no limitation on who may sue for violations of §§ 59-1602 to 59-1606 except that such violations must

directly or indirectly affect the people of Nebraska. *Nelson, supra*, requires us to determine whether the alleged unfair activities of Microsoft affect the people of Nebraska.

The plaintiffs alleged that membership of the class affected by Microsoft's activities is in excess of 4,000, the exact number being known to Microsoft. In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader. *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002). We conclude that the plaintiffs have set forth sufficient facts in their amended petition to show that the public interest is affected. Under the facts alleged, the practices of Microsoft affect the people of the State of Nebraska. Thus, the district court erred in sustaining Microsoft's demurrer as to the plaintiffs' antitrust claim under the Act.

NEB. U.C.C. § 2-302

We next address the plaintiffs' claim pursuant to § 2-302. The plaintiffs alleged that as end-user licensees of Microsoft and its Windows 98 operating system, they incurred a monopoly price charged by Microsoft. They claimed that the price versus cost disparity associated with their purchase and use of Windows 98 renders the contract between Microsoft and the plaintiffs unconscionable under § 2-302. The plaintiffs sought damages in the amount of the difference between a competitive price and the monopoly price that they incurred as end-user licensees/purchasers of Windows 98, as well as costs, attorney fees, and other relief.

The operative portion of § 2-302 provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Microsoft correctly points out that § 2-302 does not provide for money damages. The doctrine of unconscionability set forth in

§ 2-302 is not a basis for the award of money damages. As certain courts have noted, this provision of the Uniform Commercial Code was not intended to create a cause of action and cannot be used as a basis for damages. See, *Cowin Equipment Co., Inc. v. General Motors Corp.*, 734 F.2d 1581 (11th Cir. 1984); *Dean Witter Reynolds v. Superior Court*, 211 Cal. App. 3d 758, 259 Cal. Rptr. 789 (1989) (unconscionability provision does not create affirmative cause of action, but only defense); *Best v. U.S. National Bank*, 78 Or. App. 1, 714 P.2d 1049 (1986) (no authority that doctrine of unconscionability is basis for restitutionary relief).

The plaintiffs' claim for damages under § 2-302 is without merit. Thus, the district court properly dismissed their cause of action with regard to a claim pursuant to § 2-302.

CONCLUSION

The district court erred in its interpretation of the Act. Section 59-1609 permits indirect purchasers to bring a civil action under the terms of the Act. For the reasons set forth in this opinion on rehearing, the judgment of the district court is affirmed in part and in part reversed, and the cause is remanded for further proceedings. The memorandum opinion filed June 25, 2003, is withdrawn.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MILLER-LERMAN, J., not participating.

STEPHAN, J., dissenting in part.

While I agree with the majority that the appellants' claim under Neb. U.C.C. § 2-302 (Reissue 2001) is without merit, I respectfully dissent with respect to its conclusion that the district court erred in dismissing the appellants' claim under Nebraska's Consumer Protection Act (Act), Neb. Rev. Stat. § 59-1601 et seq. (Reissue 1998 & Cum. Supp. 2000). In my view, the provisions of the Act which define who may bring a private civil action for damages were, at all relevant times, substantially similar to corresponding language in § 4 of the Clayton Act, see 15 U.S.C. § 15(a) (2000), and the district court was therefore correct in concluding that it was obligated under Neb. Rev. Stat. § 59-829 (Reissue 1998) to follow *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), in construing the Nebraska statute.

Section 59-829 requires that when any language in the Act is "the same as or similar to the language of a federal antitrust law," Nebraska courts in construing the Act "shall follow the construction given to the federal law by the federal courts." It is difficult to imagine how the Legislature could have been more clear in articulating its intent that provisions of the Act which were modeled after federal antitrust law must be construed in the same manner that the U.S. Supreme Court construes the corresponding federal statutes. In carrying out this directive, it is imperative that we clearly identify the state and federal statutes which are counterparts of each other so that we do not commit the error of comparing state apples to federal oranges.

The appellants' claim is based upon an alleged violation of the substantive provision of § 59-1604, which states: "It shall be unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce." The corresponding substantive provision of federal antitrust law is § 2 of the Sherman Act, which provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (2000). While the federal statute applies to monopolization of "trade or commerce among the several States," i.e., interstate commerce, the corresponding Nebraska statute uses only the phrase "[t]rade and commerce," which is defined elsewhere in the Act as "the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska." § 59-1601(2). In *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 684, 605 N.W.2d 136, 142 (2000), we held that this definitional language limited the scope of the Act to acts or practices which have "an impact upon the public interest," and concluded that the Act is not available "to redress a private wrong where the public interest is unaffected."

Thus, while it must be shown that challenged conduct affects interstate commerce in order to be actionable under the federal antitrust laws, it is only necessary to show that such conduct affects the public interest in order to fall within the scope of the Act. But that is not the issue before us. Assuming arguendo that

the conduct at issue in this case is proscribed by the Act, the question presented here is whether the appellants, as indirect purchasers, are authorized by law to bring a civil action for damages resulting from such conduct. The Act, as it was written when this suit was commenced, authorized "[a]ny person who is injured in his business or property" by a violation of the substantive provisions of the Act to bring an action for injunctive relief and damages. § 59-1609. The corresponding provision of federal antitrust law is § 4 of the Clayton Act, which permits "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to bring a civil action for treble damages. 15 U.S.C. § 15(a). The U.S. Supreme Court construed this federal statutory provision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). In that case, the Court reaffirmed its holding in *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968), that a defendant in an antitrust suit could not assert as a defense that the plaintiff suffered no injury in its business as required by § 4 of the Clayton Act because it had passed on the claimed illegal overcharge to its customers. Specifically, the Court in *Illinois Brick Co.* declined "to construe § 4 [of the Clayton Act] to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers." *Illinois Brick Co.*, 431 U.S. at 735.

Under both § 4 of the Clayton Act and § 59-1609 as it was written when this action was commenced, a private civil action may be maintained by one whose "business or property" is injured by the claimed substantive law violation. Because of the similar language employed by each statute in defining who may be a plaintiff, it is my view that § 59-829 requires this court to construe § 59-1609 in the same manner that the U.S. Supreme Court construed § 4 of the Clayton Act in *Illinois Brick Co.* to exclude indirect purchasers from the class of potential plaintiffs. This is purely a matter of statutory construction.

As the majority notes, the U.S. Supreme Court has specifically held that states are free to enact legislation permitting indirect purchasers to bring civil antitrust actions under state law. *California v. ARC America Corp.*, 490 U.S. 93, 109 S. Ct. 1661,

104 L. Ed. 2d 86 (1989). Indeed, the Nebraska Legislature did precisely that in 2002 when it amended § 59-1609 to permit a person injured in his or her business or property to sue "whether such injured person dealt directly or indirectly with the defendant." 2002 Neb. Laws, L.B. 1278 (effective July 20, 2002). While that is the law in Nebraska now, it was not the law when this action was commenced on February 28, 2001, or when the district court dismissed the action in November 2001. If, in a subsequent amendment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law. *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003); *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002). In my view, the majority ignores both this principle and the harmonization provision of § 59-829 by concluding that § 59-1609 authorized suit by an indirect purchaser before the Legislature amended the statute to specifically create that right.

Nor am I persuaded that the decision of the Iowa Supreme Court in *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002), relieves this court of its responsibility to interpret the Act in accordance with the specific rule of construction prescribed by our Legislature in § 59-829. The Iowa case is distinguishable on at least two grounds. First, it interpreted language in the Iowa Competition Law authorizing a private civil action by a " 'person who is injured . . . by conduct prohibited under this chapter.' " *Comes*, 646 N.W.2d at 443. This language is different from the language of § 59-1604 and § 4 of the Clayton Act as construed in *Illinois Brick Co.*, which authorizes a civil suit by a "person injured in his business or property" as a result of claimed unlawful conduct. Second, the harmonization provision in the Iowa Competition Law differs from § 59-829 in that it directs Iowa courts to construe its statute " 'to complement and be harmonized with the applied laws of the United States' " having a similar purpose in order to achieve " 'uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices.' " (Emphasis omitted.) *Comes*, 646 N.W.2d at 446, citing and quoting Iowa Code Ann. § 553.2 (West 1997). Against this statutory background, the Iowa Supreme

Court defined the issue as whether it "should interpret Iowa antitrust law in the same way the United States Supreme Court has interpreted federal antitrust law" and resolved the issue by concluding that Iowa courts were not required "to interpret the Iowa Competition Law the same way federal courts have interpreted federal law." *Comes*, 646 N.W.2d at 445-46. I conclude that the opposite result is compelled by the language of § 59-829 requiring that Nebraska courts, in construing provisions of our Act using language similar to that of the federal antitrust laws, "shall follow the construction given to the federal law by the federal courts."

For these reasons, on rehearing, I would affirm the judgment of the district court.

HENDRY, C.J., and GERRARD, J., join in this dissent.

KATRINA LOUISE MATHEWS, APPELLEE AND CROSS-APPELLEE, V. MARK WINSLOW MATHEWS, APPELLEE AND CROSS-APPELLANT, AND DOUGLAS COUNTY, NEBRASKA, APPELLANT.

676 N.W.2d 42

Filed March 19, 2004. No. S-02-851.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Divorce: Child Custody: Appeal and Error.** In an original divorce action, determinations as to custody in dissolution proceedings are reviewed de novo on the record, but such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion.
3. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
4. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
5. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
6. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.

7. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
8. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
9. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
10. **Right to Counsel: Minors: Words and Phrases.** Under Neb. Rev. Stat. § 42-358(1) (Cum. Supp. 2002), a person is indigent if he or she is unable to pay the guardian ad litem or attorney fees without prejudicing, in a meaningful way, his or her financial ability to provide the necessities of life, such as food, clothing, shelter, medical care, et cetera, for himself or herself or his or her legal dependents.
11. **Right to Counsel: Appeal and Error.** A finding of indigency under Neb. Rev. Stat. § 42-358(1) (Cum. Supp. 2002) is a matter within the initial discretion of the trial court, and such a finding will not be set aside on appeal in the absence of an abuse of discretion by the trial court.
12. **Attorneys at Law: Conflict of Interest: Appeal and Error.** An appellate action is an inadequate means of presenting attorney conflicts of interest for review.
13. **Attorneys at Law: Mandamus: Appeal and Error.** When an appeal from an order denying disqualification of an attorney involves issues collateral to the basic controversy and when an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, the party should seek mandamus.
14. **Judges: 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. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give great weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
16. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
17. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
18. **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.
19. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 1998), 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.

20. ____. Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed in part, and in part vacated and remanded.

James S. Jansen, Douglas County Attorney, and Bernard J. Monbouquette for appellant.

David B. Latenser, of Latenser & Johnson, P.C., for appellee Mark Winslow Mathews.

Annette Farnan of Nebraska Legal Services, Omaha, and David M. McManaman, of Nebraska Legal Services, Lincoln, for appellee Katrina Louise Mathews.

Thomas K. Harmon, of Respeliers & Harmon, P.C., for Lynnette Z. Boyle, guardian ad litem.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

I. NATURE OF CASE

In June 2002, the marriage between Katrina Louise Mathews and Mark Winslow Mathews was dissolved. Issues regarding various aspects of the divorce decree are raised in this appeal, including the trial court's determinations in regard to child custody, child support, and the division of the marital debts. In addition, we must determine whether Katrina and Mark were properly found to be indigent under Neb. Rev. Stat. § 42-358(1) (Cum. Supp. 2002), thereby making Douglas County responsible for the guardian ad litem fees.

II. BACKGROUND

On January 2, 1988, Katrina and Mark were married in Dallas, Texas. In the following years, four children were born to the marriage. The parties separated in December 1999.

On January 20, 2000, Katrina filed a petition for legal separation. On January 28, the parties entered into an agreement which provided for, inter alia, temporary custody, visitation, and child support. On February 18, the court granted Katrina's oral motion for the appointment of a guardian ad litem (GAL).

Trial began on the separation action on December 14, 2000. At the end of the day, the matter was recessed until February 26, 2001. Before the trial recommenced, on February 9, Katrina filed a second amended petition requesting, inter alia, dissolution of the marriage, custody of the children, and child support. Mark filed his answer and cross-petition on June 18. In his cross-petition, Mark requested, inter alia, custody of the children and child support.

On September 28, 2001, Mark filed a motion to require the GAL to withdraw. Essentially, Mark argued that the GAL was biased in favor of Katrina. On October 10, the court appointed counsel for the GAL. A hearing was held on the motion on November 8, and the court overruled Mark's motion at the end of the hearing.

The trial on the dissolution action began on January 22, 2002. On June 11, the court entered its decree. The court determined that the marriage was irretrievably broken and should be dissolved. In addition, the court determined that it was in the best interests of the four minor children to be in the custody of Katrina, subject to reasonable visitation with Mark. The court ordered Mark to pay child support in the amount of $1,142.56 per month. The court also divided the marital property and ordered each party to pay his or her own attorney fees and costs.

Thereafter, Mark moved for a new trial, asserting certain errors of law set forth below in the assignments of error. The court, after notice was given to Douglas County, received evidence and heard arguments on the GAL's application for fees and Mark's motion for a new trial. In its July 26, 2002, order, the court found that both parties were indigent and ordered Douglas County to pay the GAL fees. In addition, the court overruled Mark's motion for a new trial.

Douglas County filed a timely notice of appeal with respect to the district court's indigency determination, and Mark cross-appealed from the court's order overruling his motion for new trial regarding issues related to the divorce decree.

III. ASSIGNMENTS OF ERROR

Douglas County assigns, restated, that the trial court erred (1) in finding Katrina and Mark to be indigent for purposes of § 42-358 and (2) in ordering Douglas County to pay the GAL fees.

In his cross-appeal, Mark assigns, renumbered and restated, that the trial court erred (1) in failing to order Katrina's counsel, Nebraska Legal Services, to withdraw; (2) in failing to disqualify the GAL; (3) in awarding custody of the children to Katrina; (4) in its calculation of child support; (5) in its division of the marital debt; (6) in finding Katrina indigent for purposes of payment of her share of the GAL fees; and (7) in failing to award attorney fees to Mark.

IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn., ante* p. 158, 673 N.W.2d 15 (2004).

[2] In an original divorce action, determinations as to custody in dissolution proceedings are reviewed de novo on the record, but such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998).

[3] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Claborn v. Claborn, ante* p. 201, 673 N.W.2d 533 (2004).

[4] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003).

[5] In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002).

[6] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

V. ANALYSIS

1. Douglas County's Appeal: Indigency Determination

On February 18, 2000, a GAL, who is a practicing lawyer, was appointed to conduct an investigation to protect the interests of the parties' four children. The GAL did conduct an investigation and filed a written report with the court. On June 4, 2002, the GAL filed an application for payment of fees. After a hearing, the court determined that the GAL charges were fair and reasonable and that the GAL was entitled to fees totaling $3,089. In addition, the court determined that Katrina and Mark were indigent and ordered Douglas County to pay the GAL fees. On appeal, Douglas County argues that Katrina and Mark are not indigent for purposes of § 42-358.

Section 42-358(1) provides:

> The court may appoint an attorney to protect the interests of any minor children of the parties. Such attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify on matters pertinent to the welfare of the children. The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered. *If the court finds that the party responsible is indigent, the court may order the county to pay costs.*

(Emphasis supplied.)

As an initial matter, we note that although the GAL appointed in this case is an attorney, she was appointed as a GAL in the traditional sense of conducting an investigation and reporting to the court, rather than as the court-appointed legal advocate of the children. See *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998) (noting difference between GAL appointed under court's inherent equitable powers and attorney appointed as advocate for minor child). Therefore, we must decide if a GAL appointed by the court under these circumstances can be awarded his or her fees under § 42-358(1).

In 1992, § 42-358(1) was amended to add the last two sentences of the current version of the statute in order to provide courts with statutory authority to award fees to court-appointed attorneys in domestic relations cases. However, it was certainly understood at the time that both attorneys and GAL's were appointed pursuant to the authority of § 42-358(1), even though the section only references an "attorney." See, *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990) (noting § 42-358 provides authority to appoint GAL to protect interests of minor children); *Nye v. Nye*, 213 Neb. 364, 329 N.W.2d 346 (1983) (same); *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974) (noting § 42-358 provides authority to appoint attorney to protect interests of minor children); *Pieck v. Pieck*, 190 Neb. 419, 209 N.W.2d 191 (1973) (same). Moreover, prior to 1992, the practice of awarding fees to both court-appointed GAL's and court-appointed attorneys was well established in domestic relations cases. See, *Nye, supra* (awarding fees to GAL); *Hermance v. Hermance*, 194 Neb. 720, 235 N.W.2d 231 (1975) (awarding fees to counsel appointed to represent minor children). It is, therefore, reasonable to conclude that the 1992 amendment to § 42-358(1) was intended to codify what was, in fact, occurring in practice at that time. In other words, by amending § 42-358(1), the Legislature granted courts statutory authority to award fees to court-appointed counsel, whether the attorney acted as a GAL or as a legal advocate for the minor children in a case.

A review of the legislative history relating to the amendment to § 42-358(1) supports this conclusion. The introducer of the amendment stated that the purpose of the amendment was to codify existing practice while making it clear to reluctant judges that they indeed had the authority to tax the fees of appointees as costs. Floor Debate, L.B. 1255, 92d Leg., 2d Sess. 13159 (Apr. 9, 1992). Moreover, in the statement of intent, and throughout the committee testimony and floor debate, the introducer used the terms "attorneys" and "GAL's" interchangeably when discussing the amendment to § 42-358(1). Statement of Intent, Judiciary Committee, 92d Leg., 2d Sess. (Feb. 13, 1992); Judiciary Committee Hearing, 92d Leg., 2d Sess. (Feb. 21, 1992); Floor Debate, 92d Leg., 2d Sess. 13159-60 (Apr. 9, 1992). The introducer was obviously cognizant of the then

understood interpretation of § 42-358(1), i.e., that it provided authority for courts to appoint attorneys to act as either a GAL or a legal advocate for children in domestic relations cases. The amendment to § 42-358(1) was offered to clarify the power of a court to fix fees in those circumstances.

In sum, our decision in *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998), did not address the question presented here; while the distinction announced in *Betz* properly denotes the duties and obligations of an appointee, it is not relevant for purposes of determining an appointee's entitlement to fees for services rendered. Whether an attorney is appointed as a GAL or as a legal advocate for the children under § 42-358(1), he or she is entitled to collect a reasonable fee under the provisions of § 42-358(1).

The issue in the present case arises, however, because the trial court found both parties to be indigent under § 42-358(1) and ordered Douglas County to pay the GAL fees. Because the statute does not provide the definition of indigency, we must determine when a party is "indigent" for purposes of § 42-358(1). To do so, we turn to the familiar rules of statutory interpretation.

[7] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn., ante* p. 158, 673 N.W.2d 15 (2004). Relevant here, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*

[8,9] Moreover, a court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Brown v. Harbor Fin. Mortgage Corp., ante* p. 218, 673 N.W.2d 35 (2004). In other words, in construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

Although the term "indigent" is not defined in § 42-358(1), we conclude that it is unambiguous. Therefore, we give the word its plain and ordinary meaning. *Unisys Corp., supra.* Indigent is defined as "[l]acking the means of subsistence; impoverished; needy." The American Heritage Dictionary of the English Language 670 (1969). Similarly, in 7 The Oxford English Dictionary 868 (2d ed. 1989), the following definition of indigent is provided: "Lacking the necessaries of life; in needy circumstances; characterized by poverty; poor, needy."

Other courts that have examined the word indigent in the civil context have come to a similar definition. See, *Savoy v. Savoy*, 433 Pa. Super. 549, 555, 641 A.2d 596, 599-600 (1994), quoting *Verna v. Verna*, 288 Pa. Super. 511, 432 A.2d 630 (1981) ("'[i]ndigent persons are those who do not have sufficient means to pay for their own care and maintenance'"); *Destitute v. Putman Hospital*, 125 Vt. 289, 294, 215 A.2d 134, 138 (1965) ("[i]ndigent, in a general sense, ordinarily indicates one who lacks property or means of a comfortable subsistence, and for that reason is needy or in want"). Further, we note that although the text of § 42-358(1) makes it clear that its underlying purpose is to protect the best interests of minor children through the appointment of attorneys, its secondary purpose is to provide a statutory payment mechanism through which GAL's and attorneys can be appropriately compensated for their work. Statement of Intent, L.B. 1255, Judiciary Committee, 92d Leg., 2d Sess. (Feb. 13, 1992).

[10] With the foregoing in mind, we hold that, for purposes of § 42-358(1), a person is indigent if he or she is unable to pay the GAL or attorney fees without prejudicing, in a meaningful way, his or her financial ability to provide the necessities of life, such as food, clothing, shelter, and medical care for himself or herself or his or her legal dependents. See, e.g., *Jordan v. Jordan*, 983 P.2d 1258, 1263 (Alaska 1999), quoting Alaska Stat. § 18.85.170(4) (Lexis 2002) (indigent person is "'a person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter'"); *In re Marriage of Kopp*, 320 N.W.2d 660, 662 (Iowa App. 1982) (indigent "is a person who would be

unable to employ counsel without prejudicing his financial ability to provide economic necessities for himself or his family"). Cf. Neb. Rev. Stat. §§ 29-3901(3) (Reissue 1995) and 83-1008 (Cum. Supp. 2002).

[11] We determine that, as in a criminal case, a finding of indigency under § 42-358(1) is a matter within the initial discretion of the trial court, and such a finding will not be set aside on appeal in the absence of an abuse of discretion by the trial court. See *State v. Richter*, 225 Neb. 837, 408 N.W.2d 717 (1987). The present case is complicated, however, by the fact that neither the trial court nor the parties had the benefit of a working definition of indigency, in the context of a civil case, at the time of the GAL fees hearing. We recognize that the trial court found that Katrina and Mark were indigent when it ordered Douglas County to pay the GAL fees. However, at the fees hearing, Katrina testified that she earned a monthly income of $3,200 ($38,000 annually) and Mark presented evidence that his gross monthly income was $3,500 ($42,000 annually). Under ordinary circumstances, it would appear that both Katrina and Mark have adequate resources to pay the GAL fees without prejudicing, in a meaningful way, their financial ability to provide necessities of life for themselves and their children. Both parties, however, have argued that current obligations, including taxes, debts, and costs associated with health care, along with normal living expenses, have left them with too little disposable income to pay the GAL fees. The record is not adequate for meaningful appellate review on this matter, and in fairness to the parties and the trial court, the litigants were dealing with a standard that had not previously been defined by the Legislature or an appellate court. Therefore, under these circumstances, we cannot determine whether the trial court abused its discretion in its indigency finding, and we remand this matter to the district court for a new indigency determination under the standard set forth herein.

2. Mark's Cross-Appeal

(a) Motion to Disqualify Nebraska Legal Services

On April 12, 2000, Mark filed a motion to show cause why counsel for Katrina, Nebraska Legal Services (hereinafter NLS), should not be forced to withdraw. On May 1, Katrina filed a

motion requesting sanctions against counsel for Mark. Essentially, Katrina argued that Mark's motion to require NLS to withdraw was frivolous and without a rational basis in law. By journal entry, dated May 2, the trial court overruled both motions.

On appeal, Mark argues that the trial court abused its discretion in overruling his motion to require NLS to withdraw. Mark's argument is not entirely clear as to why the trial court's ruling constitutes an abuse of discretion. As best we can determine, Mark is asserting that NLS had a conflict of interest in representing Katrina and that therefore, the trial court was required to order NLS to withdraw. Specifically, Mark appears to argue that Katrina was not indigent and, knowing Katrina's true financial status, NLS conspired with Katrina to allege that Mark committed acts of domestic violence in an effort to provide Katrina with free legal services and to obtain fee recoupment from government sources.

[12,13] Even if we assume for argument's sake that Mark's factual allegations properly assert a conflict of interest, this assignment is not proper for our review. We have often stated that an appellate action is an inadequate means of presenting attorney conflicts of interest for review. *Centra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995), citing *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990). Therefore, we have held that when an appeal from an order denying disqualification of an attorney involves issues collateral to the basic controversy and when an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, the party should seek mandamus. See, *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002); *Centra, Inc., supra*.

Here, the disqualification issue is collateral to the basic dissolution controversy, and Mark did not seek a peremptory writ of mandamus to review the trial court's denial of his motion to disqualify NLS. We decline to address his claim now. See, *Trainum, supra*; *Centra, Inc., supra*.

(b) Motion to Disqualify GAL

Mark also filed a motion to disqualify the GAL. Essentially, Mark alleged that the GAL should be forced to withdraw because

she was biased in favor of Katrina. The trial court ordered that the GAL be appointed counsel. A hearing was held on the motion, and at the end of the hearing, the motion was overruled. Subsequently, during a hearing on Mark's motion to hold the GAL in contempt, Mark orally requested the court to order the GAL to withdraw. Both motions were overruled. On appeal, Mark argues the trial court erred in overruling his motions to disqualify the GAL.

We have yet to address the appropriate standard to review a trial court's decision to overrule a party's motion to disqualify a GAL. Upon due consideration, we determine that a motion to disqualify a GAL for bias or partiality is similar to a motion to recuse a judge for bias or partiality. Therefore, such a decision is initially entrusted to the discretion of the trial court and we will not disturb that decision absent an abuse of discretion. See *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002) (on appeal, denial of motion to recuse trial judge for bias or partiality will be affirmed absent abuse of discretion). See, also, *Wrightson v. Wrightson*, 266 Ga. 493, 467 S.E.2d 578 (1996) (trial court did not abuse its discretion by failing to disqualify GAL); *State in Interest of Orgill*, 636 P.2d 1075 (Utah 1981) (juvenile court did not abuse its discretion in denying appellant's motion to disqualify GAL).

On appeal, Mark points to certain factors as evidence of bias, including statements by various affiants that they felt the GAL was biased in favor of Katrina, and Mark's own assertion that the GAL ignored evidence presented by a variety of people that was favorable to him.

We have reviewed the relevant evidence and conclude that the trial court did not abuse its discretion in overruling Mark's motion to disqualify the GAL. First, the affidavits upon which Mark relies merely state the affiants' opinions that the GAL seemed to be biased toward Katrina and uninterested in what the affiants had to say. Because the affiants were Mark's sisters and friend, it hardly constitutes an abuse of discretion for the trial court to attach appropriate weight to their opinions of bias. Moreover, Mark's assertion that the GAL ignored evidence favorable to his case is just that—an assertion. There is no evidence that the GAL purposely ignored evidence favorable to Mark's case.

Mark also asserted that the GAL's failure to submit a report at the time established by the court and the GAL's failure to report Katrina's conviction for driving under the influence (DUI) to the court were also evidence of bias. But after reviewing the relevant evidence, we conclude that the trial court did not abuse its discretion in overruling Mark's motion to disqualify the GAL. The GAL learned of the DUI because of Katrina's self-reporting, and the GAL then independently investigated the circumstances, including where the children were at the time of the event, and requested a chemical dependency evaluation of Katrina. There is no evidence that the GAL's omission of the DUI was done for any nefarious purpose or the hiding of evidence that was available to both parties. Likewise, Mark has pointed to no evidence which supports his contention that the GAL report was submitted late to prejudice his case and Mark did not assign as error the trial court's decision to overrule his motion to quash the report. This entire assignment of error is without merit.

(c) Custody of Children

In its final decree, the trial court determined that Katrina was a fit and proper person to be awarded custody of the children and that it would be in the children's best interests to be in the care, custody, and control of Katrina. On appeal, Mark argues that the court abused its discretion in awarding custody of the children to Katrina.

[14,15] 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. *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998). Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give great weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

[16] When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Id.* See, also, Neb. Rev. Stat. § 42-364 (Reissue 1998); *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990); *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990). The record

demonstrates that Katrina and Mark are both fit parents. Therefore, the best interests of the minor children must determine this issue.

In determining a child's best interests in custody matters, courts may consider many factors, including:

> "[G]eneral 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."

Ritter v. Ritter, 234 Neb. 203, 211-12, 450 N.W.2d 204, 211 (1990), quoting *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988). See, also, § 42-364(2).

In our de novo review, we conclude that the evidence supports the trial court's finding that the best interests of the children would be served by awarding custody to Katrina. Like the trial court, we give substantial weight to the evidence set forth by an evaluating psychiatrist and the GAL in the instant case. While the GAL determined that both parties were fit parents, the GAL noted that Katrina was better able to nurture and care for the children. This evidence was based on interviews with each member of the family and observation of the children at their home. As to Mark, the GAL expressed concerns that Mark was controlling and obsessive and that his behavior, among other things, hindered an ongoing, productive relationship between the children and Katrina.

In addition, during the course of the separation and prior to trial, both Katrina and Mark were evaluated by the same psychiatrist. In order to respect the privacy of both individuals, we will set forth only a summary description of the psychiatric evaluations—even though we considered the details of the evaluations in our de novo

review. The psychiatrist determined that Katrina had no current psychiatric disorder and noted that Katrina has the capacity to have a warm, positive relationship with her children and to place appropriate expectations on the children. On the basis of information obtained by clinical interviews of Katrina and Mark, as well as review of historical records, the psychiatrist concluded that Mark engaged in psychologically controlling behaviors and harassment, even though those behaviors might have in part been due to an underlying mental health disorder that may respond positively to treatment. In performing his evaluation, however, the psychiatrist found that Mark had a positive interest in his children, even though he had a strong need to be in control. Regarding custody of the children, the psychiatrist opined that the children's best interests would be served by being placed with Katrina.

On appeal, Mark argues that his psychiatric evaluation contains conclusions based upon guess and speculation and does not state an opinion to a reasonable degree of medical certainty. Therefore, Mark argues, the evaluation should not have been relied on by the trial court in making its custody determination. Mark, however, failed to object to the substance and basis of the evaluation during the hearing in which it was offered and received in evidence. Instead, Mark objected to the evaluations on the sole ground that they were incomplete, i.e., they did not contain all of the information he had requested through discovery. By failing to properly object, Mark has waived his right to assert prejudicial error on appeal. See, Neb. Rev. Stat. § 27-103 (Reissue 1995); *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

Mark also argues that the findings and recommendations of the GAL should be discounted or ignored because the GAL was biased in favor of Katrina. We have already determined that Mark's allegations of bias are without merit.

In sum, given our de novo review of the record and taking into consideration the best interests of the children, we cannot say that the trial court abused its discretion by granting custody of the children to Katrina.

(d) Child Support Calculation

In its decree, the trial court ordered Mark to pay $1,142.56 per month in child support for the four children. In addition,

Mark was ordered to pay any and all unpaid child support stemming from the court's temporary order of March 10, 2000. On appeal, Mark makes a number of assertions as to why the trial court erred in its child support calculation.

First, Mark argues that the trial court erred by not retroactively reducing his child support obligations—stemming from the court's temporary order of March 10, 2000—to reflect the significant amount of time that he had physical custody of the children in the period between the March 10 order and the June 11, 2002, decree. In support of his argument, Mark relies upon the September 2002 amended version of paragraph J of the Nebraska Child Support Guidelines. Paragraph J states, in relevant part: "An adjustment in child support may be made at the discretion of the court when visitation or parenting time substantially exceeds alternating weekends and holidays and 28 days or more in any 90-day period."

However, the current version of paragraph J, stated above, came into effect after the June 11, 2002, decree. The guideline in effect at the time of both the temporary order and the decree stated: "An adjustment in child support may be made at the discretion of the court when visitation substantially exceeds alternating weekends and holidays and 4 weeks in the summer." In other words, under the applicable version of paragraph J, the amount of "parenting time" was not a factor the trial court could use in determining whether to make an adjustment in child support.

The applicable version of the guidelines permitted an adjustment only when the *visitation* schedule deviated from the typical noncustodial visitation. In his brief before this court, Mark admits that his "non-custodial visitation rights establish a standard non-custodial parent schedule." Brief for cross-appellant at 24. In sum, although Mark produced several graphs and charts which purportedly demonstrate that he cared for the children nearly half of the time during 2000 and 2001, the guidelines in effect at that time only referenced visitation time and left any adjustment in child support up to the discretion of the court. On appeal, we see no reason to disturb the trial court's order.

Second, Mark argues that the record shows that he had exercised visitation equivalent to joint custody of the children between the March 10, 2000, temporary order and the June 11,

2002, decree. Therefore, according to Mark, the trial court erred by using the sole custody worksheet instead of the joint custody worksheet to calculate child support.

[17] Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002). For purposes of establishing child support, whether Mark exercised visitation roughly equivalent to joint custody would be relevant only if he shared joint physical custody of the children with Katrina. See, *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001); *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). Here, Katrina was granted sole custody of the children in both the temporary order and the final decree, subject only to reasonable visitation by Mark. Because Katrina was granted sole custody of the children, it was proper for the trial court to use worksheet 1.

Third, Mark argues that the trial court erred by not fully completing the child support calculation worksheet. In its decree, the court based its order of child support on exhibit 26, Katrina's child support calculation. As Mark notes, the worksheet does not provide an estimate of Katrina's gross monthly income or the applicable deductions. The worksheet does, however, state Katrina's net monthly income and provides a calculation of child support therefrom. In addition, attached to the worksheet is a copy of federal income tax form 8453, which states Katrina's gross income in 2000. Exhibit 26, in its entirety, provides an adequate basis from which to perform a child support calculation.

We have also fully considered Mark's remaining complaints regarding the trial court's calculation of child support and find each of the complaints to be without merit.

(e) Division of Marital Debt

In its decree, the trial court determined that the marital debt of the parties, absent any indebtedness on vehicles, was $24,858. The court ordered each party to pay $12,429 of the debts. The court went on to give Katrina a credit of $7,250 for the amount of unpaid daycare that Mark owed to her. Similarly, the court gave Mark a credit of $9,968 for the amount of marital debt that he had paid prior to trial.

[18] Mark argues that the court erred by relying on Katrina's statement of the marital debt found in exhibit 25. According to Mark, exhibit 25 lacked foundation and should have been disregarded in favor of his testimony concerning the marital debt. Although Mark objected to Katrina's testimony which referenced exhibit 25, Mark failed to object to exhibit 25 when it was received in evidence, and his argument is without merit. Essentially, Mark is left to argue that the trial court should have credited his testimony instead of Katrina's statement of marital debt contained in exhibit 25. However, 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. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). We do so here and conclude that the trial court did not abuse its discretion by choosing to rely on Katrina's statement of marital debt rather than Mark's in dividing the marital debts.

[19] Mark also argues that the court erred by failing to account for $20,000 that he testified to borrowing from his family. Under Neb. Rev. Stat. § 42-365 (Reissue 1998), 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. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[20] Mark testified that he borrowed $20,000 from his family because he has been "financially devastated by this process." As evidence of his devastation, Mark points to exhibit 33 which cataloged his average monthly living expenses. Such evidence, however, does not establish that the loan was marital debt. Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties. Cf. *Tyma,* 263 Neb. at 877, 644 N.W.2d at 144 ("[t]he marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties"). While these proceedings have no doubt adversely affected Mark's financial circumstances, the

loan from his family was taken out after his separation with Katrina and is not properly recognized as marital debt.

(f) Attorney Fees

On appeal, Mark claims that the trial court erred in ordering him to pay his own attorney fees. In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). Mark argues that Katrina should be ordered to pay his attorney fees because Katrina's allegation of domestic violence was frivolous. In actuality, the trial court found that "while the actions of [Mark] might have been controlling in nature," the evidence did not support a finding that Katrina was subjected to "domestic violence" by Mark. This finding is not tantamount to a determination that a claim is frivolous, and the trial court did not abuse its discretion in ordering Mark to pay his own attorney fees under the circumstances.

VI. CONCLUSION

For the foregoing reasons, we conclude that Mark's assignments of error on cross-appeal are without merit, the district court did not abuse its discretion in overruling his motion for new trial, and the court's divorce decree is affirmed in all respects. We, however, vacate that portion of the July 26, 2002, judgment of the district court which ordered Douglas County to pay the GAL fees, and remand this cause to the district court for the limited purpose of (1) making a new indigency determination based on the standard announced herein and (2) entering an order regarding the payment of the GAL fees pursuant to § 42-358(1).

AFFIRMED IN PART, AND IN PART
VACATED AND REMANDED.

TIM KRAJICEK, APPELLANT, V. JOHN A. GALE, NEBRASKA SECRETARY OF STATE, APPELLEE. STATE OF NEBRASKA, APPELLEE, V. TIM KRAJICEK, APPELLANT.

677 N.W.2d 488

Filed March 19, 2004. Nos. S-02-1067, S-02-1070.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Quo Warranto: Equity: Appeal and Error.** Quo warranto is an action in equity and is triable on appeal de novo.
3. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
4. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
6. **Natural Resources Districts: Public Officers and Employees: Domicile.** In a natural resources district that has subdistricts, a director is required to reside in the subdistrict he or she has been elected to represent, and a director's office becomes vacant if he or she moves from or ceases to be a resident of the subdistrict from which he or she was elected.
7. **Domicile: Proof.** Domicile must be determined from all the circumstances taken together in a particular case, and in order to establish a domicile, two essential facts must be present: (1) residence, or bodily presence, in the locality and (2) an intention to remain there.
8. **Quo Warranto: Proof.** In a quo warranto action, the burden of proof in the first instance is on the defendant whose right to the office is challenged.

Appeals from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Appeal in No. S-02-1067 dismissed. Judgment in No. S-02-1070 affirmed.

Gregory A. Pivovar, on brief, for appellant.

Tim Krajicek, pro se.

Jon Bruning, Attorney General, and Dale A. Comer for appellee John A. Gale.

James S. Jansen, Douglas County Attorney, and Timothy K. Dolan for appellee State of Nebraska.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Tim Krajicek appeals the order of the district court for Douglas County in two cases which were consolidated for trial and for appeal. In case No. S-02-1067, the Nebraska Secretary of State, John A. Gale, sustained an objection and determined that Krajicek's name should not appear on the primary election ballot as a candidate for reelection to the board of directors of the Papio Missouri River Natural Resources District (the NRD) because Krajicek no longer resided in the subdistrict he sought to represent. Krajicek filed a petition for writ of error requesting the court to order Gale to include Krajicek's name as a candidate from subdistrict No. 8 on the May 14, 2002, primary election ballot. The district court denied Krajicek's petition for writ of error. In case No. S-02-1070, the district court upheld the State's quo warranto petition against Krajicek and ordered Krajicek removed from the NRD board because Krajicek had ceased to be a resident and domiciliary of subdistrict No. 8. We dismiss the appeal in the writ of error case brought by Krajicek, case No. S-02-1067, and affirm the district court's order in the quo warranto case brought by the State, case No. S-02-1070.

STATEMENT OF FACTS

In 1998, Krajicek was elected to represent subdistrict No. 8 on the board of directors of the NRD for a term of 4 years beginning January 7, 1999. At the time of his election, Krajicek lived at 4104 Madison Street in Omaha, Nebraska, which was located within subdistrict No. 8 of the NRD.

On January 30, 2002, the Douglas County Attorney on behalf of the State filed a quo warranto petition seeking an order that Krajicek be removed from office because he no longer resided within subdistrict No. 8. The substance of the quo warranto petition in State v. Krajicek, Douglas County District Court, docket 1012, page 150, has become case No. S-02-1070. The State alleged that on or about May 12, 2001, Krajicek changed his residence to 7819 South 45th Avenue, which address was located in Sarpy County and outside the boundaries of subdistrict No. 8.

The State alleged that Krajicek had vacated his office under Neb. Rev. Stat. § 32-560(5) (Reissue 1998) of the Election Act, which statute provides that an elective office shall be vacant when, inter alia, the incumbent ceases to be "a resident of the state, district, county, township, or precinct in which the duties of his or her office are to be exercised or for which he or she may have been elected." Elsewhere in the Election Act, Neb. Rev. Stat. § 32-116 (Reissue 1998) defines "residence," inter alia, as follows:

> (1) that place in which a person is actually domiciled, which is the residence of an individual or family, with which a person has a settled connection for the determination of his or her civil status or other legal purposes because it is actually or legally his or her permanent and principal home, and to which, whenever he or she is absent, he or she has the intention of returning, (2) the place where a person has his or her family domiciled even if he or she does business in another place . . . .

Following a set of correspondence between Gale and Krajicek in which Gale sought answers from Krajicek regarding his actual domicile, Krajicek received a letter from Gale stating that Krajicek's name would not appear on the May 14, 2002, primary election ballot as a candidate for reelection to represent subdistrict No. 8 on the NRD board. The letter stated that Krajicek's name would be omitted because he no longer resided in subdistrict No. 8. On March 20, Krajicek filed a petition for writ of error requesting an order that his name continue to be listed on the ballot for the primary election set for May 14, 2002. The substance of the petition for writ of error in Krajicek v. Gale, Douglas County District Court, docket 1013, page 592, has become case No. S-02-1067. In connection with his petition for writ of error, Krajicek also filed an application for an ex parte stay of Gale's decision to omit Krajicek's name or a temporary injunction enjoining Gale from removing Krajicek's name from the ballot. The court overruled Krajicek's application for an ex parte stay or temporary injunction on March 22. On May 6, the court overruled Krajicek's amended application for an ex parte stay or temporary injunction.

By agreement of the parties, the State's quo warranto petition against Krajicek and Krajicek's petition for writ of error against

Gale were consolidated for purposes of trial. A bench trial was held August 8, 2002. Krajicek's general contention at trial was that for purposes of these two lawsuits, he resided at 4505 Jefferson Street, which address was located within subdistrict No. 8 of the NRD. Although Krajicek admitted that he and his family had a residence at 7819 South 45th Avenue, he asserted that he also had a residence at 4505 Jefferson Street, which at the time, was occupied by his aunt and uncle. Krajicek presented evidence that he registered to vote, received mail, stored personal items, filed tax returns, and registered his vehicle at the 4505 Jefferson Street address. Krajicek also testified that he intended to purchase the residence at 4505 Jefferson Street from his aunt and uncle at some point in the future.

The State and Gale presented evidence that Krajicek and his family had moved their personal belongings and household furniture to the 7819 South 45th Avenue address. Krajicek also filed a change of address form with the U.S. Postal Service to have mail forwarded from 4104 Madison Street to 7819 South 45th Avenue. Krajicek and his wife owned the house at 7819 South 45th Avenue and jointly paid the expenses for the home, including property taxes, utilities, insurance, and maintenance. Krajicek slept, showered, ate breakfast, left for work, and returned to the 7819 South 45th Avenue address on a daily basis, and his children attended a school nearby. Krajicek's wife registered her car at the 7819 South 45th Avenue address, and she listed the address as her address on the couple's tax return. The State and Gale also presented evidence that the house at 4505 Jefferson Street was built and paid for by Krajicek's aunt and uncle. Krajicek's aunt and uncle also paid insurance, utilities, and related expenses on the house. Although Krajicek testified that he intended to move into the house at 4505 Jefferson Street following his aunt and uncle's occupancy, he did not know when that would be.

The district court entered its consolidated order as to both cases on September 4, 2002. The court determined that both Krajicek's residence and his domicile were at 7819 South 45th Avenue and that therefore Krajicek had vacated his office as a director of the NRD because he had ceased to be a resident of the subdistrict that he represented. The court determined that Gale's

decision to omit Krajicek's name from the primary election ballot was proper and that, thus, the quo warranto petition had merit. The court concluded that Krajicek no longer properly held the office of director of the NRD and ordered that he be "immediately ousted, excluded, and removed from said office." The court also denied Krajicek's petition for writ of error. Krajicek appeals the order as to both cases.

ASSIGNMENTS OF ERROR

In case No. S-02-1067, the writ of error action, Krajicek asserts that the district court erred in (1) interpreting the meaning of "residency" under the relevant statutes, (2) placing the burden on him to establish his residence in the subdistrict rather than placing the burden on Gale to establish Krajicek's residence outside the subdistrict, and (3) denying him due process by refusing to order that his name be placed on the ballot. Gale asserts that the appeal in case No. S-02-1067 is moot because the relief Krajicek sought was limited to having his name placed on the May 14, 2002, primary election ballot and such relief cannot now be provided. Gale further asserts that under Neb. Rev. Stat. § 32-624 (Reissue 1998), the Secretary of State's decision on an objection to an individual's candidacy is final unless a court reverses the decision on or before the 55th day preceding the election and that Krajicek failed to achieve such a reversal 55 days prior to the May 14, 2002, primary election. Gale asserts that the district court was without authority to afford Krajicek relief thereafter and that this court is without jurisdiction to consider the appeal.

In case No. S-02-1070, the quo warranto action, Krajicek asserts that the district court erred in finding that he resided and was domiciled outside subdistrict No. 8 because the court misinterpreted "residence" for purposes of the relevant statutes and improperly placed the burden of proof on him.

In case No. S-02-1070, Krajicek also makes an assignment of error to the effect that the district court for Douglas County erred in considering the action because certain of the activities occurred in Sarpy County, not in Douglas County. We understand this assignment of error to relate to the proper venue of the action. On the record before us, Krajicek did not challenge venue

at the trial level. A claim of improper venue is a matter that may be waived by failure to make a timely objection. *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002). In addition, Krajicek did not argue this assignment of error in his brief. Errors that are assigned but not argued and errors that are argued but not assigned will not be addressed by an appellate court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). Accordingly, we do not further consider this assignment of error.

STANDARDS OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Rath v. City of Sutton, ante* p. 265, 673 N.W.2d 869 (2004).

[2] Quo warranto is an action in equity and is triable on appeal de novo in this court. *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979).

ANALYSIS

Case No. S-02-1067: Writ of Error Action.

[3,4] In case No. S-02-1067, the sole relief sought by Krajicek was that his name be placed on the May 14, 2002, primary election ballot as a candidate for the NRD board of directors for subdistrict No. 8. Gale asserts that the case is moot because the May 14, 2002, primary date has passed. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Rath v. City of Sutton, supra*. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Id.* We conclude that case No. S-02-1067 is a moot case because Krajicek can no longer obtain the relief he sought.

[5] As a general rule, a moot case is subject to summary dismissal. *Id.* Nebraska, however, recognizes a public interest exception to the mootness doctrine, and Krajicek urges that issues of residence, domicile, and eligibility for office in case No. S-02-1067 are issues related to public interest. Indeed, we have previously determined that certain election issues qualified for review under the public interest exception despite assertions that

the case was moot because the election at issue had passed. See *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). However, in the instant case, we conclude that to the extent issues of public interest are present in case No. S-02-1067, these issues are also present in case No. S-02-1070 and are addressed in connection with our analysis of that appeal below. We therefore dismiss the appeal in case No. S-02-1067 as moot.

Case No. S-02-1070: Quo Warranto Action.

Krajicek generally argues that the district court erred in its determination that he no longer resided and was not domiciled in subdistrict No. 8 and in therefore ordering that he be removed from his position representing subdistrict No. 8 on the NRD board of directors. We have reviewed the record de novo in this case. The evidence established that Krajicek had ceased to be a resident of subdistrict No. 8, see § 32-560(5); that he was actually domiciled outside subdistrict No. 8, see § 32-116; and that a vacancy existed in subdistrict No. 8, see Neb. Rev. Stat. § 2-3215 (Reissue 1997). Therefore, the district court did not err in ordering Krajicek removed from office.

[6] In its quo warranto petition, the State alleged that Krajicek vacated his office as a director of the NRD when he moved from 4104 Madison Street to 7819 South 45th Avenue. With respect to the residence of a natural resources district director, the following statutes are relevant: Neb. Rev. Stat. § 2-3214(1) (Reissue 1997), found in the statutes pertaining to agriculture, sets requirements for a natural resources district director and provides, inter alia, that in those districts that have established subdistricts, registered voters are eligible "as candidates from the subdistrict within which they reside." Section 2-3215 provides that "a vacancy on the board shall exist in the event of the removal from the district or subdistrict of any director." Section 2-3215 also refers to the events listed in § 32-560 from the Election Act, the latter of which provides that "[e]very elective office shall be vacant" upon the happening of certain events, including the "[i]ncumbent ceasing to be a resident of the state, district, county, township, or precinct in which the duties of his or her office are to be exercised or for which he or she may have been elected." Under § 32-116(1) of the Election Act, "residence" shall mean "that place in which a

person is actually domiciled." We read these statutes in pari materia. See *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003). Reading these related statutes together, it is clear that in a natural resources district that has subdistricts, a director is required to reside in the subdistrict he or she has been elected to represent, § 2-3214(1), and that a director's office becomes vacant if he or she moves from or ceases to be a resident of the subdistrict from which he or she was elected, §§ 2-3215 and 32-560(5). Further, residence is understood to mean actual domicile. § 32-116(1).

[7] Our case law is consistent with these statutes. In *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979), we considered a quo warranto action in which the State asserted that a county commissioner vacated her office when she ceased to be a resident of the county. We stated that although a person may have two places of residence, "only one of them may be his [or her] domicile," and concluded that in order to continue to hold office as a county commissioner, the defendant in *Jones* was required to maintain her domicile within the original county from which she had been elected. *Id.* at 491, 275 N.W.2d at 853. We stated that domicile must be determined from all the circumstances taken together in a particular case and that in order to establish a domicile, two essential facts must be present: (1) residence, or bodily presence, in the locality and (2) an intention to remain there. Similar to the holding in *Jones*, the relevant statutes in the present case indicate that for purposes of election to an NRD board where subdistricts have been established, a person can be a domiciliary of only one subdistrict. Specifically, § 2-3214(1) provides that candidates are to be elected "from *the* subdistrict within which they reside" (emphasis supplied) and § 32-116(1) provides that residence must be where the individual is "actually domiciled."

The evidence in the present case shows that in May 2001, Krajicek moved his residence from an address within subdistrict No. 8 to an address outside subdistrict No. 8. Krajicek concedes that he has a residence outside subdistrict No. 8 at 7819 South 45th Avenue, but he argues that he also maintains a residence inside subdistrict No. 8 at 4505 Jefferson Street. He argues that the residence requirement for a member of the NRD board for a subdistrict is met so long as he retains one of his residences

within subdistrict No. 8 even though he has another residence outside subdistrict No. 8. We reject Krajicek's argument.

It is clear from the record that Krajicek ceased to be domiciled in subdistrict No. 8 when he moved to 7819 South 45th Avenue. Krajicek had "bodily presence," see *State v. Jones*, 202 Neb. at 492, 275 N.W.2d at 853, at the new address because the evidence shows that, inter alia, he spent his nights at that address, had his mail forwarded to that address, and significantly contributed to the upkeep and improvement of the home at that address. By contrast, there was no evidence that he resided at 4505 Jefferson Street in the sense of being bodily present at that address.

The evidence also demonstrated Krajicek's intention to remain at 7819 South 45th Avenue because he returned to that address at nights, his wife and children resided at that address, and he indicated that he planned to eventually send his children to a high school near that address. Although Krajicek stated that he hoped to purchase the residence at 4505 Jefferson Street at some time in the future, such statements were speculative and uncertain. As we observed in *Jones*, intent will be assessed from all the surrounding circumstances.

In sum, the evidence in this case was not sufficient to establish that Krajicek was domiciled at 4505 Jefferson Street, particularly in light of the much stronger evidence that he both resided and was domiciled at 7819 South 45th Avenue. As the district court correctly determined, the record establishes that Krajicek became a resident and domiciliary of 7819 South 45th Avenue and that because that address is outside subdistrict No. 8, he vacated his office representing subdistrict No. 8 on the NRD board.

[8] Krajicek also argues that the district court erred when it "placed the burden of proof" on him. We understand that Krajicek complains that he had the burden of proof regarding the issues of residence and domicile. As the district court correctly noted, this court has previously stated that in a quo warranto action, "it is clear that the burden of proof in the first instance is on the defendant whose right to the office is challenged." *Stasch v. Weber*, 188 Neb. 710, 711, 199 N.W.2d 391, 393 (1972). See, also, 65 Am. Jur. 2d *Quo Warranto* § 119 at 165 (2001) ("[w]here a quo warranto proceeding is brought to try title to a public

office, the burden rests on the defendant or respondent, as against the state at least, to show a right to the office from which he or she is sought to be ousted"). Furthermore, as noted above, our de novo review of the record in this case shows that the evidence presented by the State established that Krajicek had ceased to be domiciled in subdistrict No. 8, see §§ 32-560 and 32-116, and that the significance of the evidence presented by Krajicek was not to the contrary. We reject Krajicek's assignments of error. The district court did not err in finding in favor of the State on its quo warranto action.

CONCLUSION

We conclude that case No. S-02-1067 is moot, and we therefore dismiss the appeal in case No. S-02-1067. We conclude that in case No. S-02-1070, the evidence establishes that Krajicek moved his residence and domicile outside subdistrict No. 8 and that therefore, the district court did not err in removing him from the NRD board of directors. We affirm the district court's order in case No. S-02-1070.

APPEAL IN NO. S-02-1067 DISMISSED.
JUDGMENT IN NO. S-02-1070 AFFIRMED.

FIRST COLONY LIFE INSURANCE COMPANY, APPELLEE, V. MICHAEL GERDES AND LINDA GERDES, APPELLANTS, AND LAURA ALBERS (SMITH) ET AL., APPELLEES.

676 N.W.2d 58

Filed March 19, 2004. No. S-02-1385.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Principal and Agent.** A power of attorney authorizes another to act as one's agent.
4. ____. Under a durable power of attorney, the authority of an attorney in fact survives the principal's subsequent disability or incapacity.

5. **Agency: Words and Phrases.** An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act.
6. **Principal and Agent.** An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.
7. **Principal and Agent: Intent.** Absent express intention, an agent may not utilize his or her position for the agent's or a third party's benefit in a substantially gratuitous transfer.
8. **Principal and Agent: Insurance: Contracts: Intent.** An attorney in fact who is acting under a durable general power of attorney to change the beneficiary designation of a principal's life insurance policy does not effect a gratuitous transfer of the principal's assets when the attorney in fact, or any third party having a relationship with the attorney in fact, does not benefit from the change, and the uncontroverted evidence establishes that the change was made in accordance with the principal's express instructions.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, L.L.P., for appellants.

Christian R. Blunk, of Berkshire & Blunk, for appellees Laura Albers (Smith), Julie Smith, and Brian Behrens.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

HENDRY, C.J.

INTRODUCTION

This is an interpleader action brought by First Colony Life Insurance Company (First Colony) to determine the rightful beneficiary of a life insurance policy issued to Thomas A. Smith (Smith) in the amount of $100,000. The two groups of defendants that First Colony interpleaded were Smith's daughters from his first marriage and Smith's stepchildren from his second marriage.

FACTUAL BACKGROUND

Smith's first marriage produced two children, Laura Albers and Julie Smith. After his divorce from his first wife, Smith married

Rita Gerdes, who had two children from a previous marriage, Michael Gerdes and Linda Gerdes (the Gerdeses).

On September 3, 1996, First Colony issued a life insurance policy to Smith in which Smith named Rita as the beneficiary. Rita died shortly thereafter. On May 6, 1997, Smith changed the beneficiary on the policy to include both of his daughters as well as the Gerdeses.

On February 10, 1998, Smith, who was in poor health from diabetes, executed a document entitled "Durable General Power of Attorney," naming Bryan Behrens as his "attorney-in-fact and as [his] agent." On the same day, Smith executed a revocable trust, naming himself as trustee and Behrens as first alternate trustee. Behrens is also named as "executor" of Smith's will, but is not a devisee, nor is he a beneficiary of the revocable trust.

Behrens is a financial planner who handled Smith's financial affairs for approximately 10 years. It was at Behrens' recommendation that Smith retained an attorney to prepare the durable general power of attorney and revocable trust.

Behrens testified that he was present at the time Smith executed the durable general power of attorney and trust. Behrens further testified that on the same day, while in the office of Smith's attorney, a change of beneficiary form was completed and signed by Smith changing the beneficiary designation on the First Colony policy from his daughters and the Gerdeses to the trust. According to Behrens, the change of beneficiary form was sent that same day to First Colony's local agent. A photocopy of the change of beneficiary form, however, was not made.

Article 1, paragraph 1.3, of the power of attorney provided that the document "shall not be effective until I [Smith] am disabled," which was defined as being unable to "handle my [Smith's] own financial affairs." Paragraph 1.3 further provided that "[m]y disability may be proved by a report of two (2) physicians, psychiatrists or psychologists who have examined me" or "by any other method of proof permitted by law." Article 2, paragraphs 2.2 and 2.13, of the document provided:

> 2.2 Full Power of Attorney: I give to my agent the full power to act or to omit to act regarding my estate or my person, I intend to grant to my agent a Durable General Power of Attorney to act for me and not to grant only a limited or

special power. My agent can act for me with regard to my property or person to the extent that I could act if I were personally present.

. . . .

2.13 Signing Documents: My agent shall have full power to sign, acknowledge or deliver any contracts, deeds or other documents as may be necessary or advisable to carry out the purposes of this Power of Attorney.

After these documents were executed, Smith went to California on vacation. According to Behrens, while in California, Smith became ill after a dialysis treatment and was never able to return to Nebraska "because he [Smith] could not get in a car or get on a plane because he was hooked up to a dialysis machine." Behrens testified that he spoke to Smith on the telephone in late February 2001 and that Smith instructed him to make sure the life insurance policy and his other assets were put into the trust. Behrens stated that although Smith was coherent during the telephone conversation, Smith informed Behrens that "he [Smith] couldn't write his own name" and that "he [Smith] didn't think he was going to live 'til the next day."

Behrens went on to testify that after speaking with Smith on the telephone, he called First Colony and was informed the trust was not the named beneficiary despite the change of beneficiary form Behrens testified Smith signed and mailed on February 10, 1998, the same day that the power of attorney and trust were executed. Thereafter, on February 25, 2001, Behrens executed a change of beneficiary form with First Colony pursuant to the power of attorney, naming the trust as sole beneficiary. Behrens explained that because Smith did not believe he was going to live, Behrens did not forward the change of beneficiary form to Smith for his signature. Behrens acknowledged that he knew the change of beneficiary would eliminate any interest the Gerdeses had in the First Colony policy, because the Gerdeses were not beneficiaries under the trust. Smith died on March 5, 2001.

In an affidavit, Behrens averred that he had not received compensation from the trust and did not intend to charge trustee fees. He further averred that he had no interest in the trust other than to act in accordance with his duties as trustee.

PROCEDURAL BACKGROUND

First Colony filed this interpleader action after Smith died, naming the Gerdeses, Smith's daughters, and Behrens as defendants. The Gerdeses, in their answer, alleged that the net effect of Behrens' changing the beneficiary was to convey a gift to Smith's daughters amounting to 50 percent of the First Colony policy proceeds and that the power of attorney did not expressly authorize Behrens to make a "gratuitous transfer." The Gerdeses' answer does not allege that Behrens' conduct was fraudulent. Smith's daughters and Behrens alleged in their answers that Behrens was directed by Smith to change the beneficiary and that, therefore, Behrens' actions were proper.

The Gerdeses filed a motion for summary judgment contending the change of the beneficiary designation was invalid as a matter of law. Smith's daughters and Behrens filed a joint motion for summary judgment, contending the trust was entitled to the life insurance proceeds.

After a hearing on the motions for summary judgment, the district court found that the insurance policy reserved to Smith the right to change the beneficiary and that the power of attorney gave Behrens the authority to act. The court further found that Behrens' testimony and affidavit, which were both uncontroverted and received without objection, established that (1) Smith was incapable of acting on his own when the beneficiary change was made on February 25, 2001; (2) Behrens had no personal interest in the trust or life insurance policy, had not profited from making the change in beneficiary, and had not received compensation for his actions as attorney in fact; and (3) Behrens' telephone conversation with Smith in late February 2001, together with his conversation with Smith in 1998 when the trust was created, established that it was Smith's intent that the policy proceeds go to the trust.

The court then determined that the

> change in beneficiary did not have the effect of diminishing or reducing Smith's property or estate in any way. Smith still owned the life insurance policy through the Trust, which was revocable by him [Smith] at any time during his lifetime. . . . Thus . . . there was no gratuitous transfer of Smith's property from his control, no benefit to the attorney in fact,

and there is evidence of the clear intent of Thomas A. Smith that the change in beneficiary should occur.

The court then granted the motion for summary judgment filed by Smith's daughters and Behrens, and overruled the motion filed by the Gerdeses. The Gerdeses appeal.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003); *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Lalley, supra.*

ASSIGNMENTS OF ERROR

The Gerdeses assign, restated and renumbered, that the district court erred in determining that (1) the durable power of attorney authorized Behrens to change the policy beneficiary, (2) Smith had expressed a clear intent to change the policy beneficiary, (3) Behrens did not make a gratuitous transfer because he did not profit from the beneficiary change, and (4) the trust is the beneficiary of the policy.

ANALYSIS

Despite their four assignments of error, the Gerdeses make only one argument in their brief: Absent an express provision in a durable general power of attorney, an agent may not utilize his or her position to make a substantially gratuitous transfer of insurance proceeds either to himself or for a third party's personal benefit. In their brief, the Gerdeses acknowledge that the "Durable General Power of Attorney . . . purports to grant plenary power to defendant Behrens to act on behalf of Thomas A. Smith in the event of his disability." Brief for appellants at 4. The Gerdeses, however, contend that absent an express provision

authorizing Behrens to effect a gratuitous transfer, the plenary power is ineffective.

Smith's daughters and Behrens contend that under these facts, changing the beneficiary of an insurance policy is not a gratuitous transfer. They argue that the power to change the beneficiary was given by the durable general power of attorney and that the evidence is uncontroverted that Smith instructed Behrens to make the change and that such change resulted in no benefit to Behrens.

[3,4] A power of attorney authorizes another to act as one's agent. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003). An agent holding a power of attorney is termed an "attorney in fact" as distinguished from an attorney at law. *Id.* Under a durable power of attorney, the authority of an attorney in fact survives the principal's subsequent disability or incapacity. Neb. Rev. Stat. § 30-2665 (Reissue 1995).

Neb. Rev. Stat. § 30-2666 (Reissue 1995) provides:

> All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal were competent and not disabled.

The district court found that Behrens' uncontroverted testimony established Smith's disability for purposes of the durable power of attorney. Such finding is not assigned as error by the Gerdeses. We therefore focus our analysis on whether Behrens' act of changing the beneficiary constituted a gratuitous transfer to himself or a third party and, if so, whether the durable general power of attorney expressly authorized such act.

[5-7] An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act. *Crosby, supra.* An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest. *Id.* Absent express intention, an agent

may not utilize his or her position for the agent's or a third party's benefit in a substantially gratuitous transfer. *Id.*

The Gerdeses rely on a number of gratuitous transfer cases previously decided by this court. Some of the cases involved the transfer of the principal's money into accounts which directly or indirectly benefited the agent. See, *Crosby, supra* (attorney in fact transferred principals' funds from certificate of deposit account with named payable-on-death beneficiary, thereby eliminating beneficiary and indirectly benefiting attorney in fact as devisee under principal's will); *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992) (attorney in fact deposited principal's $5,000 inheritance into certificate of deposit account in both principal's and attorney in fact's name based on purported authorization of gift); *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989) (attorney in fact transferred funds from principal's certificates of deposit to accounts in both principal's name and attorney in fact's name and into accounts solely in attorney in fact's name based on principal's purported oral authorization).

Other cases relied upon by the Gerdeses involve the purported oral authorization to convey the principal's real property or make gifts from the principal's money assets to the attorney in fact and close family members. See, *Townsend v. U.S.*, 889 F. Supp. 369 (D. Neb. 1995) (relying on Nebraska law that gift giving is not permitted absent express authorization to determine that checks written on principal's account to attorney in fact and other primarily close family members were revocable transfers for purposes of federal estate taxes); *In re Conservatorship of Anderson*, 262 Neb. 51, 628 N.W.2d 233 (2001) (holding that appointment of conservator was warranted when attorneys in fact made money gifts to themselves and their children out of principal's estate purportedly authorized by principal's gifting program to avoid federal taxes but not expressed in the power of attorney); *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998) (attorney in fact compensated himself for services based on his assertion of oral contract with principal and made gifts to his family members based on principal's purported oral authorization); *Mischke v. Mischke*, 247 Neb. 752, 530 N.W.2d 235 (1995) (attorney in fact conveyed his brother's property to himself and two other brothers while principal was in coma).

In all of these cases, we have held that the principal's purported oral authorization was ineffective as proof of the principal's intent to make a substantially gratuitous transfer. See, e.g., *Fletcher, supra*. This rule was enunciated out of concern for potential abuse and fraud with durable powers of attorney and has been limited in application to cases in which the attorney in fact, or someone in relationship to the attorney in fact, stood to benefit at the principal's expense.

[8] However, the cases upon which the Gerdeses rely are distinguishable because the Gerdeses do not allege that Behrens' action was fraudulent and the uncontroverted evidence in the record establishes that neither Behrens nor any third party having any relationship with Behrens benefited from changing the beneficiary to Smith's trust. Furthermore, under the terms of the First Colony policy, Smith had the right to change his beneficiary designation at any time, and the Gerdeses therefore had no vested interest as beneficiaries. See, Neb. Rev. Stat. § 44-370 (Reissue 1998) (providing policyholders shall have right to change beneficiary with consent of insurer unless appointment is irrevocable); *Goodrich v. Equitable Life Assurance Society*, 111 Neb. 616, 197 N.W. 380 (1924) (when owner reserves right to change beneficiary, beneficiary has no vested interest in policy proceeds that would prevent change before owner's death). Since neither Behrens nor any third party having any relationship with Behrens benefited from changing the beneficiary, Smith's oral authorization was properly considered by the district court as evidence of Smith's intent. The Gerdeses made no objection to Behrens' testimony that Smith intended to have all his assets go to his trust, nor did they offer any evidence to refute such testimony. Viewing this record in the light most favorable to the Gerdeses, we determine that the change of beneficiary was not a gratuitous transfer.

CONCLUSION

We conclude the trial court did not err in determining that the change of beneficiary was not a gratuitous transfer and that the trust is entitled to the policy proceeds.

AFFIRMED.

McCORMACK, J., not participating.

COLLEEN ADAM, APPELLEE, AND LOREN AND DONNA REIMERS, HUSBAND AND WIFE, ET AL., APPELLANTS, V. THE CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

676 N.W.2d 710

Filed March 26, 2004. No. S-01-1014.

1. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.
3. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
4. **Actions: Parties: Standing.** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
5. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. The litigant must have some legal or equitable right, title, or interest in the subject of the controversy.
6. **Actions: Municipal Corporations: Standing: Injunction: Annexation: Ordinances.** A person who owns or is a voter in the territory sought to be annexed has standing to maintain an action against a municipality to enjoin the enforcement of the ordinance providing for annexation or to have the attempted annexation declared void.
7. **Standing: Parties: Annexation: Ordinances.** When a person has a personal, pecuniary, and legal interest adversely affected by an annexation ordinance, he or she has standing to contest the validity of the ordinance.
8. **Municipal Corporations: Injunction: Annexation: Proof.** A party seeking to restrain an act of a municipal body relative to annexation must show some special injury peculiar to himself or herself aside from a general injury to the public.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Adams County, DANIEL BRYAN, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Arthur R. Langvardt, of Langvardt & Valle, P.C., and Mark A. Beck, of Beck Law Office, P.C., for appellants.

Randall L. Goyette and Andrew M. Loudon, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., and Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright & Lindstrom, for appellee City of Hastings.

HENDRY, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Appellants are landowners and residents in the Lochland Sanitary and Improvement District, located north of Hastings, Nebraska (the Lochland property). The Lochland Sanitary and Improvement District is not a party to this case. In city ordinance No. 3718, the City of Hastings, Nebraska (the City), appellee, purported to annex the Lochland property. In city ordinance No. 3740, the City purported to annex land owned by Colleen Adam and others. U.S. Highway 281 runs north-south in the area in question. The land annexed under ordinance No. 3740 lies to the east of Highway 281. The Lochland property lies to the west of Highway 281. The Lochland property is generally located to the northwest of the land annexed under ordinance No. 3740. A small portion of the Lochland property lies due west of the land annexed under ordinance No. 3740, connected only by Highway 281.

Appellants challenged both ordinances, and Adam challenged ordinance No. 3740 in the district court for Adams County. The district court determined that ordinance No. 3718 was unlawful, void, and of no legal effect, thus rendering the annexation of the Lochland property under ordinance No. 3718 invalid. The district court concluded, however, that appellants lacked standing to challenge ordinance No. 3740.

Appellants appealed the district court's decision concerning ordinance No. 3740. In a published opinion, the Nebraska Court of Appeals determined that appellants had standing to challenge ordinance No. 3740 and reversed the district court's order. *Adam v. City of Hastings*, 12 Neb. App. 98, 668 N.W.2d 272 (2003). The City petitioned for further review, which we granted. We reverse the decision of the Court of Appeals and remand the cause with directions.

STATEMENT OF FACTS

According to the record, these facts are undisputed: The City is a city of the first class. The Lochland property was within the City's zoning authority throughout these proceedings. The land annexed under ordinance No. 3740 lies to the north and east of the City. Highway 281 runs in a north-south direction along the western edge of the land annexed under ordinance No. 3740. The Lochland property lies north of the City. According to the maps in the record, the land immediately to the south of the Lochland property is not part of the City. Highway 281 runs in a north-south direction along the eastern edge of the Lochland property. The southeasternmost corner of the Lochland property connects to Highway 281 which in turn connects to the northwesternmost corner of the land annexed under ordinance No. 3740. Appellants do not have an economic interest in the land annexed under ordinance No. 3740.

On May 8, 2000, the Hastings City Council passed ordinance No. 3740, by which it annexed within the corporate limits of the City certain property, including the land owned by Adam and others. Ordinance No. 3740 also annexed the highway right-of-way abutting to the west. On July 24, the city council passed ordinance No. 3718, by which it annexed within the corporate limits of the City certain property, including the Lochland property. Ordinance No. 3718 annexed the highway right-of-way abutting the Lochland property to the east. The City enacted these ordinances pursuant to Neb. Rev. Stat. § 16-117(1) (Reissue 1997), which provides, inter alia, as follows:

> The corporate limits of a city of the first class shall remain as before, and the mayor and council may by ordinance . . . at any time include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character and in such direction as may be deemed proper. Such grant of power shall not be construed as conferring power upon the mayor and council to extend the limits of a city of the first class over any agricultural lands which are rural in character.

On August 3, 2000, appellants and Adam filed a declaratory action seeking, inter alia, to enjoin implementation of the ordinances. In the first cause of action (Count I) of the petition,

appellants and Adam sought to declare ordinance No. 3740 invalid and to enjoin its enforcement. In the second cause of action (Count II) of the petition, appellants sought to declare ordinance No. 3718 invalid and to enjoin its enforcement. Adam was not a party to Count II of the petition and, therefore, did not challenge ordinance No. 3718. Appellants were parties to both Counts I and II and therefore contested the City's adoption and enforcement of both ordinances Nos. 3740 and 3718.

Prior to trial, Adam and the City entered into a settlement agreement pursuant to which, inter alia, Adam withdrew from the present action and further agreed not to "challenge . . . the annexation of the Colleen Adam property by the City." Thereafter, on July 27, 2001, trial was held on appellants' challenges to ordinances Nos. 3740 and 3718. Three witnesses testified, and 30 exhibits were introduced into evidence.

In an order filed August 10, 2001, the district court granted appellants the relief they sought in Count II of the petition and declared ordinance No. 3718 invalid. The district court determined that the City had failed to comply with the statutory annexation procedures when it passed the ordinance, and the district court permanently enjoined the City from enforcing, implementing, or acting on ordinance No. 3718. The district court's decision concerning ordinance No. 3718 was not challenged by any party and is not at issue in the present appeal. Thus, contrary to the parties' urging on appeal, we need not comment on whether annexation of the Lochland property in the future, pursuant to an ordinance similar to No. 3718 and based on a shared border with land annexed under ordinance No. 3740, would satisfy the contiguity requirements of § 16-117. See *Johnson v. City of Hastings*, 241 Neb. 291, 295, 488 N.W.2d 20, 23 (1992) (discussing § 16-117 and noting that "the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation"). See, also, *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933).

With regard to Count I of the petition, the district court determined that appellants did not have standing to challenge ordinance No. 3740 and dismissed Count I of the petition. The district court stated that because appellants were not residents, tenants, real owners, or electors of the land annexed under ordinance No.

3740, they had no direct interest in the annexation. The court further found that appellants had not shown a special injury resulting from the annexation of that land peculiar to themselves.

Appellants appealed the district court's order dismissing their challenge to ordinance No. 3740 to the Court of Appeals. In its published opinion, the Court of Appeals relied on certain remarks of this court found in *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), and concluded that appellants had standing to challenge the validity of ordinance No. 3740. *Adam v. City of Hastings*, 12 Neb. App. 98, 668 N.W.2d 272 (2003). The Court of Appeals reversed the district court's order and remanded the cause for further proceedings.

The City filed a petition for further review, which we granted. For the reasons stated below, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the district court's order dismissing appellants' first cause of action challenging ordinance No. 3740.

ASSIGNMENT OF ERROR

In its petition for further review, the City assigns numerous errors which derive essentially from the City's claim that the Court of Appeals erred in determining that appellants had standing to challenge ordinance No. 3740.

STANDARDS OF REVIEW

[1] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003).

ANALYSIS

In its petition for further review, the City asserts that the Court of Appeals erred when it concluded that appellants had standing to challenge ordinance No. 3740 and reversed the district court's decision which had dismissed Count I of appellants' petition. We agree with the City that appellants do not have standing to challenge ordinance No. 3740 and that the Court of Appeals erred when it concluded to the contrary. We reverse.

[2,3] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *Crosby v. Luehrs, supra*; *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002). Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002); *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000). Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Governor's Policy Research Office v. KN Energy, supra*; *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).

[4,5] The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Crosby v. Luehrs, supra*; *Hradecky v. State, supra*. In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Id.* The litigant must have some legal or equitable right, title, or interest in the subject of the controversy. See, *Crosby v. Luehrs, supra*; *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[6-8] We have long held that a person who owned or was a voter in the territory sought to be annexed had standing to maintain an action against a municipality to enjoin the enforcement of the ordinance providing for annexation or to have the attempted annexation declared void. *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952). We have also held that when a person has a personal, pecuniary, and legal interest adversely affected by an annexation ordinance, he or she had standing to contest the validity of the ordinance. *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968). We have previously determined that persons who are not residents, property owners, taxpayers, or electors of an annexed area generally do not have standing to challenge the annexation and that "a party seeking to restrain an act of a municipal body [relative to annexation] must show some special injury peculiar to himself aside from a general injury to

the public." *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 495, 536 N.W.2d 56, 64 (1995). In this connection, we have recognized the standing of plaintiffs whose land was outside the annexed area but whose land would fall within the annexing city's zoning authority if the challenged annexation of nonplaintiff land was permitted. See, e.g., *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992) (involving city of first class where injunction sought); *Piester v. City of North Platte*, 198 Neb. 220, 252 N.W.2d 159 (1977) (involving city of first class); *Sullivan v. City of Omaha, supra* (involving city of metropolitan class where injunction sought).

In the instant case, appellants do not claim to be residents, property owners, taxpayers, or electors of the land annexed under ordinance No. 3740 and the Lochland property was within the City's zoning authority prior to passage of ordinance No. 3740. Further, as pertains to the annexation of the highway right-of-way under ordinance No. 3740 which may include some boundary of the Lochland Sanitary and Improvement District, we note that the Lochland Sanitary and Improvement District is not a party to these proceedings, and, therefore, as the district court observed, appellants cannot claim standing by virtue of some injury to the Lochland Sanitary and Improvement District.

Appellants assert that they have standing because the annexation of the land subject to ordinance No. 3740 could make possible the annexation of the Lochland property by the City at a future date. Appellants claim that because of the proximity of their property to the land annexed under ordinance No. 3740, they are affected directly by the City's annexation of the land subject to ordinance No. 3740.

We are not aware of, and appellants have not directed us to, any decisions of this court wherein this court has determined that owners of property near land subject to an annexation ordinance had standing to challenge that ordinance solely by virtue of their property's proximity to the annexed land and their property's future exposure to annexation. Appellants refer to language in *SID No. 57 v. City of Elkhorn*, 248 Neb. at 492, 536 N.W.2d at 62, in which this court commented that the plaintiff property owners who were challenging a current annexation of certain sanitary and improvement district property had "acquiesce[d]" in

a previous annexation, which annexation arguably caused the plaintiff property owners' land to become contiguous to the earlier annexation and thus exposed to annexation. It was language to this effect in *SID No. 57 v. City of Elkhorn* on which the Court of Appeals relied in concluding that appellants herein had an interest sufficient for standing to challenge ordinance No. 3740. See *Adam v. City of Hastings*, 12 Neb. App. 98, 668 N.W.2d 272 (2003). We observe, however, that on the facts of *SID No. 57 v. City of Elkhorn*, we determined that the plaintiff property owners lacked standing to contest the current annexation ordinance and, in so doing, we confirmed the general rules with regard to standing in annexation cases.

We reaffirm our previous decisions with regard to standing in annexation cases, and to the extent that language in *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), suggests that proximity to land subject to an annexation ordinance, alone, is sufficient to establish standing upon a plaintiff, that language is specifically disapproved. Accordingly, reliance on such language by the Court of Appeals was misplaced.

We have reviewed the record in the instant case which shows that appellants do not have a personal, pecuniary, and legal interest adversely affected by ordinance No. 3740. They are neither residents, property owners, taxpayers, nor electors of the land annexed under ordinance No. 3740. Appellants have not asserted a special injury. Accordingly, appellants do not have standing to contest ordinance No. 3740.

CONCLUSION

For the reasons stated above, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the district court's order dismissing appellants' first cause of action challenging ordinance No. 3740.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., not participating.

HEATHER KEYS AND CHARLES KEYS, INDIVIDUALLY AND AS WIFE AND HUSBAND, APPELLANTS, V. LANETTE GUTHMANN, M.D., AND PHYSICIANS CLINIC, INC., A NEBRASKA CORPORATION DOING BUSINESS AS PHYSICIANS CLINIC, APPELLEES.

676 N.W.2d 354

Filed March 26, 2004. No. S-02-471.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
4. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden is on the plaintiff to show: (1) the generally recognized medical standard of care, (2) a deviation from that standard by the defendant, and (3) that the deviation was the proximate cause of the plaintiff's alleged injuries.
5. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony.
6. ____: ____: ____: ____. In medical malpractice cases brought under the res ipsa loquitur doctrine, negligence may be inferred in three situations without affirmative proof: (1) when the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, et cetera, in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.
7. **Malpractice: Physicians and Surgeons: Expert Witnesses.** Generally, the common knowledge exception to expert testimony is applicable in cases where a physician fails to remove a foreign object from a patient's body or where a patient enters the hospital for treatment on one part of the body and sustains injury to another part of the body.
8. ____: ____: ____. The common knowledge exception does not apply where the defendant physician's negligence is not obvious from the facts and circumstances of the case.
9. **Summary Judgment: Proof.** A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

10. **Malpractice: Physicians and Surgeons: Affidavits: Negligence: Summary Judgment.** An affidavit of the defendant physician in a malpractice case, which affidavit states that the defendant did not breach the appropriate standard of care, presents a prima facie case of lack of negligence for the purposes of summary judgment.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Phillip G. Wright and David M. Handley, of Wright & Associates, for appellants.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., and, on brief, Patrick W. Meyer for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

This is a medical malpractice case brought by Heather Keys and Charles Keys (the plaintiffs) against Lanette Guthmann, M.D., and her employer, Physicians Clinic, Inc. (the defendants). The Douglas County District Court granted the defendants' motion for summary judgment, and the plaintiffs have appealed.

SCOPE OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *K N Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003).

FACTS

At all times relevant to this case, Heather was a patient of Guthmann's and Guthmann was a licensed obstetrics and gynecology (OB/GYN) physician employed by Physicians Clinic,

Inc., in Omaha, Nebraska. In their petition, the plaintiffs alleged that on December 12, 1998, Guthmann performed an episiotomy on Heather to aid in the birth of her first child and that while performing the episiotomy, Guthmann cut through Heather's anal sphincter. Complications from this procedure were the basis of the plaintiffs' petition.

According to Guthmann's deposition testimony, the episiotomy did not originally extend to Heather's sphincter, but over the course of the delivery, the incision continued to tear until it reached the sphincter. Guthmann stated that in her experience, it was common for an episiotomy to continue to tear in this manner. In describing her subsequent repair of the torn sphincter, Guthmann said that it "pulled together nicely."

On December 22, 1998, Heather telephoned Guthmann's office and complained of having problems controlling her bowels. Guthmann's records indicate that Heather preferred not to come into the clinic for an examination and chose to allow the injured area time to heal.

At her 6-week postpartum visit, Heather complained of having problems with bowel movements and incontinence with gas. A rectal examination indicated a possible separation of the sphincter, which led Guthmann to believe that the sphincter had not healed well and that Heather might need surgery to correct the problem. Guthmann scheduled an appointment for Heather with Garnet Blatchford, M.D., a colon and rectal surgeon.

Blatchford's examination of Heather revealed that Heather had suffered a sphincter injury as the result of an obstetric delivery. In Blatchford's deposition, she stated that this type of trauma was fairly common. She stated that in most cases, it is not the episiotomy that causes the sphincter injury, but, rather, a tear that occurs in the line of the episiotomy. Blatchford opined that a doctor is unable to visually distinguish between an injury directly caused by an episiotomy and one caused by subsequent tearing. She described Heather's sphincter as healed, but in a gapped position. Blatchford further stated that she had no complaints with the way Guthmann had sutured the laceration.

On March 15, 1999, Blatchford performed a sphincteroplasty on Heather. A followup visit on April 7 showed the injury to be 98 percent healed. After this visit, Blatchford wrote to Guthmann and

stated that Heather was no longer having problems controlling her bowels but was still having some incontinence with gas. Blatchford suggested that Heather perform some Kegel exercises and that she schedule another appointment in 1 month. The last contact Blatchford had with Heather was a telephone call on April 19. Blatchford released Heather to return to work on April 26.

In their petition, the plaintiffs alleged that as a result of the injury to Heather's sphincter, she has suffered permanent injury and special damages due to the need to repair the sphincter. The plaintiffs claimed that Guthmann's negligence was the proximate cause of Heather's injuries. In particular, they asserted that Guthmann was negligent in (1) not properly performing the episiotomy, by failing to perform a posterolateral incision in a proper manner, and not properly repairing the damaged sphincter and (2) failing to perform proper postpartum followup with respect to the damaged sphincter.

The defendants' answer alleged that all of the procedures performed upon Heather were performed in compliance with the applicable standard of care for practicing OB/GYN physicians in Omaha or similar communities. The defendants denied that Guthmann caused any injury to Heather.

The defendants subsequently moved for summary judgment, which motion was sustained by the district court. The court found that the affidavits of Guthmann and Raymond Schulte, M.D., a board-certified OB/GYN physician, presented a prima facie case of lack of negligence. The court stated that the burden then shifted to the plaintiffs to show that an issue of material fact existed which prevented judgment as a matter of law. The court concluded that Heather's affidavit did not qualify as expert testimony and that because no expert testimony was presented by the plaintiffs with regard to the applicable standard of care and causation, the defendants were entitled to judgment as a matter of law. The plaintiffs filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

The plaintiffs assign the following restated errors to the district court: (1) its failure to find that the injuries sustained by Heather were of a type wherein negligence may be implied and (2) its failure to recognize that material issues of fact precluded the entry of summary judgment.

ANALYSIS

[3-5] In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003). In *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001), we stated that in a malpractice action involving professional negligence, the burden is on the plaintiff to show: (1) the generally recognized medical standard of care, (2) a deviation from that standard by the defendant, and (3) that the deviation was the proximate cause of the plaintiff's alleged injuries. Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony. *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003).

[6] The plaintiffs argue that Heather's injury was of a type that did not require expert testimony concerning negligence, thus implicating the doctrine of res ipsa loquitur. In *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996), we stated that in medical malpractice cases brought under the res ipsa loquitur doctrine, negligence may be inferred in three situations without affirmative proof: (1) when the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, et cetera, in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries. The plaintiffs assert that the circumstances of this case fit into the second category, which is often referred to as the "common knowledge exception."

[7] Generally, the common knowledge exception is applicable in cases where a physician fails to remove a foreign object from a patient's body or where a patient enters the hospital for treatment on one part of the body and sustains injury to another part of the body. *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000). As we noted in *Swierczek v. Lynch*, 237 Neb. 469, 478, 466 N.W.2d 512, 518 (1991), "It is within the common knowledge and experience of a layperson to determine

that an individual does not enter the hospital for extraction of her teeth and come out with an injury to nerves in her arms and hands, without some type of negligence occurring."

In *Swierczek*, the plaintiff requested the extraction of all her teeth. After her oral surgery, the plaintiff discovered she had suffered injury to the nerves of her hands and fingers. As such, the plaintiff's injury was to a part of her body for which she had not sought medical treatment, and we held that the common knowledge exception applied.

[8] However, in *Fossett*, we stated that the common knowledge exception does not apply where the defendant physician's negligence is not obvious from the facts and circumstances of the case. In *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982), *disapproved on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992), the plaintiff sued her physician because her esophagus was perforated during a dilation procedure. The plaintiff developed pneumonia and required major surgery. We held that in such a situation, negligence could not be presumed by application of the common knowledge exception.

In the case at bar, the injury was related to the performance of an episiotomy during the delivery of a child. The facts presented do not support application of the common knowledge exception to the requirement of expert testimony to establish a physician's negligence. Giving Heather all reasonable inferences, negligence could not be inferred as a matter of law.

[9] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003). A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003). At that point, the burden of producing evidence shifts to the party opposing the motion. *Id.*

[10] An affidavit of the defendant physician in a malpractice case, which affidavit states that the defendant did not breach the

appropriate standard of care, presents a prima facie case of lack of negligence for the purposes of summary judgment. *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995). The burden then shifts to the plaintiff to show that an issue of material fact exists and that that fact prevents judgment as a matter of law. *Id.*

Both Guthmann and Blatchford opined that continued tearing after the performance of an episiotomy was a common occurrence. Schulte stated that he was familiar with the requisite standard of care for OB/GYN physicians and that his review of the circumstances showed that Guthmann acted at or above this standard in her treatment of Heather. This evidence established a prima facie case for lack of negligence on the part of Guthmann. Accordingly, the burden of producing evidence shifted to the plaintiffs to show that an issue of material fact existed which prevented a judgment in favor of the defendants as a matter of law.

Since none of the res ipsa loquitur exceptions apply, the plaintiffs were then required to produce expert testimony establishing the negligence of Guthmann. This would include evidence as to the generally recognized standard of care, Guthmann's deviation from this standard, and that the deviation was a proximate cause of Heather's injuries.

Next, we must address whether the plaintiffs sustained their burden of proof. Heather's affidavit averred that Guthmann made two admissions to her during the course of her treatment. Heather alleged that Guthmann told her that she was being referred to Blatchford because " 'I didn't do the repair right.' " Heather also alleged that when referring to Heather's sphincter injury, Guthmann stated: " 'Once every ten years isn't too bad.' "

These statements are analogous to a statement made by a physician in *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000). There, when asked why he did not remove some fluid during a certain procedure, the physician replied, " 'I don't know why I left it there, I just left it there.' " *Id.* at 710-11, 605 N.W.2d at 470. We concluded that such statement did not create a reasonable inference of negligence and that a mistake is not synonymous with negligence.

We conclude that Guthmann's alleged admissions do not create a reasonable inference of negligence. The statements by Guthmann and all reasonable inferences therefrom do not sustain

the plaintiffs' burden to show the generally recognized standard of medical care and that the defendants deviated from that standard. Thus, the plaintiffs have not shown by expert testimony that the defendants were negligent.

The plaintiffs argue that even if Heather's injury is of the type that requires expert medical testimony, there are material questions of fact that preclude summary judgment for the defendants. We disagree. Guthmann set forth a prima facie case of lack of negligence. The burden then shifted to the plaintiffs to establish an issue of material fact that would prevent a judgment in favor of Guthmann as a matter of law. The plaintiffs failed to sustain this burden. As such, there is no genuine issue as to any material fact, and the defendants were entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth herein, the order of the Douglas County District Court granting summary judgment to the defendants is affirmed.

AFFIRMED.

THOMAS S. MITCHELL, JR., APPELLEE, V.
NIKKI A. FRENCH, APPELLEE, AND
COUNTY OF DOUGLAS, NEBRASKA, APPELLANT.

676 N.W.2d 361

Filed March 26, 2004. No. S-02-738.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. 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 Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded with directions.

James S. Jansen, Douglas County Attorney, and Bernard J. Monbouquette for appellant.

Thomas K. Harmon, of Respeliers & Harmon, P.C., for guardian ad litem.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

The issue presented in this case is whether the district court erred under Neb. Rev. Stat. § 42-358(1) (Cum. Supp. 2002) when it ordered Douglas County to pay a portion of the guardian ad litem fees on behalf of one of the parties to the action without finding that the party was indigent. We hold that it was error and reverse, and remand with directions.

BACKGROUND

On December 28, 2000, Thomas S. Mitchell, Jr., initiated this action in the district court for Douglas County against Nikki A. French. Mitchell's operative petition alleged that he was the father of two minor children born to French and sought a judgment of paternity and custody of the children. French filed a cross-petition in which she also alleged that Mitchell was the father of the two children. French sought custody of the children and child support from Mitchell.

During the course of the action, a guardian ad litem (GAL) was appointed for the children. At the conclusion of the action, the GAL applied for an award of her fees. The district court awarded the GAL $1,536, to be assessed equally between Mitchell and French. The court also found that French was indigent and ordered the county to pay French's half of the GAL fees. The county does not take exception to this order.

The court later held a hearing with regard to Mitchell's half of the GAL fees. No evidence was received at the hearing. Mitchell did not appear personally at the hearing, but was represented by his attorney. His attorney told the court that he had been told by Mitchell's parents that Mitchell had been unemployed for several months, lived with his parents, was struggling with alcohol and drug issues, and was receiving counseling for those problems. Mitchell's attorney also told the court "with a certain degree of confidence that the original affidavit

on file in this case regarding [Mitchell's] income is no longer correct." That affidavit, filed approximately 16 months prior to the GAL fees hearing, indicated Mitchell's monthly net income was $1,859.17.

At the conclusion of the hearing, the court stated, "I won't find that [Mitchell is] indigent." Nonetheless, the court ordered the county to pay Mitchell's half of the GAL fees because Mitchell "is unable to make payments towards the Guardian ad Litem's fee at this time." The court further ordered Mitchell to reimburse the county the same amount. The county appeals, and we moved the case to our docket.

ASSIGNMENT OF ERROR

The county assigns that the district court erred in ordering it to pay Mitchell's half of the GAL fees without finding that Mitchell was indigent.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn., ante* p. 158, 673 N.W.2d 15 (2004).

ANALYSIS

In their arguments to this court, the county and the GAL assume that § 42-358(1) is the controlling statute in this case. It authorizes a court to appoint an attorney or a GAL to protect the interests of minor children. See, *id.*; *Mathews v. Mathews, ante* p. 604, 676 N.W.2d 42 (2004). It further allows the attorney or GAL to recover his or her fees, specifically providing in part: "The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered. If the court finds that the party responsible is indigent, the court may order the county to pay the costs." § 42-358(1); *Mathews v. Mathews, supra.*

We agree that § 42-358(1) controls. Mitchell's operative petition was filed pursuant to Nebraska's paternity statutes at Neb. Rev. Stat. ch. 43, art. 14 (Reissue 1998 & Cum. Supp. 2002). None of those statutes expressly authorize the appointment of a

GAL. However, this action also involved child custody and child support issues. In fact, the pleadings in this case indicate that paternity was not disputed and that custody and child support were the only controverted issues. Therefore, the provisions commonly applied in dissolution actions were applicable here as well. See, *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981) (standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) were applicable in custody dispute that began as paternity action); *State ex rel. Ross v. Jacobs*, 222 Neb. 380, 383 N.W.2d 791 (1986); *Riederer v. Siciunas*, 193 Neb. 580, 228 N.W.2d 283 (1975). Included among them was § 42-358.

The issue presented in this case was decided by the Nebraska Court of Appeals in *Brackhan v. Brackhan*, 3 Neb. App. 143, 524 N.W.2d 74 (1994). In that case, York County was ordered to pay GAL fees in a dissolution action despite the fact that neither party was found to be indigent. The Court of Appeals reversed the order of the district court for two reasons. First, the court determined that York County did not have notice of any hearing on the GAL's application for fees and had no notice that the indigence of either party was at issue. In this case, the county does not contend that it was deprived of such notice.

The second reason for the Court of Appeals' reversal, a reason "of equal import" to the first, was that "a finding of indigence is a prerequisite to an order entered pursuant to § 42-358 requiring the County to pay the costs which have been fixed, taxed, and ordered to be paid by the parties." *Brackhan v. Brackhan*, 3 Neb. App. at 147, 524 N.W.2d at 77.

[2] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, *ante* p. 158, 673 N.W.2d 15 (2004). As the Court of Appeals recognized in *Brackhan*, § 42-358 requires no interpretation. It plainly allows for payment of GAL fees by a county only if a court finds that the party responsible is indigent. In this case, the district court expressly declined to find that Mitchell was indigent. Thus, the court erred in ordering the county to pay Mitchell's half of the GAL fees.

The GAL argues that the district court effectively found Mitchell was indigent when it stated that Mitchell "is unable to make payments towards the Guardian ad Litem's fee at this time." The GAL interprets this language to be the equivalent of a finding of indigency. We disagree without even needing to resort to the definition of indigency announced in a recent Supreme Court opinion. See *Mathews v. Mathews, ante* p. 604, 676 N.W.2d 42 (2004) (holding that person is indigent under § 42-358 if he or she is unable to pay GAL or attorney fees without prejudicing, in meaningful way, his or her financial ability to provide necessities of life). The district court's statement not only contradicts its explicit refusal to find Mitchell indigent, it is also unsupported by any evidence in the record. Mitchell's attorney, in unsworn statements to the court, shared his view of Mitchell's situation as related to him by Mitchell's parents. He told the court that Mitchell was unemployed and no longer had a monthly net income of $1,859.17, as an affidavit filed earlier in the action indicated. Even if we were to accept the GAL's interpretation of the district court's statement and conclude that the court effectively found Mitchell was indigent, the unsworn statements by Mitchell's attorney are insufficient to support such a finding.

CONCLUSION

The district court erred in ordering the county to pay Mitchell's half of the GAL fees because it did not first find that Mitchell was indigent. We reverse the order of the district court and remand the cause with directions to vacate its order requiring the county to pay Mitchell's half of the GAL fees.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF MARIE J. TROBOUGH, AN INCAPACITATED AND PROTECTED PERSON. LORI BAIN, INTERESTED PARTY, APPELLANT, V. GLORIA TROBOUGH CLIPPINGER, GUARDIAN AND CONSERVATOR, APPELLEE.

676 N.W.2d 364

Filed March 26, 2004. No. S-03-668.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews conservatorship proceedings for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Estates: Guardians and Conservators: Accounting.** Any person interested in an estate may ask the conservator to file an accounting or may object to the accounting.

Appeal from the County Court for Douglas County: JEFFREY MARCUZZO, Judge. Order vacated, and cause remanded with directions.

Susan J. Spahn, Christopher S. Wallace, and Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellant.

Robert J. Murray and Angela M. Pelan, of Lamson, Dugan & Murray, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

This appeal arises out of a conservatorship proceeding in the Douglas County Court. The appellant objected to the final accounting of the conservator and requested that the conservator be surcharged and relieved of her duties as to administration of the conservatorship. The county court denied the appellant's request, approved the final accounting, terminated the conservatorship, and discharged the conservator. The court also directed that issues raised by the appellant with respect to certain personal property be transferred to the probate court to be considered as part of the probate proceedings.

SCOPE OF REVIEW

[1] An appellate court reviews conservatorship proceedings for error appearing on the record made in the county court. See *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996).

[2] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 311, 664 N.W.2d 456 (2003).

FACTS

On January 27, 2000, Gloria Trobough Clippinger (Clippinger) filed a petition requesting that she be appointed the guardian and conservator for her mother, Marie J. Trobough. At the time, Trobough was 89 years old and residing in an assisted living facility in Omaha, Nebraska. The petition alleged that Trobough was incapacitated and unable to manage her property and affairs because she suffered from dementia and disorientation. It was alleged that Trobough's net worth was between $400,000 and $500,000. The Douglas County Court subsequently appointed Clippinger to act as Trobough's guardian and conservator. Clippinger filed annual reports and accountings on March 23, 2001, and March 28, 2002.

After Trobough's death on January 10, 2003, her granddaughter, Lori Bain, filed several pleadings with regard to the conservatorship. In her petition to void the transfer of personal property and for an accounting, Bain alleged that Trobough had collected many valuable antiques and was regarded as one of the premier collectors of dolls in the Omaha area. The petition alleged that Clippinger had moved certain property of Trobough's to Tennessee and purchased such property for $5,000. Bain alleged that the payment was grossly inadequate to compensate for the value of the personal property, which she estimated exceeded $100,000. The petition claimed that the transfer of this personal property was tainted by a substantial conflict of interest and should, therefore, be voided. Bain requested that the county court require Clippinger to account for all of Trobough's personal property that was moved to Tennessee.

In support of her petition, Bain filed an affidavit from Greg Ford, an auctioneer, who averred that he was involved in a 2-day

auction of Trobough's dolls and personal property and that the gross sales from the auction were $109,456.50, including $93,073 for the doll auction. Ford stated that the items sent to Tennessee were higher quality antiques than those sold at auction. He averred that the value of these items was between $100,000 and $150,000.

Clippinger requested that the county court consolidate the conservatorship proceedings with the probate proceedings that were pending in county court. On March 7, 2003, the court held a hearing regarding the motion to consolidate and ordered Clippinger to file her final accounting.

On March 24, 2003, Clippinger filed her final accounting and a petition requesting that the conservatorship be terminated and that she be discharged from her duties as guardian and conservator. Bain subsequently traveled to Tennessee to inventory the disputed property, and she then filed objections to the final accounting.

Bain also petitioned for removal and surcharge of the conservator and appointment of a successor conservator. She asserted that Clippinger had failed to account for personal property which Clippinger had transferred to herself without court approval and asked that the county court void the transfer. Bain also alleged that Clippinger had failed to account for certificates of deposit totaling in excess of $80,000. In a supplemental petition for approval of the final accounting, Clippinger included the certificates of deposit, which were valued at more than $90,000.

The record indicates that a hearing was scheduled for May 13, 2003; however, this proceeding evolved into a mere discussion among the parties and the county court regarding the problems created by the simultaneous conservatorship and probate proceedings. At that time, the court indicated that it approved the accounting as to the monetary assets and then stated: "The objections as to the personal property, these dolls and figurines in those arguments, are transferred to the probate case. I am ordering them transferred now."

In an order dated May 14, 2003, the county court approved the final accounting as to the monetary assets, terminated the conservatorship, discharged Clippinger of her responsibilities as conservator, and released the surety. The court denied Bain's

petition seeking to remove Clippinger as conservator, to surcharge the conservator, and to appoint a successor conservator. The court also directed that the dolls, figurines, and other personal property be transferred to the personal representative of Trobough's estate in a manner so as to preserve the issues raised by Bain until the court could consider them as a part of the probate proceedings.

Pursuant to the county court's order, Clippinger, as personal representative of Trobough's estate, filed a receipt for all of the assets listed on the final accounting in the conservatorship. Included with this receipt was an inventory of personal property indicating a transfer of dolls valued at $39,375; furniture valued at $16,367; figurines, jewelry, and "whatnot" valued at $7,175; a list of missing items valued at $19,040; a list of Hummel figurines valued at $64,725; another 5 pages of inventory of dolls; and 16 pages of inventoried items with no value listed. Bain timely filed this appeal from the May 14, 2003, order of the county court.

ASSIGNMENTS OF ERROR

Bain's assignments of error can be summarized as follows: The county court erred (1) in discharging Clippinger from her responsibilities as conservator; (2) in approving the final accounting in the conservatorship, even though it did not account for all of Trobough's assets; (3) in transferring conservatorship assets to the probate estate without addressing the issues surrounding those assets; (4) in not voiding Clippinger's purchase of estate assets; (5) in not appointing a successor conservator; (6) in failing to surcharge Clippinger for the value of the estate assets she unlawfully purchased or failed to account for; and (7) in failing to award attorney fees to an interested person whose actions preserved assets of the estate.

ANALYSIS

The record in this case consists of the pleadings and responses thereto and a document entitled "bill of exceptions," which is a transcription of the proceedings held on March 7, April 23, and May 13, 2003. No evidentiary hearing was held, and no exhibits were offered into evidence. Because the county court failed to conduct an evidentiary hearing, we vacate the judgment and remand the cause with directions.

We first note that the duties of a conservator are defined in Neb. Rev. Stat. ch. 30, art. 26 (Reissue 1995, Cum. Supp. 2002 & Supp. 2003). Pursuant to § 30-2648, Clippinger, as conservator, was required to account to the county court for her administration of the estate. The law also allows any person interested in the welfare of the person for whom a conservator has been appointed to file a petition asking for an accounting of the administration of the estate. See § 30-2645. In this case, Bain sought the accounting as an interested person. "*Upon notice and hearing*," the court may give appropriate instructions or may make any appropriate order in response to the interested person's petition. (Emphasis supplied.) See § 30-2645(c).

Our concern is the failure of the county court to conduct an evidentiary hearing to consider Bain's petitions. Instead, the court engaged in discussions with the parties without receiving any evidence to support or refute the issues raised in the pleadings. Without an evidentiary hearing, the court had no basis upon which to enter its orders in the conservatorship proceedings.

An appellate court reviews conservatorship proceedings for error appearing on the record made in the county court. See *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996). 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. *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 311, 664 N.W.2d 456 (2003). We conclude that the county court erred as a matter of law in failing to hold an evidentiary hearing and in failing to resolve the disputed issues in the conservatorship proceedings. The orders which the court entered are not supported by competent evidence.

In this case, the record shows that at a proceeding on March 7, 2003, the county court ordered Clippinger to file a final accounting and to close the conservatorship estate by April 23. At the March 7 proceeding, Bain's counsel asked the court to address how it planned to handle the petition to void the transfer of certain personal property by Clippinger. The court responded that the property issues should be considered in the probate proceedings.

The following dialog then occurred:

> [Counsel for Bain]: So when he files a final accounting at that time we can object. If we don't see the personal property in there we can come and object on the final accounting?
>
> THE COURT: Sure, you can object to it.
>
> [Counsel]: Okay.
>
> THE COURT: But like I say, since the party is deceased - - -
>
> . . . .
>
> THE COURT: - - - you know, we're going to go ahead and close this out. You know, and I'm not going to destroy any claims that you may have or that you may wish to contest.
>
> . . . .
>
> [Counsel]: But I guess in my own mind I'm thinking that the conservatorship is the place to object to a transfer of personal [property] to conservator.
>
> THE COURT: Yeah, you will be able to make your objections.
>
> [Counsel]: Okay.

On April 23, 2003, the matter was continued until May 13 to give Bain an opportunity to inventory the personal property that had been moved to Tennessee. At the hearing on May 13, the parties appeared before the court and essentially entered into another dialog with regard to their respective positions concerning the conservatorship.

Clippinger's attorney argued that the issues regarding the final accounting in the conservatorship should be transferred to the probate proceedings and that Clippinger should be discharged as conservator and the conservatorship proceedings terminated. Clippinger's attorney agreed to void the transfer of the assets which Bain alleged had been improperly transferred to Clippinger as conservator. Counsel admitted that it had become apparent that the property had somewhat greater value than Clippinger's original estimate.

Bain's attorney alleged that Clippinger had not fully accounted for all of the personal property and argued that property could not

be transferred to the probate estate when it had not been accounted for in the conservatorship.

The county court then stated that based on a review of the records by auditors, it would approve the accounting as to the monetary assets. The court recognized the parties' disagreement as to the dolls and figurines and directed transfer of this dispute to the probate proceedings. The court terminated the conservatorship and awarded attorney fees to Clippinger in the amount of $793.

Bain has properly preserved her objection to the alleged wrongful transfer of personal property to Clippinger, but we are unable to reach the merits of that issue because the county court did not conduct an evidentiary hearing.

Although conservatorship proceedings and probate proceedings may contain similar issues, the actions exist independently of each other. Issues which arise in a conservatorship should be resolved in that venue, and under the facts alleged in this case, the county court should have resolved those issues in the conservatorship proceedings as requested by Bain.

A party who disagrees with a county court's approval of a final accounting and the discharge of a conservator must appeal at that time because the county court's action is a final order. See *In re Guardianship & Conservatorship of Borowiak*, 10 Neb. App. 22, 624 N.W.2d 72 (2001); § 30-2648 ("[e]very conservator must account to the court for his administration of the trust upon his resignation or removal . . . . [A]n order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship").

Upon the death of the person for whom a conservatorship has been established, any issues relating to the conservatorship should be finally resolved in that proceeding. Issues relating to a final accounting and discharge of a conservator should not be carried over into the probate proceedings. The death of a person for whom a conservatorship has been established terminates the conservator's authority and responsibility as conservator. See *In re Guardianship & Conservatorship of Borowiak, supra*. However, the termination does not affect the conservator's liability for prior

acts or his obligation to account for funds and assets of the protected person. *Id.* See, also, §§ 30-2622 and 30-2648.

Rather than determining the propriety of Clippinger's actions, the county court attempted to transfer the questions to the probate proceedings. The court erred in not deciding all the issues presented.

[3] Any person interested in an estate may ask the conservator to file an accounting or may object to the accounting. § 30-2645. The conservator may, in a proper proceeding, be surcharged with any losses that occurred because of a breach of trust. See § 30-2658. Thus, Bain was within her rights to seek an accounting of the conservatorship.

A conservator should not be discharged prior to a complete accounting of the conservatorship's assets. If a conservator were to be discharged without properly accounting for the assets of the estate, the personal representative would have no recourse available to recover such assets. There would be no remedy to surcharge the conservator who failed to account for certain assets under his or her charge. That result would make the judicial process fundamentally unfair and cause damage to conservatorship proceedings. The issues involving the accounting were properly before the county court in the conservatorship proceedings and should have been decided there.

CONCLUSION

The May 14, 2003, order of the county court is vacated, and the cause is remanded with directions that the county court is to hold an evidentiary hearing to address the unresolved matters raised in the conservatorship proceedings.

ORDER VACATED, AND CAUSE
REMANDED WITH DIRECTIONS.

RYAN BIXENMANN, APPELLANT, V. H. KEHM CONSTRUCTION AND OHIO CASUALTY INSURANCE CO., APPELLEES.

676 N.W.2d 370

Filed March 26, 2004. No. S-03-817.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2002), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-121(5) (Cum. Supp. 2002), an injured employee may not undertake rehabilitation on his or her own and receive temporary total disability benefits without approval from either the court or his or her former employer.
6. ____. Neb. Rev. Stat. § 48-121(5) (Cum. Supp. 2002) requires that an employer must first offer, and the employee accept, vocational rehabilitation, or such rehabilitation must be court ordered before an employee becomes eligible for temporary total disability benefits.
7. **Workers' Compensation: Statutes.** While the compensation court is entitled to adopt and promulgate rules necessary for carrying out the intent of the Nebraska Workers' Compensation Act, the rules cannot modify, alter, or enlarge provisions of a statute entrusted to its administration.
8. **Workers' Compensation: Attorney Fees.** Where there is no reasonable controversy, Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002) authorizes the award of attorney fees.
9. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Words and Phrases: Appeal and Error.** A reasonable controversy under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002) may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard K. Watts, of Watts Law Office, P.C., and, on brief, Stephanie A. Payne for appellant.

William D. Gilner, of Nolan, Olson, Hansen, Fieber & Lautenbaugh, L.L.P., for appellees.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

This appeal arises from an order of affirmance on review by the Nebraska Workers' Compensation Court review panel. The review panel affirmed the decision of the trial court which denied Ryan Bixenmann temporary total disability (TTD) benefits during vocational rehabilitation and also denied waiting-time penalties, attorney fees, and interest. In this appeal, we must resolve an apparent inconsistency between Workers' Comp. Ct. R. of Proc. 36 (2002) and the Nebraska Workers' Compensation Act as to whether Bixenmann is entitled to an award of TTD benefits retroactive to commencement of his vocational rehabilitation plan.

BACKGROUND

Bixenmann injured his right wrist on October 8, 1996, during and in the course of his employment with H. Kehm Construction (H. Kehm). He reached maximum medical improvement on January 24, 2000, a date to which all parties stipulated. Thereafter, a vocational rehabilitation counselor was appointed. Before the rehabilitation counselor completed a vocational rehabilitation plan, she received a letter from H. Kehm's workers' compensation insurer, Ohio Casualty Insurance Co. (Ohio Casualty), on April 24, 2000. This letter informed the counselor that "Ohio Casualty Group will no longer authorize any vocational rehabilitation services for Mr. Bixenmann." Ohio Casualty stated that it had a videotape showing Bixenmann engaging in full-contact karate. Thus, Ohio Casualty concluded in its letter that Bixenmann had full use of his hands and was not in need of vocational rehabilitation. The rehabilitation counselor responded to Ohio Casualty's letter, stating that she would put the file on hold for 60 days.

Thereafter, for reasons not relevant to this appeal, a new vocational rehabilitation counselor was appointed. The counselor met with Bixenmann and prepared a vocational rehabilitation plan wherein Bixenmann would obtain a degree as a computer programming technician. Bixenmann and the counselor agreed to the plan, and it was sent to the compensation court's vocational rehabilitation specialist as required by rule 36. The specialist approved the plan and sent a copy to Ohio Casualty. Ohio Casualty did not respond within 14 days. Pursuant to rule 36, the vocational rehabilitation specialist advised Bixenmann that H. Kehm and Ohio Casualty were presumed to have accepted the plan and to have agreed to pay temporary benefits while Bixenmann was undergoing vocational rehabilitation. The vocational rehabilitation plan called for Bixenmann to start school on January 7, 2002, which he did. Bixenmann was still attending classes at the time of trial on July 22.

At trial, Bixenmann sought the compensation court's approval of the vocational rehabilitation plan currently underway and requested that TTD benefits be awarded retroactively to January 7, 2002, the date the vocational rehabilitation plan commenced.

The trial court found that based on the evidence at trial, Bixenmann was entitled to vocational rehabilitation benefits and that the plan was appropriate. The trial court declined, however, to award TTD benefits retroactive to January 7, 2002. The trial court, citing *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997), stated that an employer must first offer, and the employee accept, vocational rehabilitation, or such rehabilitation must be court ordered before an employee becomes eligible for TTD benefits. The trial court noted that the holding in *Thach* was premised on the language of Neb. Rev. Stat. § 48-121(5) (Reissue 1988) and that, therefore, it was statutorily powerless to award TTD benefits to Bixenmann retroactively. The trial court concluded that where it was prohibited by statute to issue a retroactive award, "it is difficult to imagine how the Court's own rules (Rule 36) can somehow confer such power." Thus, the trial court awarded TTD benefits from the date of the court's order forward. The trial court denied Bixenmann's request for waiting-time penalties and attorney fees. Bixenmann appealed the trial court's decision to the review panel, which affirmed.

ASSIGNMENTS OF ERROR

Bixenmann assigns, restated, that the trial court erred in (1) failing to award TTD benefits retroactive to January 7, 2002, the date he commenced his vocational rehabilitation plan, and (2) failing to award waiting-time penalties, attorney fees, and interest.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2002), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Swanson v. Park Place Automotive, ante* p. 133, 672 N.W.2d 405 (2003); *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Brown v. Harbor Fin. Mortgage Corp., ante* p. 218, 673 N.W.2d 35 (2004); *Morris v. Nebraska Health System, supra.*

[3,4] Statutory interpretation presents a question of law. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*; *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001).

ANALYSIS

Bixenmann contends on appeal that he is entitled to an award of TTD benefits retroactive to the commencement of his vocational rehabilitation plan. Bixenmann maintains that rule 36 creates an irrebutable presumption that H. Kehm and Ohio Casualty accepted the vocational rehabilitation plan and agreed to pay Bixenmann TTD benefits for the duration of his rehabilitation. Specifically, Bixenmann contends that neither H. Kehm nor Ohio Casualty notified the compensation court that it was rejecting the rehabilitation plan within 14 days of the date it received notice of the plan approved by the compensation court's vocational rehabilitation specialist. As such, Bixenmann contends

that he is entitled to TTD benefits retroactive to commencement of his plan of rehabilitation pursuant to § 48-121(5) (Cum. Supp. 2002).

Section 48-121(5) provides:

> The employee shall be entitled to compensation from his or her employer for temporary disability while undergoing physical or medical rehabilitation and while undergoing vocational rehabilitation whether such vocational rehabilitation is voluntarily offered by the employer and accepted by the employee or is ordered by the Nebraska Workers' Compensation Court or any judge of the compensation court.

Rule 36, entitled "Eligibility and Approval of Vocational Rehabilitation Services," provides, in its entirety:

> **A.** Vocational rehabilitation services shall be made available as soon as it has been medically determined that the employee is capable of undertaking such activity and that he or she is unable to perform suitable work for which he or she has had previous training or experience.
>
> **B.** All voluntary vocational rehabilitation plans including on-the-job training, job placement, and formal retraining, must have prior approval of the court's vocational rehabilitation specialists.
>
> 1. Notice of all approved or disapproved plans shall be sent to the employee, and either the employer, its insurer or risk management pool, and the vocational rehabilitation counselor.
>
> 2. Such employer or insurer or risk management pool shall inform the court within 14 days of the date such notice is sent whether or not it will accept an approved plan and shall concurrently with such acceptance agree to the payment of temporary disability to the employee while he or she is undergoing vocational rehabilitation and making satisfactory progress.
>
> 3. If the employer, its insurer or risk management pool does not respond, it will be presumed that the employer, its insurer or risk management pool has accepted the plan and has agreed to the payment of temporary disability benefits to the employee while he or she is undergoing vocational rehabilitation and making satisfactory progress.

4. The fee for the evaluation and for the development and implementation of the vocational rehabilitation plan shall be paid by the employer or his or her insurer or risk management pool.

[5,6] In *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997), we held that under § 48-121(5), an injured employee may not undertake rehabilitation on his or her own and receive TTD benefits without approval from either the court or his or her former employer. In so holding, we determined that a plain reading of § 48-121(5) requires that an employer must first offer, and the employee accept, vocational rehabilitation, or such rehabilitation must be court ordered before an employee becomes eligible for TTD benefits. As such, we reversed the judgment of the trial court which awarded TTD benefits from a point prior to the court's approval of the rehabilitation plan. Because the rehabilitation plan in this case was not court ordered as of the date Bixenmann began classes on January 7, 2002, we conclude, based on *Thach*, that a retroactive award in this case is proper only if we find that H. Kehm offered the plan and Bixenmann accepted.

Bixenmann maintains that under rule 36, H. Kehm and Ohio Casualty both failed to reject the vocational rehabilitation plan within 14 days of receiving notice from the vocational rehabilitation specialist. H. Kehm and Ohio Casualty both contend, however, that the April 24, 2000, letter sent by Ohio Casualty to the rehabilitation counselor prior to issuance of the rule 36 notice constitutes their refusal to authorize or otherwise agree to the rehabilitation plan. We need not address whether the April 24 letter complies with the terms of rule 36 because we agree with the review panel and find that rule 36 is an incorrect statement of the law.

The review panel concluded that the Nebraska Workers' Compensation Act does not include a provision similar to rule 36 wherein the rehabilitation plan is presumed accepted by the employer if the employer fails to respond within 14 days of notice of approval of the plan by a vocational rehabilitation specialist.

[7] While the compensation court is entitled to adopt and promulgate rules necessary for carrying out the intent of the Nebraska Workers' Compensation Act, see Neb. Rev. Stat. § 48-163 (Cum. Supp. 2002), the rules cannot modify, alter, or

enlarge provisions of a statute entrusted to its administration. *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995).

We conclude that rule 36 is an incorrect statement of the law and that neither H. Kehm nor Ohio Casualty are deemed to have accepted the vocational rehabilitation plan by reason of their failure to respond within 14 days. There is no evidence in the record indicating H. Kehm offered vocational rehabilitation, and the April 24, 2000, letter sent by Ohio Casualty to the rehabilitation counselor warrants a finding to the contrary. Because H. Kehm did not offer vocational rehabilitation, and such rehabilitation was not court ordered prior to trial, a retroactive award would be unfounded. As such, Bixenmann's TTD benefits should begin as of the date they were ordered by the trial court.

[8,9] For his second assignment of error, Bixenmann contends he is entitled to waiting-time penalties, attorney fees, and interest pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002). Where there is no reasonable controversy, § 48-125 authorizes the award of attorney fees. *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996). A reasonable controversy under § 48-125 may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

We agree with the review panel and conclude that the matters at issue in this appeal were heretofore unanswered by this court and that, accordingly, there was a reasonable controversy. We, therefore, deny Bixenmann's request for waiting-time penalties, attorney fees, and interest.

CONCLUSION

We hold that Bixenmann is not entitled to an award of TTD benefits retroactive to the date his vocational rehabilitation plan commenced on January 7, 2002. We further hold that Bixenmann

is not entitled to waiting-time penalties, attorney fees, or interest. Accordingly, we affirm the judgment of the trial court as affirmed by the review panel.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. VALLI JO WILLIAMS, RESPONDENT.

676 N.W.2d 376

Filed March 26, 2004. No. S-04-259.

Original action. Judgment of disbarment.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

On February 26, 2004, relator, the Counsel for Discipline of the Nebraska Supreme Court, filed a motion for reciprocal discipline pursuant to Neb. Ct. R. of Discipline 21 (rev. 2001) against respondent, Valli Jo Williams. The motion sought to impose an appropriate disciplinary sanction against respondent in Nebraska as a result of the revocation of respondent's license to practice law in the State of Iowa by the Iowa Supreme Court. On March 3, 2004, respondent filed a voluntary surrender of her license to practice law in the State of Nebraska.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on March 30, 1983. She was also admitted to practice law in the State of Iowa. On July 2, 2003, the Iowa Supreme Court Board of Professional Ethics and Conduct (Board) filed a complaint against respondent after she pled guilty in federal court to charges of interstate transportation of stolen property and wire fraud. The charges stemmed from respondent's employment in the claims departments of two employers and her submission to

those employers of fictitious accident claims, resulting in respondent's receipt of $1,062,339.68 in insurance payments for those fictitious claims. As a result of her guilty pleas, respondent was sentenced to two 30-month terms of imprisonment, to be served concurrently, and ordered to pay restitution.

The Board's complaint charged respondent with multiple violations of the Iowa Code of Professional Responsibility. In *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Williams*, No. 03-1702, 2004 WL 345595 (Iowa Feb. 25, 2004), the Iowa Supreme Court determined that respondent took advantage of positions of trust, defrauded two separate employers in excess of $1 million, and misappropriated such amounts to her personal use. The court further determined that respondent's actions were not an isolated instance of misconduct, but a carefully planned scheme involving wire fraud and interstate transportation of stolen property taking place over a 7-year period. The court concluded, inter alia, that based upon her actions, respondent violated numerous disciplinary rules by engaging in illegal conduct involving moral turpitude; engaging in illegal conduct involving dishonesty, fraud, deceit, or misrepresentation; and engaging in conduct that adversely reflected upon her fitness to practice law. On February 25, 2004, the Iowa Supreme Court revoked respondent's license to practice law in Iowa.

On February 26, 2004, relator filed a motion for reciprocal discipline pursuant to rule 21, seeking an order of appropriate discipline, which discipline could include disbarment. The motion recited, inter alia, respondent's federal indictment and guilty pleas to interstate transportation of stolen property and wire fraud, the sentences that were entered upon those guilty pleas, and the Iowa Supreme Court's revocation of respondent's license to practice law in Iowa. Attached to the motion was a copy of the *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Williams* opinion, which was incorporated into the motion by reference.

On March 3, 2004, respondent filed with this court a voluntary surrender of license, voluntarily surrendering her license to practice law in the State of Nebraska. In her voluntary surrender, respondent stated that she "knowingly" did not contest the truth of the allegations set forth in the motion for reciprocal discipline

and effectively waived all proceedings against her. In addition to surrendering her license, respondent consented to the entry of an order of disbarment.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to rule 15, we find that respondent has voluntarily surrendered her license to practice law, admitted in writing that she knowingly does not challenge or contest the truth of the allegations set forth in the motion for reciprocal discipline, waived all proceedings against her in connection therewith, and consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent knowingly did not challenge or contest the truth of the allegations set forth in the motion for reciprocal discipline and that her waiver was knowingly made. The court accepts respondent's surrender of her license to practice law, finds that respondent should be disbarred, and hereby orders her disbarred from the practice of law in the State of Nebraska effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V. GREGORY LAMMERS, APPELLANT.

676 N.W.2d 716

Filed April 2, 2004. No. S-02-1206.

1. **Motions to Suppress: Search Warrants: Affidavits: Appeal and Error.** A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous.
2. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
3. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
4. **Motions to Suppress: Search Warrants: Appeal and Error.** In connection with a challenge to the execution of a search warrant, in reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
5. **Search Warrants: Affidavits: Probable Cause: Words and Phrases.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
6. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity.
7. ____: ____. The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
8. **Criminal Law: Eyewitnesses: Search Warrants: Affidavits: Words and Phrases.** A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement. The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth circumstances from which the informant's status as a citizen informant can reasonably be inferred. Unlike the police tipster who acts for

money, leniency, or some other selfish purpose, the citizen informant's only motive is to help law officers in the suppression of crime. Unlike the professional informant, the citizen informant is without motive to exaggerate, falsify, or distort the facts to serve his or her own ends.

9. **Eyewitnesses.** Once an individual is considered to be a citizen informant, reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known.
10. **Search and Seizure: Search Warrants: Probable Cause: Police Officers and Sheriffs: Proof.** Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable; consequently, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable.
11. **Constitutional Law: Search Warrants.** The reasonableness of the execution of a search warrant under the Fourth Amendment must be evaluated by examining the totality of the circumstances.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. Affirmed.

Bradley E. Nick, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Gregory Lammers was convicted in the district court for Dodge County, Nebraska, of possession of methamphetamine with intent to deliver and was sentenced to 4 to 5 years' imprisonment. Lammers appeals his conviction and assigns error to the denial of his motion to suppress evidence obtained from a search of his residence. He argues that the search warrant was improperly issued because the supporting affidavit did not establish probable cause and that the search was unreasonable because police officers conducted an improper "knock-and-announce" search pursuant to the warrant. We affirm.

STATEMENT OF FACTS

On April 12, 2002, the State filed an information charging Lammers with one count of possession of methamphetamine

with intent to deliver. The charge against Lammers was based on evidence seized in a search of Lammers' residence, which search was conducted on March 22 pursuant to a search warrant. That evidence included approximately 80 grams of methamphetamine and $8,507 in cash.

On June 7, 2002, Lammers filed a motion to suppress all evidence seized as a result of the March 22 search. Lammers made two arguments in support of suppression: (1) the search warrant was issued on the basis of an affidavit that failed to establish probable cause and (2) the police officers executing the search warrant failed to conduct a proper "knock and announce" prior to forcibly entering his residence.

The search warrant for Lammers' residence was issued by the Dodge County Court on March 21, 2002. The county court concluded that the affidavit of Shane Wimer, a Fremont, Nebraska, police officer, established probable cause to support issuance of the warrant. In the affidavit, Wimer stated his belief that controlled substances and evidence of the use, sale, or distribution of controlled substances would be found in a search of Lammers' residence. Wimer made the following assertions to support his conclusion: On March 4, 2002, a police officer identified as "K Pafford" was called to a bank in Fremont to investigate a report of possible drugs found in the bank. At the bank, Pafford was given a corner of a plastic baggie containing approximately 3.2 grams of a yellow powdery substance which later tested positive for methamphetamine. A bank employee told Pafford that Lammers had been in the bank to make a deposit and that while at a teller window, Lammers removed some items from his pocket. Shortly after Lammers left the bank, the plastic baggie corner containing the yellow-powdered substance was located on the floor "in nearly the same spot" where Lammers had been standing.

Wimer also stated in the affidavit that a house located on North Madison Street in Fremont was under the control or custody of Lammers. Wimer stated that on March 7, 2002, he performed a sanitation check at that location and found 19 enumerated items that he asserted would support his conclusions that the location was Lammers' residence and that the use of controlled substances had occurred there. These items included various

pieces of correspondence addressed to Lammers, notes and correspondence to others, various pieces of paper with names and telephone numbers written on them, a glass beer bottle with burn residue that appeared to have been turned into a homemade glass pipe, one plastic baggie with the corner missing, one plastic baggie with the bottom missing and heat sealed, plastic baggie corners, and various pieces of aluminum foil both with and without burn residue.

Wimer also stated in the affidavit that he performed another sanitation check on March 14, 2002, and found 13 enumerated items including additional pieces of paper with names and telephone numbers, additional pieces of aluminum foil with multiple folds both with and without burn residue, and a piece of wire. The affidavit further stated that another police officer performed a sanitation check on March 21 and found 14 enumerated items including additional items similar to those found in the earlier checks and, in particular, 8 plastic baggies with corners missing and 28 pieces of aluminum foil of which 12 had burn residue.

Wimer stated in the affidavit that he had knowledge that aluminum foil with folds and burn residue of the type found in the sanitation checks indicated the use of such foil for ingestion of powdered controlled substances. Wimer indicated that his training and experience with methods of ingestion indicated that the glass beer bottle found in the sanitation check could have been used as a pipe to smoke a powdered controlled substance. Wimer knew that baggie corners and baggies with corners torn indicated the packaging and resale of controlled substances. Wimer also stated that the wire found in the March 14, 2002, sanitation check was of the same type and size as a wire found with the plastic baggie from the bank.

Wimer also stated in the affidavit that in the summer of 2001, he witnessed at least two occasions where a car pulled up to the North Madison Street residence and a passenger exited the vehicle and entered the residence while the driver and other passengers stayed in the vehicle. The passenger who exited remained inside the residence less than 10 to 15 minutes.

Wimer further stated that he had conducted a criminal history check of Lammers. The check revealed that Lammers' criminal history included a 1984 arrest in South Dakota for possession of

a controlled substance and a 1985 arrest in Nebraska for using an explosive device to damage property. The check also revealed that on January 7, 2002, 2 months prior to the bank episode of March 4, Lammers had been arrested in Washington County, Nebraska, for possession of methamphetamine and possession of drug paraphernalia. The Washington County case had not yet gone to trial; however, Wimer spoke to the investigating officer who indicated that Lammers had been visiting a residence in Washington County when officers executed a search warrant and found Lammers to be in possession of methamphetamine and a glass pipe.

Wimer also stated that a woman whose name showed up on various pieces of paper and correspondence found in the sanitation checks of Lammers' residence was known to be involved in the drug culture.

At the hearing on Lammers' motion to suppress, Wimer testified regarding the execution of the search warrant. Wimer had presented his affidavit and request for a search warrant to the Dodge County Court on March 21, 2002, and the county court issued the daytime knock-and-announce warrant that day.

On March 22, 2002, Wimer and several other police officers executed the search warrant. They arrived at Lammers' residence at approximately 10 minutes after 7 a.m. Wimer testified that the residence was a small, two-bedroom residence with a bathroom, kitchen, living room, and a basement and that the residence had both a front door and a back door. Upon their arrival, Wimer instructed another officer, Stuart Nadgwick, who was first in line, to knock and announce. Nadgwick knocked and yelled, "Police department, search warrant." Nadgwick waited 8 seconds and knocked and announced the presence of police a second time. Wimer heard no activity inside the house. Following the second knock and announce and having received no response, Nadgwick called up another officer to use a ram to force entry. The officers used the ram to open the door and entered the residence. Wimer estimated that 10 to 12 seconds passed between the first knock and announce and the use of the ram to force entry. Wimer testified that he believed 10 to 12 seconds to be sufficient for someone to answer the door in a house the size of Lammers' residence and that he was generally

concerned that to wait longer could have resulted in the destruction of evidence.

Nadgwick also testified at the hearing. He testified that Wimer informed him prior to the police officers' arrival at the door that he should wait 8 seconds after the first knock and announce. After the first knock and announce, Nadgwick waited 8 seconds by counting "one thousand one, one thousand two, one thousand three, et cetera, until eight one thousand." Nadgwick did not hear any activity inside the house while waiting the 8 seconds. A second knock and announce was made. Nadgwick agreed with Wimer's estimate that 10 to 12 seconds elapsed between the first knock and announce and the time the door was rammed. When Nadgwick entered the residence, he observed Lammers standing in street clothes approximately 7 to 8 feet from the door.

In a written journal entry filed on June 26, 2002, the district court overruled both parts of Lammers' motion to suppress. Although the district court did not articulate its findings as indicated in *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996), the parties agree that there is no factual dispute that there were 10 to 12 seconds between the first knock and announce and the ramming of the door. We consider the merits of the motion to suppress on this basis.

A bench trial on stipulated facts was held on August 27, 2002. On August 30, the district court entered an order finding Lammers guilty of possession of methamphetamine with intent to deliver. On October 1, the district court sentenced Lammers to 4 to 5 years' imprisonment. Lammers appeals.

ASSIGNMENTS OF ERROR

Lammers asserts that the district court erred in denying his motion to suppress evidence and in admitting such evidence at trial because (1) there was no probable cause to support issuance of the search warrant and (2) the search warrant was improperly executed when police officers failed to properly knock and announce prior to forcibly entering his residence.

STANDARDS OF REVIEW

[1-3] A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a

search warrant, will be upheld unless its findings are clearly erroneous. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003). In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *Id.*

[4] In connection with a challenge to the execution of a search warrant, in reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

ANALYSIS

Sufficiency of Affidavit in Support of Issuance of Search Warrant.

Lammers first argues that the search warrant was improperly issued because the affidavit supporting the warrant did not establish probable cause. Lammers tends to focus on the fact that the bank employee was not identified by name in the affidavit and asserts that without the information imparted by the bank employee and the methamphetamine from the bank, the remainder of the affidavit does not establish probable cause. We determine that the affidavit was sufficient to support issuance of the search warrant.

[5] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *March, supra.* Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *Id.*

One of the key pieces of information in the affidavit supporting probable cause in the present case was the bank employee's report to police that possible drugs were found in the bank and that the drugs were located near where Lammers had been standing shortly before their discovery. The bank employee's report was significant because it identified Lammers as having been in possession of a controlled substance and it prompted the investigation that lead to the discovery of much of the other evidence recited in the affidavit. Lammers argues that the information provided by the bank employee could not be used to support a finding of probable cause because the affidavit does not identify the bank employee by name and therefore the information was not sufficiently reliable. We do not agree.

[6,7] Although information provided by an informant must be found to be reliable to support a finding of probable cause, a finding of reliability does not necessarily require that the informant be identified by name. In the context of a search warrant, we have said that when the warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity. *State v. Marcus*, 265 Neb. 910, 660 N.W.2d 837 (2003). Further, the affiant must establish the informant's credibility or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *Id.* The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.*

[8] In the present case, the State asserts that the bank employee was a citizen informant. We agree. A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement. *Id.* The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth circumstances from which the informant's status as a citizen informant

can reasonably be inferred. *Id.* Unlike the police tipster who acts for money, leniency, or some other selfish purpose, the citizen informant's only motive is to help law officers in the suppression of crime. *Id.* Unlike the informant who acts out of self-interest, the citizen informant is without motive to exaggerate, falsify, or distort the facts to serve his or her own ends. *Id.* The bank employee in the present case was a witness to certain facts recited in the affidavit and acted openly to assist law enforcement. Nothing in the affidavit suggests that the bank employee had a motive to exaggerate, falsify, or distort the facts to serve his or her own ends, and it is reasonable to infer that the bank employee was motivated solely by good citizenship.

Lammers notes that the bank employee was not identified by name in the affidavit and therefore challenges the bank employee's status as a citizen informant. We reject the inference in Lammers' argument that the bank employee should be considered an anonymous informant whose reliability must be separately established, and instead, we determine that given the facts, the bank employee is not an anonymous source and that the information supplied by the bank employee is presumptively reliable. In this regard, we note that it has been observed that "[c]ourts have been lenient in their assessment of the type and amount of information needed to identify a particular informant. Many courts have found, for instance, that identification of the informant's occupation alone is sufficient [to negate a claim that the informant was anonymous]." *City of Maumee v. Weisner*, 87 Ohio St. 3d 295, 301, 720 N.E.2d 507, 514 (1999). Thus, for example, in *U.S. v. Pasquarille*, 20 F.3d 682 (6th Cir. 1994), the Court of Appeals for the Sixth Circuit concluded that although the informant's name was unknown, information that he was a transporter of prisoners was enough to identify him. In the instant case, the informant was identified in the affidavit as a bank employee who witnessed certain facts and it is apparent that the informant's identity, although not recited in the affidavit, was known to police. We consider the bank employee in this case to be a citizen informant and not an anonymous informant.

[9] Once an individual is considered to be a citizen informant, reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information

became known. *State v. Marcus*, 265 Neb. 910, 660 N.W.2d 837 (2003). Thus, we have said that an informant's detailed eyewitness report of a crime may be self-corroborating because it supplies its own indicia of reliability. *Id.* We have also said that an untested citizen informant who has personally observed the commission of a crime is presumptively reliable. *Id.*

It is clear from the affidavit that the bank employee personally observed the presence of drugs in circumstances which indicated that the drugs had been in Lammers' possession. Because the bank employee had no apparent motive other than good citizenship in reporting these observations, the bank employee's information is presumptively reliable and was properly used to support a finding of probable cause to issue the search warrant in this case. The information provided by the bank employee was combined with the other information detailed in the affidavit indicating that controlled substances were being used, sold, or distributed at Lammers' residence in Fremont. The information in the affidavit indicated a fair probability that contraband or evidence of a crime would be found in a search of the residence, and the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. See *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003). The district court did not err in denying Lammers' motion to suppress on this basis. We reject Lammers' first assignment of error.

Execution of Search Warrant.

Lammers next argues generally that because the police officers conducted an improper knock-and-announce search pursuant to the warrant, the search was unreasonable. Lammers specifically claims that the police were not refused admittance and improperly forced their way into his residence 10 to 12 seconds after the first knock and announce. The State counters that the police were constructively refused admittance and were therefore entitled to forcibly enter Lammers' residence. Based on the recent authority in *United States. v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003), the propriety of the execution of the warrant does not turn on refusal, and viewing the record under a totality of the circumstances analysis, after the second knock and announce in this case, an exigency justifying entry had matured and the search warrant was properly executed.

[10] In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7. *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003). Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable; consequently, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable. *Id.* Because the police in this case conducted the search of Lammers' residence pursuant to a warrant that was supported by probable cause, Lammers bore the burden to demonstrate that the search was unreasonable.

In a drug case involving execution of a search warrant, the U.S. Supreme Court recently considered whether a 15- to 20-second wait before a forcible entry at midday following a single knock and announce satisfied the Fourth Amendment. The Court concluded under a totality of the circumstances analysis that a reasonable suspicion of exigency existed and that the forcible entry was reasonable. In *Banks*, the police had information that Lashawn Banks was selling cocaine at his home, and the police obtained a warrant to search his two-bedroom apartment. Upon arriving at Banks' door, the officers knocked and announced their presence. There was no response and no indication that anyone was home. Fifteen to twenty seconds after the single knock and announce, the officers broke open Banks' door with a battering ram. The subsequent search of Banks' residence produced evidence of drug dealing. Banks' motion to suppress evidence obtained from the search was denied in federal district court. A divided panel of the Court of Appeals for the Ninth Circuit reversed, and ordered suppression. The U.S. Supreme Court reversed the Ninth Circuit's decision after concluding that the search satisfied the Fourth Amendment.

We note that the Court in *Banks* recognized at the outset that the officers therein "were obliged to knock and announce their intentions when executing the search warrant." 540 U.S. at 35. However, the Court thereafter stated that "when executing a [knock-and-announce] warrant . . . if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in." 540 U.S. at 36-37. The Court in *Banks* observed that the case "turn[ed] on the significance of exigency

revealed by circumstances known to the officers." 540 U.S. at 37. In *Banks*, the Court found that an exigency, namely, the imminent disposal of drugs, had "matured," 540 U.S. at 40, 15 to 20 seconds after the officers knocked and announced their purpose a single time. The Court stated that "after 15 or 20 seconds without a response, police could fairly suspect that cocaine would be gone if they were reticent any longer." 540 U.S. at 38. The Court also stated that "15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine." 540 U.S. at 40.

In *United States. v. Banks*, 540 U.S. 31, 40, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003), the Court noted that "the crucial fact in examining [the reasonableness of the forced entry of police] is not time to reach the door but the particular exigency claimed . . . what matters is the opportunity to get rid of cocaine." That is, when the exigency claimed is disposal of drugs as evidence,

> it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter; since the bathroom and kitchen are usually in the interior of a dwelling, not the front hall, there is no reason generally to peg the travel time to the location of the door, and no reliable basis for giving the proprietor of a mansion a longer wait than the resident of a bungalow, or an apartment like Banks'.

540 U.S. at 40.

[11] In *Banks*, the Court reemphasized that the reasonableness of the execution of a warrant under the Fourth Amendment must be evaluated by examining the totality of the circumstances. 540 U.S. at 36 ("we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case"). The Court declined to set forth bright-line rules with respect to the analysis of the proper execution of warrants and instead emphasized the fact-specific nature of the reasonableness inquiry. Although the Court stated in *Banks* that the "call is a close one" as to whether the 15 to 20 seconds the officers waited prior to forcing their way in was sufficient, the Court determined that under the facts, which established a reasonable suspicion of exigency, the time was reasonable under the Fourth Amendment, "even without refusal of admittance." 540 U.S. at

38, 43. In footnote 5 of *Banks*, the Court cited, with apparent approval, other cases in which courts found similar or shorter waiting times to be reasonable in drug cases involving easily disposable evidence. E.g., *U.S. v. Markling*, 7 F.3d 1309 (7th Cir. 1993) (holding 7-second wait at small motel room reasonable when officers acted on specific tip that suspect was likely to dispose of drugs); *U.S. v. Garcia*, 983 F.2d 1160 (1st Cir. 1993) (holding 10-second wait after loud announcement reasonable).

We therefore review the district court's rejection of Lammers' challenge to the execution of the warrant by reference to the totality of the circumstances in the present case. At the outset, we note that the warrant at issue was a knock-and-announce warrant as contrasted with a "no-knock" warrant. See Neb. Rev. Stat. § 29-411 (Reissue 1995). The State argues, inter alia, that the police officers were justified in forcing their way into the residence after their first knock and announce because they were searching for evidence of drugs and such evidence was easily disposable. Wimer, one of the officers executing the warrant, testified about his concern that drugs could be readily flushed down the toilet. The State thus claims that the facts known to the officers and reflected in the record led to a reasonable suspicion of exigency which justified a forcible entry. See *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

In the instant case, the search was commenced at approximately 10 minutes after 7 a.m. The Legislature has determined that for purposes of search warrants, the hours from 7 a.m. to 8 p.m. are considered "daytime." See Neb. Rev. Stat. § 29-814.04 (Reissue 1995). The evidence showed that the residence was a small house, and therefore a person could move reasonably quickly within the residence to attempt to destroy drug evidence. The testimony indicates that destruction of evidence was a concern of the police. We also note that the officers in this case made a second knock and announce prior to calling up the ram and received no response.

In connection with the execution of a warrant, whether or not exigent circumstances exist is subject to a reasonable suspicion analysis, *United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003), and the existence of reasonable suspicion is subject to a de novo review on appeal, *Kelley, supra*. Our

review of the record shows that the totality of the circumstances in this case supports a reasonable suspicion of exigency, namely the imminent destruction of drug evidence which justified a forcible entry, even absent a refusal of admittance. Under the facts of this case, the exigency developed subsequent to the knock and announce. The execution of the search warrant was not improper. The district court did not err in rejecting Lammers' claim regarding the execution of the search warrant. The district court did not err in denying Lammers' motion to suppress on this basis. We reject Lammers' second assignment of error.

CONCLUSION

The affidavit in support of the search warrant established probable cause justifying its issuance, and the execution of the search warrant was not improper. We, therefore, conclude that the district court did not err in denying Lammers' motion to suppress and in admitting the evidence obtained from the search of Lammers' residence pursuant to the warrant. We therefore affirm Lammers' conviction.

AFFIRMED.

GERRARD, J., dissenting.

I agree with the majority's conclusion that the affidavit in this case was sufficient to establish probable cause to issue a search warrant. I also agree with the majority's exposition of the legal principles governing the court's "knock-and-announce" analysis, but I disagree with the conclusion that the majority reaches. This case does not involve a dispute about the historical facts; thus, as the majority notes, the ultimate determination of reasonable suspicion is reviewed de novo by this court. I would conclude, based on the circumstances presented here, that a reasonable suspicion of an exigent circumstance had not yet matured and that the district court should have sustained Lammers' motion to suppress the evidence obtained from the search of his residence. Thus, I respectfully dissent.

I begin by noting the reasoning with which the U.S. Supreme Court approved the reasonableness of the search conducted in *United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003). In *Banks*, as the majority notes, the court concluded it was reasonable to suspect an imminent loss of evidence 15 or 20

seconds after the police had knocked and announced their presence. The Court stated that on the record in that case,

> what matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink. The significant circumstances include the arrival of the police during the day, when anyone inside would probably have been up and around, and the sufficiency of 15 to 20 seconds for getting to the bathroom or the kitchen to start flushing cocaine down the drain. That is, when circumstances are exigent because a pusher may be near the point of putting his drugs beyond reach, it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter; since the bathroom and kitchen are usually in the interior of a dwelling, not the front hall, there is no reason generally to peg the travel time to the location of the door, and no reliable basis for giving the proprietor of a mansion a longer wait than the resident of a bungalow, or an apartment like Banks's. And 15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine.

540 U.S. at 40.

The Court's analysis in *Banks* must be read in light of the Court's earlier holdings in *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995), and *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). In *Wilson*, the police officers executing the search warrant announced their presence at the same time that they entered the residence. The Court reversed the Arkansas Supreme Court's affirmance of the resulting conviction, explaining that the knock-and-announce principle formed a part of the Fourth Amendment inquiry into the reasonableness of a search. At the same time, the Court cautioned that the flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignored countervailing law enforcement interests. See *Wilson, supra*.

In *Richards, supra*, the Wisconsin Supreme Court had concluded that police were *never* required to knock and announce their presence when executing a search warrant in a felony drug investigation. The U.S. Supreme Court rejected the Wisconsin

court's conclusion that the Fourth Amendment permitted a per se exception in drug cases to what the Court now characterized as the "knock-and-announce requirement." 520 U.S. at 388. The Court held that in order to justify a no-knock entry, police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. See *id.* But the Court refused to create a per se exception for felony drug investigations, stating that if it created such an exception, even for a category of offenses with a considerable risk of destruction of evidence, "the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." 520 U.S. at 394.

Obviously, under *Wilson, supra*, police cannot satisfy the knock-and-announce requirement by simultaneously announcing their presence and entering a residence, and *Richards, supra*, makes clear that the fact that drugs are easily disposable does not change the requirement of *Wilson*. But it is equally obvious that pursuant to *United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003), officers are permitted to force entry if they wait long enough, under the circumstances, to have a reasonable suspicion that waiting longer would permit the destruction of evidence. The instant case falls somewhere in the middle. The Court in *Banks* cautioned against distorting the "totality of the circumstances" principle by resorting to categorical schemes, and I recognize that the line in these cases can be difficult to draw. But, as Justice Holmes wrote, "the constant business of the law is to draw such lines." *Dominion Hotel v. Arizona*, 249 U.S. 265, 269, 39 S. Ct. 273, 63 L. Ed. 597 (1919).

In a rare concession, the Court stated in *Banks* that the "call," in that case, was "a close one." 540 U.S. at 38. This case, in my opinion, crosses the line, and the district court should have concluded that the search was unreasonable under the Fourth Amendment. In *Banks*, police entered the residence of a suspected drug dealer after 15 to 20 seconds. The Court specifically noted that the exigency of possible destruction of evidence was heightened because the "prudent dealer" will be prepared to quickly dispose of evidence. See 540 U.S. at 40.

In this case, on the other hand, police entered the residence after only 10 to 12 seconds, and had apparently determined to do so before they even reached Lammers' residence a few minutes after 7 a.m. The facts known to the police prior to executing the search warrant, as summarized in the majority opinion, do not particularly suggest that Lammers was a sophisticated drug dealer; the police did not seek a no-knock warrant. Rather, the record just as easily suggests that Lammers was certainly a consumer, and not a very prudent consumer at that. The fact that Lammers dropped his drugs at the bank indicates that he was not particularly cautious or discreet. I would conclude, considering the totality of the circumstances in this case, that the exigent circumstance claimed by the police—reasonable suspicion of the possible destruction of evidence—had not yet matured at the time that the police forced entry into Lammers' residence.

Nebraska law requires that in the absence of judicial direction, an officer executing a search warrant effectively give "notice of his office and purpose" before breaking into a building. See Neb. Rev. Stat. § 29-411 (Reissue 1995). Both the U.S. Constitution and § 29-411, however, permit the issuance of a no-knock search warrant when proof is presented that evidence may be easily disposed of or destroyed, or that danger to the executing officer may result. See *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). While *Richards* cautioned against the overgeneralization associated with a per se rule permitting no-knock warrants in felony drug cases, the Court certainly did not preclude a no-knock search warrant when circumstances justify one. "[W]hen the officers know, before searching, of circumstances that they believe justify a no-knock entry, it seems more consistent with the Fourth Amendment to ask a neutral judge for approval before intruding upon a citizen's privacy." *U.S. v. Scroggins*, No. 03-2279, 2004 WL 574495 at *4 (8th Cir. Mar. 24, 2004). The majority's determination in this case, however, comes perilously close to permitting police to sidestep the procedure established by § 29-411 for obtaining a no-knock warrant. The police could obtain an ordinary search warrant, and then satisfy the knock-and-announce requirement with what is, in my opinion, a perfunctory announcement of their presence before a nearly immediate forced entry.

In order for *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995); *Richards, supra*; and § 29-411 to have continued vitality, the knock-and-announce requirement must be meaningfully implemented. I do not believe that, at 7:10 in the morning, waiting 10 to 12 seconds before breaking down Lammers' door was a meaningful announcement of police presence, and I conclude, after a de novo review, that the search was unreasonable under the Fourth Amendment. I would hold that the district court erred in denying Lammers' motion to suppress on that basis.

HENDRY, C.J., joins in this dissent.

IN RE WENDLAND-REINER TRUST.
JOHN M. MCHENRY, SUCCESSOR TRUSTEE, APPELLEE, V.
ROSELLA L. REINER, APPELLEE, AND
JOHN R. WENDLAND, APPELLANT.

677 N.W.2d 117

Filed April 2, 2004. No. S-02-1395.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
3. **Trusts.** The settlor of a trust may reserve the power of revocation or amendment, and such a power is consistent with a valid trust.
4. **Trusts: Intent.** The rules of construction for interpreting a trust are applied when the language of the trust is not clear; but if the language clearly expresses the settlor's intent, the rules do not apply.
5. **Trusts.** The law does not require that a settlor expressly recite that he or she is amending a trust agreement in order to make an amendment effective.
6. **Trusts: Intent.** The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator.
7. ____: ____. When there are two or more instruments relating to a trust, they should be construed together to carry out the settlor's intent.
8. **Trusts: Notice: Waiver.** Provisions in a trust agreement requiring the settlor to provide written notice of amendments to the trustee are for the benefit of the trustee. Thus, compliance may be waived by the trustee.

Appeal from the County Court for Lancaster County: MARY L. DOYLE, Judge. Affirmed.

Patrick D. Timmer, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellant.

Jeanette Stull, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee Rosella L. Reiner.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

This appeal involves a revocable trust created by Charles W. Phillips. The trust agreement granted Phillips, as settlor, the right to amend the terms of the trust agreement "by instrument in writing delivered to the Trustee." Phillips named himself as the trustee and funded the trust with an annuity issued by Hartford Life Insurance Company (Hartford). Before his death, Phillips sent a letter to Hartford directing Hartford to alter the amount to be paid to one of the beneficiaries of the trust. The issue is whether the letter amended the trust agreement. We conclude that Phillips' letter amended the trust agreement and affirm the trial court's decision.

BACKGROUND

Phillips created the trust on June 25, 1993. The trust agreement provided that the trustee would make monthly payments of $1,000 to Rosella L. Reiner until her death. After her death, the trust was to be liquidated and the proceeds paid in equal shares to Phillips' grandsons, Robert J. Wendland and John R. Wendland, as remainder beneficiaries. In addition, the trust agreement provided: "So long as he lives (except during any period of adjudicated incompetency) the Grantor [i.e., Phillips] shall have the right, by instrument in writing delivered to the Trustee: . . . B. Amendment of Agreement: To amend this Agreement in any and every particular." Phillips named himself as the trustee. He deposited $181,876.38 into the trust and used those funds to purchase an annuity issued by Hartford.

On March 10, 1995, Phillips sent a letter to Hartford. The body of the letter provided:

> I am the trustee of the Wendland-Reiner Trust [d]ated 06-25-93. The annuitant is Rosella L. Reiner.

> Effective immediately, I want to have systematic monthly withdrawals in the amount of $500.00. . . . Please send these monthly payments to the annuitant, Rosella L. Reiner. . . .
>
> Please make the first payment on March 1, 1995 and subsequent payments on the first of each following month.
>
> I understand that the taxes on these withdrawals will [be] paid by the trust . . . . I further understand that I reserve the right to change the amount of the systematic withdrawals at any time. Please note that my signature has been guaranteed.

The signature block of the letter read "Charles W. Phillips, Trustee," and the letter was signed by Phillips. Hartford complied with the letter and lowered the amount of monthly payments to Reiner to $500.

Phillips sent three more letters to Hartford, each of which directed Hartford to change the amount of the monthly payments that were to be made to Reiner. Hartford complied with the letters. For our purposes, the final letter, dated May 22, 1997, is the most important. It directed Hartford to increase the amount of the monthly payments to $2,000. Like the other two letters, it was substantially similar in all other respects to the March 10, 1995, letter.

In addition to the letters directing Hartford to increase the amount of Reiner's monthly payments, Phillips sent two letters directing Hartford to make one-time lump-sum withdrawals and to pay the money to Reiner. The first letter, sent in October 1997, requested a $5,000 withdrawal, and the second, sent in December 1997, requested a $6,000 withdrawal; Hartford complied with both letters.

Phillips died in January 1999. After Phillips' death, Reiner continued to receive $2,000 monthly payments until March 1, 2002. At that time, the first successor trustee, Harry L. Wendland, reduced the amount of the monthly payments to $1,000, the amount originally specified in the trust agreement.

Harry Wendland subsequently resigned as successor trustee, and the Lancaster County Court appointed John M. McHenry as the second successor trustee. McHenry then filed a petition for trust administration proceedings. In it, he asked the court to

determine whether the May 22, 1997, letter amended the trust agreement by increasing the amount of Reiner's monthly payments to $2,000. In Reiner's answer, she alleged that the letter amended the terms of the trust agreement and that she was therefore entitled to receive $2,000 per month. In the remainder beneficiaries' answer, they alleged that the letter failed to meet the trust agreement's requirements for amendment and that therefore, the original language of the trust agreement setting the amount to be paid to Reiner at $1,000 per month controlled.

The county court concluded that the May 22, 1997, letter amended the trust agreement. It ordered McHenry to reimburse Reiner for all shortages in payments since March 1, 2001, and to increase the amount of all future payments to $2,000.

ASSIGNMENTS OF ERROR

John Wendland, one of the remainder beneficiaries, assigns, restated and consolidated, that the court erred in (1) finding that the May 22, 1997, letter was a valid amendment to the trust agreement; (2) ordering the successor trustee, McHenry, to reimburse Reiner for all shortages in payments since March 1, 2001; and (3) ordering McHenry to increase the future payments to Reiner to $2,000 per month.

STANDARD OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re R.B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003). In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001).

ANALYSIS

[3] The settlor of a trust may reserve the power of revocation or amendment, and such a power is consistent with a valid trust. *Whalen v. Swircin*, 141 Neb. 650, 4 N.W.2d 737 (1942). Phillips expressly reserved the power to amend the trust agreement. The issue is whether by sending the letter to Hartford, Phillips exercised the power to amend the trust agreement. The remainder

beneficiary makes two arguments for why the letter did not amend the trust agreement. First, he argues that Phillips did not express the intent to modify the trust agreement in the letter. Second, he argues that even if Phillips intended to amend the trust agreement with the letter, sending the letter to Hartford did not comply with the procedure for amendment set out in the trust agreement.

Intent to Modify Trust Agreement

We must first determine whether Phillips expressed the intent to modify the trust agreement in the letter to Hartford. The parties agree that to do this, we must interpret the letter. We treat this as a question of law on which we have an obligation to reach a conclusion independent of that of the trial court. Accord *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994) (interpretation of language of trust is matter of law).

[4,5] The rules of construction for interpreting a trust are applied when the language of the trust is not clear; but if the language clearly expresses the settlor's intent, the rules do not apply. *Wahrman v. Wahrman*, 243 Neb. 673, 502 N.W.2d 95 (1993). The remainder beneficiary points out that in the letter, Phillips did not expressly state that he was amending the trust agreement. The remainder beneficiary argues that this clearly shows that Phillips did not intend to amend the trust agreement. We are not persuaded by this reasoning. Neither the express terms of the trust agreement nor the law required Phillips to expressly recite that he was amending the trust agreement in order to make an amendment effective. See *In re Estate of Davis*, 775 A.2d 1127 (Me. 2001). Further, the letter refers to the trust, suggesting that Phillips contemplated that the letter would affect the trust. At best, the language of the letter is unclear, and we thus turn to the rules of construction.

[6,7] The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator. *Smith v. Smith, supra*. When there are two or more instruments relating to a trust, they should be construed together to carry out the settlor's intent. *Estate of Taylor*, 361 Pa. Super. 395, 522 A.2d 641 (1987). Here, the letter makes reference to the trust. Thus, in deciphering what Phillips intended with the letter, we consider both the original trust agreement and the letter.

We conclude that Phillips' intent can be determined because the letter is inherently inconsistent with the original terms of the trust agreement. The letter ordered Hartford to increase the amount of the distributions Reiner was receiving from the annuity. The annuity formed the corpus of the trust. Thus, altering the amount of the distribution which Hartford was paying to Reiner fundamentally modified the relationship between the parties to the trust by increasing the amount Reiner was receiving at the expense of the remainder beneficiaries' interests. This shows that Phillips intended to amend the trust agreement. Cf. *In re Estate of Davis, supra* (holding that when second trust was inconsistent with terms of first trust, inconsistency indicated that second trust was intended to modify first trust).

Procedural Requirements for Amendment

Next, the remainder beneficiary argues that even if Phillips intended to amend the trust agreement with the letter, sending it to Hartford did not comply with the procedure for amendment set out in the trust agreement.

We have never addressed whether a settlor's failure to strictly follow the procedures for amendment set out in a trust agreement renders an attempted amendment invalid. Courts in other jurisdictions require varying levels of compliance with the amendment procedures set out in a trust agreement. Some courts adhere to a strict compliance standard which requires that "[i]f a particular mode is specified, that method must be strictly complied with in order for the modification to be effective." *Lourdes College of Sylvania, Ohio v. Bishop*, 94 Ohio Misc. 2d 51, 57, 703 N.E.2d 362, 366 (1997). See, also, 90 C.J.S. *Trusts* § 115 (2002). The modern trend, however, backs away from strict compliance. Both the Restatement (Third) of Trusts and the Uniform Trust Code provide that a settlor may amend a trust by substantially complying with a method set out in the terms of the trust. See, Restatement (Third) of Trusts § 63, comment *i.* (2003); Unif. Trust Code § 602(c)(1), 7C U.L.A. 183 (Cum. Supp. 2000). Accord *Williams v. Bank of California*, 96 Wash. 2d 860, 639 P.2d 1339 (1982). In addition, under both the Restatement and the Uniform Trust Code, if the trust does not provide a method for amendment or the method provided is not expressly made

exclusive, the settlor's power to amend the trust can be "exercised in any way that provides clear and convincing evidence of the settlor's intention to do so." Restatement, *supra*, § 63(3) at 443. Accord Unif. Trust Code § 602 (c)(2)(B). We note that the Legislature has adopted a *modified* version of Uniform Trust Code § 602. See Neb. Rev. Stat. § 30-3854 (Supp. 2003). However, the operative date of § 30-3854 is January 1, 2005, and thus it does not govern the resolution of this case.

[8] Here, it is unnecessary for us to choose between the strict compliance rule and the more modern rule endorsed by the Restatement, *supra*, and the Uniform Trust Code. The trust agreement provided that Phillips could amend the trust agreement "by instrument in writing delivered to the Trustee." The remainder beneficiary argues that the letter to Hartford was not an instrument and was not delivered to the trustee. However, even those jurisdictions that follow the strict compliance rule recognize that provisions requiring the settlor to provide written notice of amendments to the trustee are for the benefit of the trustee. Thus, compliance concerning written notice requirements may be waived by the trustee. See *Merchants National Bank of Mobile v. Cowley*, 265 Ala. 125, 89 So. 2d 616 (1956); *St. Louis Union Trust Co. v. Dudley*, 162 S.W.2d 290 (Mo. App. 1942); 90 C.J.S. *Trusts* § 115 (2002). Here, Phillips was both the trustee and the settlor. As a result, he was in a position to waive the unnecessary formality of giving himself written notification of his intent to amend the trust agreement. See *Argo v. Moncus*, 721 So. 2d 218 (Ala. Civ. App. 1998).

CONCLUSION

We conclude that Phillips expressed the intent to amend the trust agreement in the May 22, 1997, letter and that any failure to comply with the amendment procedure in the trust agreement was waived. We have considered Reiner's claim that she is entitled to attorney fees under Neb. Rev. Stat. § 30-1601(6) (Cum. Supp. 2002) and find it to be without merit.

AFFIRMED.

HENDRY, C.J., not participating.

KAREN M. KVAMME AND BERNARD N. KVAMME, WIFE AND HUSBAND, APPELLEES, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT.

677 N.W.2d 122

Filed April 2, 2004. No. S-03-005.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **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 such discretion a factor in determining admissibility.
3. **Trial: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy and unfair prejudice, and the trial court's decision will not be reversed absent an abuse of discretion.
4. ____: ____: ____. If a trial court erroneously admits evidence that unfairly prejudices a substantial right of the complaining litigant, such admission is an abuse of discretion and constitutes reversible error.
5. **Insurance: Contracts: Motor Vehicles: Evidence: Proximate Cause: Damages.** Evidence concerning the amount of uninsured motorist coverage an insurance policy provides is irrelevant to the issue of the amount of damages proximately caused by an uninsured motorist.
6. **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.
7. **Insurance: Contracts: Juries: Evidence.** Generally, Nebraska does not allow evidence of liability insurance or policy limits to be admitted because it may inject prejudice into the jury's decisionmaking process, thereby distorting the jury's verdict.
8. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the wrongful admission of evidence must unfairly prejudice a substantial right of a litigant complaining about the evidence admitted.
9. **Trial: Evidence: Presumptions: Appeal and Error.** Error in the admission of evidence is presumed to be prejudicial where the evidence admitted may have influenced the verdict or affected unfavorably the party against whom it was admitted.
10. **Trial: Evidence: Appeal and Error.** Where it cannot be gleaned from the record that evidence wrongfully admitted did not affect the result of the trial unfavorably to the party against whom such evidence was admitted, reception of that evidence must be considered prejudicial error.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for a new trial.

Danene J. Tushar and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Tim J. Kielty for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Karen M. Kvamme was injured when her vehicle was struck by an uninsured motorist. After an insurance coverage dispute arose, Karen sued her insurer, State Farm Mutual Automobile Insurance Company (State Farm). At trial, over State Farm's objection, the trial court allowed Karen to present evidence to the jury that the policy limit of her uninsured motorist coverage was $100,000. The main issue on appeal is whether the court committed reversible error by allowing this information to go before the jury.

FACTUAL AND PROCEDURAL BACKGROUND

On September 29, 1996, Karen was involved in a motor vehicle accident with an uninsured motorist. At the time of the accident, Karen and Bernard N. Kvamme (the Kvammes) were insured under an insurance policy issued by State Farm (the Policy). Seeking compensation for, inter alia, her injuries and expenses, Karen filed suit against State Farm on September 27, 2000. Karen's husband, Bernard, joined in the lawsuit, alleging that he suffered a loss of consortium as a result of the accident.

Prior to trial, the parties agreed to stipulate to a number of facts, which were memorialized in the court's pretrial order. Relevant here, the parties agreed that the person who struck Karen's vehicle was an uninsured motorist, that he was negligent in the operation of his vehicle, and that his negligence was the proximate cause of the accident with Karen. In addition, the parties agreed that the Policy provided coverage for an automobile collision caused by the negligence of an uninsured motorist and that such coverage extended to the vehicle driven by Karen. The parties also agreed that only two issues needed to be resolved at trial: (1) whether the Kvammes' damages, if any, were proximately caused by the accident and (2) the merit of Bernard's claim for loss of consortium.

Thereafter, in an attempt to prevent potentially prejudicial information from reaching the jury, State Farm filed a motion in limine requesting the court to order the Kvammes, and witnesses testifying in support of the Kvammes, to refrain from making any

reference to, inter alia, the Policy's $100,000 coverage limitation. State Farm argued that any reference to the Policy's coverage limitation would be irrelevant to the issues of liability and damages and that the probative value of such evidence would be substantially outweighed by the danger of unfair prejudice to State Farm. Believing the submission of the Policy's limit would prevent the jury from speculating about the amount of available insurance coverage, the court denied State Farm's request.

Trial began on October 7, 2002. During his opening statement, counsel for the Kvammes informed the jury of the Policy's $100,000 coverage limitation and explained that Karen had paid a higher premium for this coverage. Later, over State Farm's objection, the insurance policy was admitted into evidence. Immediately thereafter, and again after State Farm's objections were overruled, the parties stipulated that the Policy contained a $100,000 coverage limitation.

On October 9, 2002, the jury returned a verdict in favor of the Kvammes in the amount of $50,202. State Farm moved for a new trial and a setoff or credit for payments already rendered to the Kvammes. After a hearing on these motions, the court overruled State Farm's motion for a new trial and ordered that the jury verdict be reduced by $8,728.27 to account for payments already made to the Kvammes. State Farm appealed.

ASSIGNMENTS OF ERROR

State Farm assigns four errors, summarized and restated as two: The trial court erred in (1) allowing the amount of coverage available under the Policy to be admitted into evidence and (2) ruling that the evidence was sufficient to support a jury instruction on Bernard's claim for loss of consortium.

STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Olson v. Sherrerd*, 266 Neb. 207, 663 N.W.2d 617 (2003).

ANALYSIS

On appeal, State Farm argues that evidence concerning the amount of coverage available under the Policy was irrelevant

under Neb. Rev. Stat. § 27-401 (Reissue 1995) and unfairly prejudicial under Neb. Rev. Stat. § 27-403 (Reissue 1995) and that the trial court abused its discretion by allowing this information to be admitted into evidence. Before we examine the merits of State Farm's argument, however, we consider the Kvammes' argument that State Farm waived its objections by stipulating to the amount of available coverage under the policy during trial. Although State Farm agrees it entered into a stipulation concerning the amount of available coverage, it contends that it merely stipulated to the foundation of the testimony regarding the Policy's limit, while simultaneously renewing its objection to the introduction of the Policy's limit into evidence. The record supports State Farm's contention. Read in context, it is clear that State Farm renewed its objection to the introduction of the Policy's limit into evidence. Thus, State Farm properly preserved its objections for appellate review.

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Kinney v. H.P. Smith Ford*, 266 Neb. 591, 667 N.W.2d 529 (2003). The exercise of judicial discretion is implicit in determinations of relevancy and unfair prejudice, and the trial court's decision will not be reversed absent an abuse of discretion. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000). If a trial court erroneously admits evidence that unfairly prejudices a substantial right of the complaining litigant, such admission is an abuse of discretion and constitutes reversible error. *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

Our first step is to determine whether it was error to allow the jury to hear evidence of the Policy's coverage limit; if so, we then must decide if the error was prejudicial and reversible. In Nebraska, all relevant evidence is admissible unless there is some specific constitutional or statutory reason to exclude such evidence. Neb. Rev. Stat. § 27-402 (Reissue 1995). Relevant evidence is that which tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. § 27-401.

Prior to trial, the parties stipulated to a number of facts. Relevant here, the parties agreed that the person who struck

Karen's vehicle was an uninsured motorist, that he was negligent in the operation of his vehicle, and that his negligence was the proximate cause of the accident with Karen. In addition, the parties agreed that the Policy provided coverage for an automobile collision caused by the negligence of an uninsured motorist and that such coverage extended to the vehicle driven by Karen. Because State Farm admitted that coverage existed and that the uninsured motorist was the proximate cause of the accident, the only issue to be resolved at trial was the amount of damages, if any, that the Kvammes suffered as a direct and proximate result of the accident.

[5] Therefore, we must determine if evidence of the Policy's limit made the existence or cause of the Kvammes' damages more or less probable. We conclude that it did not and hold that evidence concerning the amount of uninsured motorist coverage an insurance policy provides is irrelevant to the issue of the amount of damages proximately caused by an uninsured motorist. See, e.g., *Allstate Ins. Co. v. Ramos*, 782 A.2d 280 (D.C. 2001); *Alfa Mut. Ins. Co. v. Moreland*, 589 So. 2d 169 (Ala. 1991); *Allstate Ins. v. Miller*, 315 Md. 182, 553 A.2d 1268 (1989); *Fahey v. Safeco Ins. Co. of America*, 49 Conn. App. 306, 714 A.2d 686 (1998). Cf. *Schaffer v. Bolz*, 181 Neb. 509, 149 N.W.2d 334 (1967).

Simply stated, the amount of coverage provided by State Farm under the Policy has no bearing on the amount of damages the Kvammes incurred as a result of the accident. Moreover, to allow evidence of the amount of uninsured motorist coverage would only serve to confuse the jury and distort the jury verdict. See, *Farley v. Allstate*, 355 Md. 34, 43, 733 A.2d 1014, 1018 (1999) ("if the jury were provided with a definitive amount of available policy limits the likely result would be a distorted jury verdict"); *Miller*, 315 Md. at 192, 553 A.2d at 1272 ("establishing the availability of a sum certain is likely to distort a jury verdict").

The Kvammes argue that the amount of available coverage was relevant because such evidence prevented the jury from assuming that only the mandatory minimum of coverage existed and basing its award on that amount. Stated otherwise, the Kvammes assert that because Nebraska requires an insured motorist to carry $25,000 in uninsured motorist coverage, see

Neb. Rev. Stat. § 44-6408(1)(a) (Reissue 1998), jurors will assume a policy's limit is $25,000 absent evidence to the contrary. We do not agree. If the parties or the court are convinced that this type of assumption regarding minimum coverage is somehow a legitimate concern, the court could draft a narrow jury instruction to allay that concern.

[6] In the instant case, the jurors were not instructed to base their damage determination on the amount of coverage that was available under the Policy. Instead, the jury was properly instructed to calculate the amount of damage proximately caused by the uninsured motorist. 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. *Myers v. Platte Valley Public Power & Irr. Dist.*, 159 Neb. 493, 67 N.W.2d 739 (1954); *Webber v. City of Scottsbluff*, 150 Neb. 446, 35 N.W.2d 110 (1948). Thus, absent evidence to the contrary, we assume the jury followed the instructions it was given.

The Kvammes also argue that the Policy's limit was relevant because they brought an action in contract and that therefore, the jury should be entitled to have an understanding of the terms and provisions of that contract so as not to have to guess or assume facts to which they have not been informed. This argument is without merit. Although this action is based on the contractual relationship between the Kvammes and State Farm, it is analogous to an action in tort because the jury's only charge was to determine the amount of damages proximately caused by the uninsured motorist's negligence. See, *Preferred Risk Mut. Ins. Co. v. Ryan*, 589 So. 2d 165 (Ala. 1991); *Allstate Ins. v. Miller*, 315 Md. 182, 553 A.2d 1268 (1989); *Auto-Owners Ins. Co. v. Dewberry*, 383 So. 2d 1109 (Fla. App. 1980).

As the Maryland Court of Appeals correctly observed:

> [T]his case is "functionally . . . a tort case," the purpose of which is to establish the damages that [the defendant insurer] is required to pay under the underinsured motorist portion of the [plaintiffs'] policy. . . . Therefore, this action is not, as the [plaintiffs] suggest, a contract action in the sense that any provisions of the insurance policy were at issue or that coverage was being denied based

> upon language in the insurance contract. The jury was not required to interpret any provisions of the contract in accordance with any principles of contract law: its sole responsibility was to listen to the evidence and determine what amount, if any, [the defendant insurer] should be obligated to pay based on the testimony of the [plaintiffs] and their doctors.

Farley v. Allstate, 355 Md. 34, 45-46, 733 A.2d 1014, 1020 (1999). Thus, the amount of available coverage provided under the Policy was irrelevant to the issue of damages and should not have been presented to the jury.

[7] Furthermore, we note that our ruling comports with established Nebraska law. Generally, Nebraska does not allow evidence of liability insurance or policy limits to be admitted because it may inject prejudice into the jury's decisionmaking process, thereby distorting the jury's verdict. See, Neb. Rev. Stat. § 27-411 (Reissue 1995); *Reimer v. Surgical Servs. of the Great Plains*, 258 Neb. 671, 605 N.W.2d 777 (2000); *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993); *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984); *Schaffer v. Bolz*, 181 Neb. 509, 149 N.W.2d 334 (1967) (introduction of policy limits in tort action was erroneous and prejudicial and may have improperly influenced jury). Our ruling today simply extends this rule, long accepted in tort cases, to an insured's suit against his or her insurer for the damages proximately caused by the negligence of an uninsured motorist, which we have determined is the functional equivalent of an action in tort.

In sum, the amount of uninsured motorist coverage a policy provides is irrelevant to the issue of damages and should not be disclosed unless the amount itself is in controversy. Accordingly, in the ordinary case, such limits should not be considered by the jury. In cases where the verdict exceeds the coverage amount, the trial court may then reduce the verdict, upon proper post-trial motion, to comply with the limits of the policy. See, e.g., *Alfa Mut. Ins. Co. v. Moreland*, 589 So. 2d 169 (Ala. 1991); *Miller, supra.*

Because we have concluded that evidence concerning the amount of available coverage under the Policy was irrelevant under § 27-401, such evidence was inadmissible under § 27-402.

See *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999). Consequently, the trial court abused its discretion by admitting the Policy's limit into evidence.

[8] Our inquiry is not at an end, however, because we must also determine whether the error in admitting this irrelevant evidence was prejudicial and requires reversal. See *id.* To constitute reversible error in a civil case, the wrongful admission of evidence must unfairly prejudice a substantial right of a litigant complaining about the evidence admitted. See *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

[9] The Kvammes contend that because the jury's verdict was approximately one-half of the coverage limit, no prejudice has befallen State Farm. However, their argument is not in keeping with our longstanding rules regarding the prejudicial effect of wrongfully admitted evidence. Error in the admission of evidence is presumed to be prejudicial where the evidence admitted may have influenced the verdict or affected unfavorably the party against whom it was admitted. *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974); *Witte v. Lisle*, 184 Neb. 742, 171 N.W.2d 781 (1969); *Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co.*, 177 Neb. 287, 128 N.W.2d 773 (1964). Here, by merely contending that the record contains evidence to support the jury's verdict of $50,202, the Kvammes have mistaken the sufficiency of the evidence with the prejudicial effect that the admission of the irrelevant evidence may have had on the jury.

[10] It has long been our rule that where it cannot be gleaned from the record that evidence wrongfully admitted did not affect the result of the trial unfavorably to the party against whom such evidence was admitted, reception of that evidence must be considered prejudicial error. *Blue Valley Co-op, supra.* See, also, *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003); *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996); *First Baptist Church v. State*, 178 Neb. 831, 135 N.W.2d 756 (1965); *Singles v. Union P. R.R. Co.*, 174 Neb. 816, 119 N.W.2d 680 (1963); *Grantham v. Farmers Mutual Ins. Co.*, 174 Neb. 790, 119 N.W.2d 519 (1963); *Borden v. General Insurance Co.*, 157 Neb. 98, 59 N.W.2d 141 (1953). Our review of the record does not disclose what effect the

submission of the Policy's limit might have had on the jury's verdict. We, therefore, necessarily conclude that the Kvammes have not overcome the presumption that State Farm was prejudiced by the admission of the Policy's coverage limitation into evidence.

CONCLUSION

For the foregoing reasons, we determine that the trial court abused its discretion by admitting the amount of coverage provided under the Policy into evidence and that such error was unfairly prejudicial to State Farm. The judgment of the district court is reversed, and the cause is remanded for a new trial. Because we reverse for a new trial on the basis of admitting irrelevant evidence, we need not and do not decide whether there was sufficient evidence to support a jury instruction on Bernard's claim for loss of consortium.

REVERSED AND REMANDED FOR A NEW TRIAL.

MICHAEL VEATCH, APPELLEE, V.
AMERICAN TOOL, APPELLANT.

676 N.W.2d 730

Filed April 2, 2004. No. S-03-889.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2002), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. **Workers' Compensation: Evidence: Due Process: Appeal and Error.** Subject to the limits of constitutional due process, the admission of evidence is within the discretion of the Nebraska Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
4. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation: Rules of Evidence.** As a general rule, the Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence.

6. **Workers' Compensation: Rules of Evidence: Legislature: Due Process.** Subject to the limits of constitutional due process, the Legislature has granted the Nebraska Workers' Compensation Court the power to prescribe its own rules of evidence and related procedure.
7. **Workers' Compensation: Rules of Evidence: Expert Witnesses.** Because the application of standards under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), in Nebraska is limited to cases in which the Nebraska rules of evidence apply, and those rules do not apply in Workers' Compensation Court, *Daubert* standards do not apply in a workers' compensation case.
8. **Workers' Compensation: Evidence: Expert Witnesses: Testimony.** In a workers' compensation case, the witness must qualify as an expert and the testimony must assist the trier of fact to understand the evidence or determine a fact in issue. The witness must have a factual basis for the opinion, and the testimony must be relevant.
9. **Workers' Compensation: Expert Witnesses.** Expert testimony in a workers' compensation case must be based on a reasonable degree of medical certainty or a reasonable probability.
10. ____: ____. An expert opinion in a workers' compensation case based on a mere possibility is insufficient, but the standard also does not require absolute certainty.
11. **Workers' Compensation: Words and Phrases.** While cases involving repetitive trauma injuries have some characteristics of both an accidental injury and an occupational disease, the compensability of a condition resulting from the cumulative effects of work-related trauma is to be tested under the statutory definition of accident.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Bryan S. Hatch, of Stinson, Morrison & Hecker, L.L.P., for appellant.

Roger D. Moore, of Rehm Bennett Law Firm, P.C., L.L.O., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

The primary issue is whether we will apply *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), to workers' compensation cases. A Workers' Compensation Court review panel held that *Daubert* did not apply to the proceedings. Because the Nebraska rules of evidence do not apply in workers' compensation cases, we hold that *Daubert* principles do not apply. We affirm.

ASSIGNMENTS OF ERROR

American Tool assigns that the district court erred by (1) determining that the receipt of expert testimony in a workers' compensation proceeding is not governed by *Daubert*, (2) determining that the expert testimony had foundation and was relevant, and (3) analyzing the injury as an accident instead of an occupational disease.

BACKGROUND

In November 1997, the appellee, Michael Veatch, complained of left wrist discomfort while performing duties raking a furnace at American Tool. He was diagnosed with tendonitis and, after some improvement, was released from medical care. In February 1998, Veatch returned to his physician and was diagnosed with recurrent tendonitis. Veatch received workers' compensation benefits for the injury, was placed on light duty, and attended occupational therapy. He returned to his physician in June 1999 with flareups in the left wrist and pain upon flexion, extension, or rotation. X rays showed no evidence of fracture, and Veatch's range of motion was excellent.

In September 1999, following a motor vehicle accident, Veatch was referred to Dr. David P. Heiser. Heiser noted various injuries, including left wrist pain. Veatch later returned to Heiser, complaining of wrist pain that he had experienced for 2 years.

After ordering an MRI, Heiser suspected that Veatch had avascular necrosis instead of tendonitis and referred Veatch to Dr. Richard P. Murphy. Murphy diagnosed the condition as avascular necrosis and performed surgery on Veatch's wrist. Murphy issued an early report stating in one part that in his opinion, the injury was work related, and stating in another that the injury "may be work related." He later issued a report stating: "More likely than not, the diagnosed condition was caused by, significantly contributed or aggravated by [Veatch's] repetitive use of his left wrist in his employment with American Tool." Murphy testified that his opinion had been consistent and that he had changed the wording to make it legally clear. Heiser, however, issued a report stating that he could not state with a reasonable degree of medical certainty that the injury was solely related to Veatch's job at American Tool.

Veatch filed a petition seeking workers' compensation benefits. At trial, American Tool offered evidence that the injury was not work related. This evidence included early x rays that did not show an injury and a bone scan taken after Veatch was injured in the 1999 motor vehicle accident that showed injury. Murphy's deposition testimony, among other things, set out (1) his qualifications as an orthopedic surgeon; (2) his familiarity with avascular necrosis; (3) his opinion that repetitive motion could cause avascular necrosis; and (4) his opinion that based on a reasonable degree of medical certainty, Veatch's injury was work related. He testified that there were different views on the issue, but pointed to an article that stated microtrauma could lead to avascular necrosis and that explained repetitive stress could cause microtrauma. Murphy also did not believe that a 1996 dirt bike accident caused the injury and that he did not need to view notes about Veatch's history to determine the cause of the avascular necrosis. Murphy also explained why the absence of an injury on early x rays did not mean that the injury was not work related.

American Tool objected to Murphy's testimony, pointing to deposition testimony about which Murphy was not fully informed, details of Veatch's employment and medical history, and a lack of studies or information about the role of repetitive motion in causing avascular necrosis. American Tool argued that the testimony lacked foundation, was irrelevant, and was inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The trial court overruled the motion. The court found for Veatch and concluded that the injury was work related and caused by repetitive trauma. The court concluded that the injury was an accident instead of an occupational disease. American Tool appealed to a review panel of the Workers' Compensation Court, which affirmed. American Tool appeals.

STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2002), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment,

order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Swanson v. Park Place Automotive, ante* p. 133, 672 N.W.2d 405 (2003).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Brown v. Harbor Fin. Mortgage Corp., ante* p. 218, 673 N.W.2d 35 (2004).

[3] Subject to the limits of constitutional due process, the admission of evidence is within the discretion of the Nebraska Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997).

[4] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Brown v. Harbor Fin. Mortgage Corp., supra.*

ANALYSIS

FOUNDATION AND RELEVANCY OF EXPERT'S OPINION

American Tool contends that the Workers' Compensation Court should have applied *Daubert* to determine the admissibility of expert testimony. It argues that due process requires the use of *Daubert* to determine whether expert testimony is admissible even if the rules of evidence do not apply in a workers' compensation case.

[5,6] As a general rule, the Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence. Neb. Rev. Stat. §§ 48-168(1) (Reissue 1998) and 27-1101(4)(d) (Reissue 1995); *Sheridan v. Catering Mgmt., Inc., supra.* Subject to the limits of constitutional due process, the Legislature has granted the compensation court the power to prescribe its own rules of evidence and related procedure. § 48-168; *Sheridan v. Catering Mgmt., Inc., supra.*

Before we adopted the *Daubert* standards in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), we held that due process, not the *Frye* standard, provided the standard for

admitting expert testimony in a workers' compensation case. *Sheridan v. Catering Mgmt., Inc., supra*, citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In *Schafersman*, we specifically limited our ruling to those cases where the question was "the admissibility of expert opinion testimony under the Nebraska rules of evidence." 262 Neb. at 232, 631 N.W.2d at 876.

Recently, we determined that *Daubert* does not apply to cases involving the termination of parental rights where the Nebraska rules of evidence do not apply. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). In reaching that decision, we specifically cited to cases from other jurisdictions holding that *Daubert* does not apply in a workers' compensation case where the rules of evidence do not apply. *In re Interest of Rebecka P., supra*, citing *Mulroy v. Becton Dickinson Co.*, 48 Conn. App. 774, 712 A.2d 436 (1998), and *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[7] Because the application of *Daubert* standards in Nebraska is limited to cases in which the Nebraska rules of evidence apply, and those rules do not apply in Workers' Compensation Court, we conclude that the *Daubert* standards do not apply in a workers' compensation case. Thus, rather than the formal rules of evidence, admissibility of Murphy's testimony is analyzed under due process.

[8-10] We have stated that in a workers' compensation case, the witness must qualify as an expert and the testimony must assist the trier of fact to understand the evidence or determine a fact in issue. The witness must have a factual basis for the opinion, and the testimony must be relevant. *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997). Expert testimony in a workers' compensation case must be based on a reasonable degree of medical certainty or a reasonable probability. *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996). An expert opinion in a workers' compensation case based on a mere possibility is insufficient, but the standard also does not require absolute certainty. See *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). In addressing the admissibility of an expert's opinion in a workers' compensation case, we have stated:

> "A qualified expert may not testify without adequate basis for his or her opinions concerning the facts of the case

> on which the expert is testifying. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. [Citation omitted.] The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess. [Citation omitted.] Thus, a trial court may exclude an expert opinion because the expert is not qualified, because there is no proper foundation or factual basis for the opinion, because the testimony would not assist the trier of fact to understand the factual issue, or because the testimony is not relevant."

Sheridan v. Catering Mgmt., Inc., 252 Neb. at 832, 566 N.W.2d at 114-15. Despite the foundational and relevancy requirements, due process does not require that the *Daubert* standards be applied. See *id.*

Here, Murphy admitted, and the record shows, that some disagreement exists whether repetitive stress can cause avascular necrosis. Murphy, however, presented medical evidence that microtrauma caused by repetitive motion can cause the condition. Murphy also explained his reasoning for his opinion why other injuries Veatch sustained were not the cause of the avascular necrosis. He further explained why he did not need to review Veatch's medical records and history to reach his determination. After sufficient explanation of his qualifications and reasoning, Murphy stated that it was his opinion to a reasonable degree of medical certainty that the avascular necrosis was caused by Veatch's employment at American Tool. There is some dispute in the record about the role of repetitive trauma in causing avascular necrosis. American Tool disputes that Murphy could give his opinion without reviewing Veatch's medical records. From our review of the record, however, we determine that the court did not abuse its discretion when it determined that Murphy's testimony was relevant and based on proper foundation.

Treatment of Repetitive Trauma as Accident

American Tool next argues that the workers' compensation court should have treated the injury as an occupational disease instead of an accident.

[11] We recently refused to overrule precedent holding that repetitive trauma injuries are "accidents" and not "occupational diseases." *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). We have held that while such cases have some characteristics of both an accidental injury and an occupational disease, the compensability of a condition resulting from the cumulative effects of work-related trauma is to be tested under the statutory definition of accident. *Id.*

We have reviewed American Tool's argument on this issue and determine it is without merit.

CONCLUSION

We conclude that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), does not apply in a workers' compensation case because the Nebraska rules of evidence do not apply. We further determine that the trial court did not abuse its discretion when it determined that Murphy's testimony was relevant and was made with sufficient foundation. Finally, we conclude that the trial court was correct when it analyzed the injury as an accident instead of an occupational disease.

AFFIRMED.

MILLER-LERMAN, J., not participating.

TODD D. SIMON ET AL., APPELLANTS, V.
CITY OF OMAHA, APPELLEE.

677 N.W.2d 129

Filed April 9, 2004. No. S-02-1061.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
3. **Attorney Fees.** Attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
4. **Federal Acts: Civil Rights: Attorney Fees.** Under The Civil Rights Attorney's Fees Awards Act of 1976, courts may award reasonable attorney fees to a prevailing party in a civil rights action brought pursuant to 42 U.S.C. § 1983 (2000).

5. **Constitutional Law: Judgments: Costs: Attorney Fees.** In the absence of a judgment on the merits or a court-ordered consent decree, appellants are not entitled to an award of costs and attorney fees under 42 U.S.C. § 1988 (2000).
6. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
7. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, or unambiguous out of a statute.
8. **Eminent Domain: Costs: Attorney Fees.** Under Neb. Rev. Stat. § 76-726(1) (Reissue 2003), a court-ordered award of costs, expenses, and attorney fees is appropriate only in connection with a proceeding initiated by an agency seeking to acquire property by condemnation.
9. **Attorney Fees: Appeal and Error.** The determination of whether the common fund doctrine applies is a question of law, with respect to which an appellate court must reach a conclusion independent of the trial court's ruling.
10. **Attorney Fees.** Absent the existence of a fund, created, preserved, or protected by a litigant, the common fund doctrine is inapplicable.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

James D. Sherrets, Theodore R. Boecker, Jr., and Kimberly K. Carbullido, of Sherrets & Boecker, L.L.C., for appellants.

Paul D. Kratz, Omaha City Attorney, and Bernard J. in den Bosch for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Appellants, Todd D. Simon, Frank A. Pane, and Jamaica Partnership, filed a petition in the district court for Douglas County against appellee, City of Omaha, seeking injunctive and declaratory relief, after the Omaha City Council adopted a resolution that approved the "Omaha Performing Arts Society Douglas Street Heritage Development Project Redevelopment Plan" (redevelopment plan) for downtown Omaha. A portion of the resolution declared real property located within the proposed redevelopment plan, including properties owned by appellants, as "blighted" and

"substandard." In their petition, appellants claimed appellee was "target[ing their properties] for eminent domain acquisition." In an amended resolution, appellants' properties were deleted from the area included within the redevelopment plan.

Appellants moved for costs and attorney fees. The district court denied the motion. The parties stipulated to the dismissal of the petition. Appellants appeal the order of the district court denying their motion for costs and attorney fees. We affirm.

STATEMENT OF FACTS

The pertinent facts, which are essentially undisputed, are as follows:

Appellants are the owners of real property located at 112 South 11th Street, 1110 Douglas Street, and 1112 Douglas Street in Omaha. On February 5, 2002, the Omaha City Council adopted resolution No. 137-280. The resolution approved the redevelopment plan, which anticipated the development of a performing arts complex in a region of downtown Omaha. Although the resolution adopted the redevelopment plan and declared the downtown area covered by the redevelopment plan as "blighted" and "substandard," nothing within the resolution itself authorized the acquisition of real property in the area covered by the redevelopment plan.

Appellants' properties are located within the downtown area covered by the redevelopment plan. As such, appellants' properties were declared "blighted" and "substandard" by resolution No. 137-280.

On February 19, 2002, appellants filed a "Petition for Temporary Restraining Order, Temporary and Permanent Injunction and Declaratory Judgment," in the district court for Douglas County. In their 11-count petition, appellants alleged that the resolution's declaration of their properties as "blighted" and "substandard" was appellee's first step in a redevelopment plan that contemplated appellee taking appellants' properties by eminent domain. In their petition, appellants raised several legal challenges to the city council's adoption of resolution No. 137-280, including allegations that such action violated state statute, denied appellants due process and equal protection, and was induced through misrepresentation. Appellants sought, inter

alia, injunctive relief enjoining "the effectiveness of any declaration that their properties . . . are blighted or substandard," and "a declaratory judgment that the declaration [of their] properties [as] blighted and substandard is arbitrary, capricious and invalid under law."

On February 20, 2002, the district court entered an order temporarily restraining the city council's "action of February 5, 2002 labeling [appellants'] properties [as] 'blighted and substandard' . . . from becoming effective." The temporary restraining order specifically provided, however, that the order was "without prejudice to [appellee] proceeding with work on its redevelopment agreement."

On February 26, 2002, the parties appeared before the district court on appellee's motion to quash and to continue proceedings, which motion sought, in part, a continuance of any further proceedings while appellee sought to amend resolution No. 137-280 to remove appellants' properties from the redevelopment plan. The district court granted the continuance, and by agreement of the parties, the temporary restraining order was continued "until further order of the Court." On March 26, the city council amended resolution No. 137-280. Although appellants' properties remained designated as "blighted" and "substandard," the amendment removed appellants' properties from the redevelopment plan. Thereafter, the parties informed the district court that all issues in the dispute had been resolved.

On April 9, 2002, appellants' counsel informed the court that appellants intended to voluntarily dismiss their action. Also on April 9, the district court heard argument and received evidence on appellants' motion for costs and attorney fees which had been filed April 8. In their motion, appellants alleged they were due costs and attorney fees based on essentially three different theories: (1) federal civil rights statutes, 42 U.S.C. §§ 1983 and 1988 (2000); (2) the Nebraska eminent domain statutes, see Neb. Rev. Stat. § 76-701 et seq. (Reissue 2003); and (3) the common fund doctrine.

With respect to the federal civil rights statutes, appellants alleged that they had terminated and/or avoided an infringement of their federal constitutional rights encompassed in § 1983 and were therefore entitled to attorney fees under § 1988. With respect

to the eminent domain statutes, appellants alleged that they had successfully terminated a taking by eminent domain and were therefore entitled to attorney fees pursuant to § 76-726(1). Finally, with respect to the common fund doctrine, appellants alleged that they were entitled to an award of costs and attorney fees, because they had "avoided an unnecessary and illegal land-banking and permanent taking of their property and saved substantial amounts of public funds as a result of this litigation."

On August 28, 2002, the district court entered an order denying appellants' motion for costs and attorney fees. The court rejected the theories advanced by appellants by noting that in the instant case, "there was no verdict, no *prevailing* party, no admission of error, [no] deprivation of procedural rights, nor was there an illegal or improper contract that was addressed so as to benefit taxpayers and the public in general." (Emphasis in original.) The court noted that its involvement had been de minimis and remarked that an award of fees would "arguably be a punishment to [appellee] for contributing to the amicable resolution of the parties' dispute" and "could have a chilling effect on future settlements."

On September 17, 2002, the district court dismissed appellants' lawsuit based upon the stipulation of the parties that the action was moot. Thereafter, appellants filed the instant appeal, challenging the district court's order denying their motion for costs and attorney fees.

ASSIGNMENT OF ERROR

Appellants assign various errors. These various assignments of error can be restated as one: The district court erred in denying appellants' motion for costs and attorney fees.

STANDARDS OF REVIEW

[1,2] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Interest of Tamantha S., ante* p. 78, 672 N.W.2d 24 (2003). On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003);

Koehler v. Farmers Alliance Mut. Ins. Co., 252 Neb. 712, 566 N.W.2d 750 (1997).

ANALYSIS

[3] Initially, we note that as a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *In re Trust Created by Martin, supra*. In support of appellants' claim that they are entitled to an award of costs and attorney fees, in their brief on appeal, appellants raise various legal theories, none of which we determine to have merit. In particular, we address appellants' claims that as a consequence of their having filed this action, they are entitled to an award of costs and attorney fees under §§ 1983 and 1988, § 76-726(1), and the common fund doctrine. We conclude that appellants are not entitled to an award of costs and attorney fees under any of the theories they have advanced. We affirm the district court's order denying appellants' motion for costs and attorney fees.

Attorney Fees Under §§ 1983 and 1988.

[4] Appellants seek costs and attorney fees under the provisions of §§ 1983 and 1988. Under The Civil Rights Attorney's Fees Awards Act of 1976, courts may award reasonable attorney fees to a prevailing party in a civil rights action brought pursuant to § 1983. See § 1988(b) ("[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs"). In support of their claim for costs and attorney fees under § 1988, appellants assert that while their properties have " 'not . . .' been illegally taken [by appellee]," brief for appellants at 20, they have averted a denial of their due process rights caused by appellee's declaration that their properties were "blighted" and "substandard." We interpret appellants' argument on appeal as asserting that the filing of the present litigation by appellants acted as the catalyst in prompting the city counsel to amend resolution No. 137-280, and that therefore, appellants are entitled to § 1988 prevailing party status under the "catalyst theory," which

posits that a plaintiff is deemed a "prevailing party" if a lawsuit acted as a catalyst in prompting a defendant to take action to meet plaintiffs' claims despite the lack of judicial involvement in the result. See, e.g., *Little Rock School Dist. v. Special School Dist. 1*, 17 F.3d 260 (8th Cir. 1994). We reject appellants' argument.

Although not in the context of § 1988, the U.S. Supreme Court has interpreted the meaning of " 'prevailing party' " and rejected the catalyst theory. In *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 600, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), the plaintiffs had filed a lawsuit claiming that language within a state statute violated the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. § 3601 et seq. (2000), and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. (2000). After the lawsuit was filed, the state legislature amended the statute to remove the allegedly offending language. Although the lawsuit was subsequently dismissed as moot, the plaintiffs filed a motion for attorney fees under the FHAA and the ADA, both of which permit an award of attorney fees to the "prevailing party." See, § 3613(c)(2) ("the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs"); § 12205 ("the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs"). Although no judgment had been entered in favor of the plaintiffs, the plaintiffs in *Buckhannon Board & Care Home, Inc.* claimed that they were entitled to an award of attorney fees under the "catalyst theory." The district court denied the plaintiffs' motion for attorney fees, and that decision was affirmed by the court of appeals. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, No. 99-1424, 2000 WL 42250 (4th Cir. Jan. 20, 2000) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 203 F.3d 819 (4th Cir. 2000)).

On appeal to the U.S. Supreme Court, the Court noted that "[n]umerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party.' " *Buckhannon Board & Care Home, Inc.*, 532 U.S. at 600 (citing Civil Rights Act of 1964, Voting Rights Act Amendments of 1975, and The Civil Rights Attorney's Fees Awards Act of 1976). In *Buckhannon*

Board & Care Home, Inc., the Court rejected the catalyst theory as applied to the FHAA and the ADA, stating that

> [t]he question presented here is whether this term [prevailing party] includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

532 U.S. at 600.

In reaching this conclusion, the U.S. Supreme Court noted that when Congress used the term "prevailing party" to designate those parties eligible for an award of litigation fees and costs, it was using a "legal term of art." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). The Court reviewed its prior decisions applying "prevailing party" and concluded that it had awarded attorney fees only when the plaintiff had received a judgment on the merits or obtained a court-ordered consent decree. "These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." 532 U.S. at 604 (quoting *Texas Teachers Assn. v. Garland School Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989)). The Court observed that "[n]ever have we awarded attorney's fees for nonjudicial 'alteration of actual circumstances.'" 532 U.S. at 606 (quoting Justice Ginsburg's dissent to majority opinion). After analyzing its prior cases, the Court concluded, "We cannot agree that the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining judicial relief." *Id.* Accordingly, the Court held that "the 'catalyst theory' is not a permissible basis for the award of attorney's fees under the FHAA . . . and ADA." 532 U.S. at 610.

The *Buckhannon Board & Care Home, Inc.* analysis of "prevailing party" has been extended and applied to attorney fees claims under § 1988. In *Richardson v. Miller*, 279 F.3d 1 (1st Cir.

2002), the plaintiff filed suit under § 1983, claiming the City of Boston and other defendants illegally seized documents belonging to the plaintiff. The city voluntarily returned most of the documents, and the plaintiff dismissed his lawsuit. Thereafter, relying upon the catalyst theory, the plaintiff moved for attorney fees under § 1988.

On appeal, the U.S. Court of Appeals for the First Circuit concluded that the U.S. Supreme Court had "expressly rejected the catalyst theory." 279 F.3d at 4. Although acknowledging that the holding in *Buckhannon Board & Care Home, Inc.* was limited to the FHAA and the ADA context, the court of appeals observed that "the Court specifically noted that the fee-shifting provisions of several statutes, including [§ 1988], should be interpreted consistently." 279 F.3d at 4. The *Richardson* court rejected the plaintiff's claim for attorney fees under § 1988, concluding "we are constrained to follow the Court's broad directive and join several of our sister circuits in concluding that the catalyst theory may no longer be used to award attorney's fees under [§ 1988]." *Id.* (citing, inter alia, *Chambers v. Ohio Dept. of Human Services*, 273 F.3d 690 (6th Cir. 2001); *Johnson v. ITT Aerospace/Communications*, 272 F.3d 498 (7th Cir. 2001); *New York Taxi Drivers v. Westchester County Taxi*, 272 F.3d 154 (2d Cir. 2001); *Johnson v. Rodriguez*, 260 F.3d 493 (5th Cir. 2001); *Bennett v. Yoshina*, 259 F.3d 1097 (9th Cir. 2001)).

[5] In the instant case, appellants dismissed their lawsuit after the city council voluntarily amended resolution No. 137-280 to remove appellants' properties from the proposed redevelopment plan. As noted by the district court in its order denying appellants' motion for costs and attorney fees, the court's involvement was de minimis. Specifically, the district court did not enter a judgment on the merits and there was no court-ordered consent decree creating a " 'material alteration of the legal relationship of the parties.' " See *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (quoting *Texas Teachers Assn. v. Garland School Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989)). Based upon the U.S. Supreme Court's decision in *Buckhannon Board & Care Home, Inc.* and the extension of the reasoning in that case by the federal courts of appeals to cases

involving claims for attorney fees under § 1988, we conclude that in the absence of a judgment on the merits or a court-ordered consent decree, appellants are not entitled to an award of costs and attorney fees under § 1988. To the extent that language in *Preister v. Madison County*, 258 Neb. 775, 606 N.W.2d 756 (2000), and *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), could be interpreted as approving the "catalyst theory" in the context of a claim for attorney fees under § 1988, that language is disapproved. Accordingly, we determine that appellants' claim for attorney fees under § 1988 is without merit.

Attorney Fees Under § 76-726(1).

Appellants assert that the district court erred in failing to award them costs and attorney fees pursuant to § 76-726(1). While essentially conceding that no condemnation action had been filed against their properties, appellants nonetheless argue that their lawsuit was, in effect, a preemptive action which forestalled the filing of a condemnation proceeding. As such, appellants claim that they are entitled to an award of costs and attorney fees under § 76-726(1). We disagree.

Section 76-726 is located in chapter 76, Real Property, article 7, Eminent Domain, of the Nebraska Revised Statutes. Section 76-726(1) provides, in pertinent part, as follows:

> The court having jurisdiction of a proceeding instituted by an agency . . . to acquire real property by condemnation shall award the owner of . . . such real property such sum as will, in the opinion of the court, reimburse such owner for his or her reasonable . . . expenses, including reasonable attorney's . . . fees, actually incurred because of the condemnation proceedings if (a) the final judgment is that the agency cannot acquire the real property by condemnation or (b) the proceeding is abandoned by the agency. If a settlement is effected, the court may award to the plaintiff reasonable expenses, fees, and costs.

[6,7] Resolution of appellants' claim for attorney fees under § 76-726(1) involves statutory construction. The meaning of a statute is a question of law, and an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *In re Interest of Tamantha S.*,

ante p. 78, 672 N.W.2d 24 (2003). We have previously stated that in discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.* Further, a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, or unambiguous out of a statute. *Id.*; *Wilder v. Grant Cty. Sch. Dist. No. 0001*, 265 Neb. 742, 658 N.W.2d 923 (2003).

[8] In accordance with these precepts, giving effect to the entire statute and applying the statute's plain language, it is apparent that under § 76-726(1), a court-ordered award of costs, expenses, and attorney fees is appropriate only in connection with a proceeding initiated by an agency seeking to acquire real property by condemnation. Given the introductory expression in § 76-726(1) to "[t]he court having jurisdiction," we read "proceeding" in § 76-726(1) as referring to an action filed in court, and therefore, proceedings before the Omaha City Council even if "instituted by an agency" are not the types of proceedings which give rise to attorney fees under § 76-726(1).

In the instant case, the "proceeding" was filed by appellants, not an agency, and the purpose of the proceeding was to obtain declaratory and injunctive relief, not condemnation. There is nothing in the plain language of § 76-726(1) which authorizes the trial court to award costs and attorney fees in the type of lawsuit filed by appellants. We conclude that appellants' claim for costs and attorney fees under § 76-726(1) is without merit.

Attorney Fees Under Common Fund Doctrine.

[9] Finally, appellants claim the district court erred in failing to award them costs and attorney fees under the common fund doctrine. The determination of whether the common fund doctrine applies is a question of law, with respect to which this court must reach a conclusion independent of the trial court's ruling. *Kindred v. City of Omaha Emp. Ret. Sys.*, 252 Neb. 658, 564 N.W.2d 592 (1997); *In re Estate of Stull*, 8 Neb. App. 301, 593 N.W.2d 18 (1999).

An explanation of the common fund doctrine is found in *Summerville v. North Platte Valley Weather Control Dist.*, 171 Neb. 695, 696-97, 107 N.W.2d 425, 427 (1961), wherein we stated:

> [W]here one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.

We have also stated:

> " 'An attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund.' "

Kindred v. City of Omaha Emp. Ret. Sys., 252 Neb. at 662, 564 N.W.2d at 595 (quoting *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961)).

Our prior rulings make it clear that the common fund doctrine "presupposes the existence of a fund." *Dennis v. State*, 234 Neb. 427, 445, 451 N.W.2d 676, 687 (1990) (quoting *United Nursing Homes v. McNutt*, 35 Wash. App. 632, 669 P.2d 476 (1983)), *reversed on other grounds sub nom. Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991). In *Dennis*, we determined that an attorney whose efforts resulted in a finding that a taxation statute was unconstitutional could not recover a fee payable out of all tax refunds which were due as a result of the ruling, because no "common fund" existed.

[10] Similarly, there is no evidence establishing the existence of a fund in the present litigation. Appellants' mere reference to a saving of tax dollars will not suffice. We have reviewed the record in the instant case, and nothing in the record on appeal demonstrates that appellants created, preserved, or protected a fund of money. Absent a fund, the common fund doctrine is inapplicable. Accordingly, we conclude that appellants' claim for costs and attorney fees under the common fund doctrine is without merit.

CONCLUSION

For the reasons stated above, we conclude that the district court did not abuse its discretion when it denied appellants' claim for costs and attorney fees. Accordingly, we affirm the order of the district court that denied appellants' motion for costs and attorney fees.

AFFIRMED.

DANNY HOUSTON, APPELLEE AND CROSS-APPELLANT, V. METROVISION, INC., DOING BUSINESS AS LINCOLN CABLEVISION, AND TELECOMMUNICATION SERVICES, INC., ALSO KNOWN AS T.S.I., APPELLANTS AND CROSS-APPELLEES, AND LIBERTY MUTUAL INSURANCE CO., APPELLEE.

677 N.W.2d 139

Filed April 9, 2004. No. S-02-1316.

1. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
2. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
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 such discretion a factor in determining admissibility.
4. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
5. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
6. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
7. **Jury Instructions.** The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., and Cathy S. Trent, Stephen L. Ahl, and James Snowden, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellants.

Christopher D. Jerram, of Kelley & Lehan, P.C., and Stanley White, of White & White, L.L.C., for appellee Danny Houston.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

This is a negligence action brought by Danny Houston against Metrovision, Inc., doing business as Lincoln Cablevision (Metrovision), and Telecommunication Services, Inc. (TSI) (collectively the appellants). Houston received a jury verdict in his favor, prompting this appeal and Houston's cross-appeal. We affirm.

BACKGROUND

At all relevant times, Metrovision provided cable television services in Lincoln, Nebraska. In the early 1990's, Metrovision began an upgrade of its cable television system. Metrovision hired TSI as the general contractor for the project. In turn, TSI hired a number of subcontractors to perform various aspects of the project. Houston was an employee of one of the subcontractors hired by TSI.

On July 27, 1992, Houston was performing "wreck-out" on a utility pole near 14th and Avery Streets in Lincoln. "Wreck-out" is a term used to describe the process of removing old cable television wires and other equipment from utility poles after the new wires have been installed. Linemen performing "wreck-out" climb the utility poles, cut the old wires, drop them to the ground, remove hardware on the pole, and then descend from the pole.

Houston was in the process of descending from the utility pole when his arm brushed against an energized ground wire. He received a shock, causing him to fall from the pole to the street

below and suffer injuries. Houston was aware that the electricity to the cable television system was still on while he did his work. He also testified that before he climbed the pole, he noticed that a ground wire on the pole was broken. To test to see if the wire was "hot," Houston touched the wire with the back of his hand but felt nothing. In addition to the broken ground wire, there is evidence that a "neutral connector" on the pole had failed, unbeknownst to Houston.

Houston filed a negligence action against the appellants and other defendants. The other defendants have long since been dismissed from the case. Houston alleged that the appellants were negligent in failing to turn off the electrical power to the cable television system. The appellants asserted that Houston was contributorily negligent and that he assumed the risk. The case proceeded to a jury trial. At trial, the court granted Metrovision's motion for a directed verdict, and the jury later returned a verdict in favor of TSI. Houston appealed to the Nebraska Court of Appeals, and Metrovision and TSI cross-appealed. In a memorandum opinion, the Court of Appeals reversed, and remanded for a new trial. *Houston v. Telecommunication Servs., Inc.*, 8 Neb. App. xiii (No. 97-956, Feb. 17, 2000). No petition for further review was filed. The conclusions reached by the Court of Appeals in its opinion are discussed in greater detail below.

Following the Court of Appeals' mandate, the cause was once again tried to a jury. This time, the jury found that Houston was 40 percent negligent and that the appellants were 60 percent negligent. Houston's $2,375,000 in damages was therefore reduced to $1,425,000 to reflect the allocation of negligence to Houston, and judgment was entered in that amount. The appellants filed motions for judgment notwithstanding the verdict or for a new trial, but both were denied. We moved the case to our own docket.

ASSIGNMENTS OF ERROR

The appellants assign, consolidated, that the district court erred in (1) denying the appellants' motions for directed verdict and judgment notwithstanding the verdict or for a new trial; (2) failing to hold that the appellants owed no duty of care to Houston, as an employee of a subcontractor who had received workers' compensation benefits for his on-the-job injury; (3) failing to hold

that the appellants owed no duty of care to Houston because the "wreck-out" work was not a "peculiar risk"; (4) submitting the case to the jury because there was no proof of the appellants' knowledge of a risk and because of Houston's superior knowledge; (5) failing to instruct the jury that the verdict should be for the appellants if the sole proximate cause of the accident was the negligence of the subcontractor; (6) failing to instruct the jury to make an allocation for the negligence of the subcontractor; (7) giving verdict form No. 5 and in not giving a verdict form requiring a separate allocation of negligence between Metrovision and TSI; and (8) denying the appellants' motion in limine and receiving evidence of subsequent remedial measures.

On cross-appeal, Houston assigns that the district court erred in (1) failing to allow him to elicit testimony from a witness regarding Occupational Safety and Health Administration (OSHA) requirements; (2) failing to submit his proposed jury instructions regarding violation of OSHA requirements; and (3) submitting assumption of the risk as a defense because (a) there was insufficient evidence he assumed the risk and (b) assumption of the risk violates Neb. Const. art. I, § 3.

STANDARD OF REVIEW

[1] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Carlson v. Okerstrom, ante* p. 397, 675 N.W.2d 89 (2004).

[2] Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Steele v. Sedlacek, ante* p. 1, 673 N.W.2d 1 (2003).

[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 such discretion a factor in determining admissibility. *Id.*

ANALYSIS

In their first four assignments of error, the appellants argue that the district court erred in denying their motions for directed

verdict and judgment notwithstanding the verdict or for a new trial because they did not owe a duty of care to Houston, an employee of a subcontractor. They claim that they owed no duty of care to Houston for a number of reasons, including that (1) workers' compensation provided Houston's exclusive remedy against the appellants, (2) the wreck-out work Houston performed did not involve a peculiar risk, and (3) Houston had knowledge of the dangers presented.

[4,5] Houston argues that the appellants' arguments are defeated by the law-of-the-case doctrine. Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001).

> "An issue which has been litigated and decided in one stage of a case should not be relitigated in a later stage. The most usual situation for the application of the doctrine involves a second or third appeal in the same case. For instance, an appellate court may reverse and remand a case for a new trial because of alleged errors of law committed by the trial court. After a second trial there may be a second appeal in which the appellant wishes to reargue the points decided on the former appeal. . . ."

In re Application of City of Lincoln, 243 Neb. 458, 467-68, 500 N.W.2d 183, 190 (1993), quoting Milton D. Green, Basic Civil Procedure 240 (2d ed. 1979). The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *In re Estate of Stull*, 261 Neb. 319, 622 N.W.2d 886 (2001).

The first trial in this action resulted in a directed verdict for Metrovision and a jury verdict for TSI. On appeal, Houston argued that the jury should have been instructed that TSI owed him a nondelegable duty of care. The Court of Appeals agreed. The court, relying on *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993), determined "[w]ithout question" that the wreck-out work performed by Houston involved a peculiar risk and that, therefore, the jury should have been

instructed that TSI owed Houston a nondelegable duty to ensure a safe work environment. In addition, Houston also argued on appeal that the district court erred in granting a directed verdict in favor of Metrovision. The Court of Appeals again agreed with Houston. It concluded that Metrovision also owed a nondelegable duty of care to Houston because the work performed by Houston involved peculiar risks. In addition, the Court of Appeals also rejected the appellants' contention on cross-appeal that Houston's action was barred by the exclusive remedy provision of the Nebraska Workers' Compensation Act. Thus, the appellants' arguments in this appeal were squarely addressed by the Court of Appeals in the prior appeal. The Court of Appeals determined that the wreck-out work performed by Houston involved a peculiar risk and that, as a result, both Metrovision and TSI owed Houston a nondelegable duty of care. The law-of-the-case doctrine precludes the appellants from relitigating that issue in this appeal.

The appellants also assign a number of errors in the jury instructions and verdict forms. They contend that the jury should have been instructed that its verdict should be for the appellants if it found that the sole proximate cause of the accident was the negligence of the subcontractor. They also believe that verdict form No. 5 should have allowed the jury to allocate negligence to the subcontractor and should also have allowed for a separate allocation of negligence between Metrovision and TSI.

[6,7] The appellants did not raise these issues in the district court. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003). The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission. *Id.* The appellants fifth, sixth, and seventh assignments of error are not properly before this court.

Finally, the appellants assign that the district court erred in receiving evidence of subsequent remedial measures. The evidence at issue was a document written by Metrovision after Houston's accident instructing TSI, among other things, that no wreck-out work should be performed until electricity is turned

off to the system. Under Neb. Rev. Stat. § 27-407 (Reissue 1995), evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct. However, such evidence is admissible when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The admissibility of the document at issue was addressed by the Court of Appeals during the first appeal in this action. During the first trial, testimony was received from Ralph Gasow, TSI's project manager, and Jackie Harris, Metrovision's project manager. The Court of Appeals recognized that Gasow's and Harris' testimony was contradictory on the question of which party had control of the wreck-out project. Thus, the court held that the document was admissible under § 27-407 on the controverted issue of control of the project as well as to impeach their testimony. At the second trial, the depositions of both Gasow and Harris were received into evidence. Their deposition testimony in the second trial revealed the same inconsistencies previously noted by the Court of Appeals. Thus, where the facts presented at the second trial did not materially and substantially differ from the facts presented at the first trial, the admissibility of the document at the second trial was determined by the law-of-the-case doctrine. *Tank v. Peterson*, 228 Neb. 491, 423 N.W.2d 752 (1988). This assignment of error is without merit.

Houston's cross-appeal, according to his brief, was filed "in the event this Court determines that [the appellants'] argument(s) are meritorious and determines a new trial is required." Brief for appellee on cross-appeal at 39. Because we conclude that the appellants' arguments are without merit and that no new trial is required, it is not necessary that we address Houston's cross-appeal.

CONCLUSION

The Court of Appeals' conclusion, in a prior appeal in this action, that the appellants owed Houston a nondelegable duty of care became the law of the case and may not be reargued here. The appellants' assignments of error regarding the jury instructions and verdict forms are not properly before this court. Finally, their contention that evidence of subsequent remedial

measures was erroneously received into evidence is without merit. We affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM BROUDER FREEMAN, APPELLANT.

677 N.W.2d 164

Filed April 9, 2004. No. S-02-1365.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
2. **Verdicts: Evidence: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
3. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Trial: Evidence: Motions to Suppress.** The State may properly argue and introduce evidence relating to a defendant's attempt to suppress evidence or otherwise avoid the fair adjudication of a dispute.
5. **Criminal Law: Witnesses.** A defendant's attempted intimidation or intimidation of a State's witness is evidence of the defendant's conscious guilt that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crime charged.
6. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
7. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
8. **Criminal Law: Venue: Proof.** Venue may be proved like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.
9. **Sexual Assault.** Serious personal injury is not an element of first degree sexual assault.

10. **Criminal Law: Other Acts: Sentences: Juries: Proof.** Other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.
11. **Presentence Reports: Waiver.** A defendant waives the right to personally review his presentence report with his counsel if he fails to notify the trial court that he has not reviewed it and that he wishes to do so.
12. **Presentence Reports: Appeal and Error.** The failure to object to the presentence report precludes a defendant from challenging it on appeal.

Appeal from the District Court for Nemaha County: DANIEL BRYAN, JR., Judge. Affirmed.

Gregory A. Pivovar and Anthony S. Troia for appellant.

Jon Bruning, Attorney General, and Marie Colleen Clarke for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

William Brouder Freeman was convicted of first degree sexual assault and sentenced to a term of 10 to 20 years in prison. Freeman appeals his conviction and sentence.

SCOPE OF REVIEW

[1] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

[2] A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

[3] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

FACTS

Freeman was charged by information in the Nemaha County District Court with first degree sexual assault, a Class II felony, in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1995). The information alleged that Freeman had subjected the victim to sexual penetration without her consent. An amended information was later filed, charging Freeman with violation of § 28-319(1)(a) and (b) and alleging that Freeman knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of her conduct.

On February 15, 2001, a party was held at a house in Peru, Nebraska. The victim was a student at Peru State College, where she lived in a women's dormitory. The victim arrived at the party at about 8:30 p.m.

During the next 2 hours, the victim drank four Jack Daniel's "sippers" and about half a bottle of "apple pucker." The victim testified that she was not an experienced drinker and that she was feeling "a little" intoxicated after consuming the alcohol. The victim left the party around 10:30 p.m. to attend a dance on campus. When the dance ended at midnight, she returned to the party, which had grown to include about 75 people, including some that the victim did not know. Upon her return, the victim drank 1½ Jack Daniel's sippers, for a total alcohol consumption of nearly 6 Jack Daniel's sippers and half a bottle of apple pucker.

At some time during the party, the victim began to feel ill and asked one of the residents of the house if she could lie down. On the way to a bedroom, the victim went to the bathroom and vomited. Once in the bedroom, she lay down on the bed. The victim's next memory was when she was awakened and told that the party was over and everyone had left. She was assisted to a couch in another room because she still felt dizzy. All the lights were off in the house, and she did not remember hearing or seeing anyone else in the house.

At some time during the night, the victim awoke but saw no one in the room and went back to sleep. Her next memory was when she awoke on the floor and found a man she could not identify on top of her. She could not see the man's face because the only light in the room came from a street light outside one of the windows. The victim then realized that her pants and underwear

had been removed, but her sweater and bra were still in place. The victim could feel the man's penis in her vagina.

The victim tried to push the man off, but her hands were "stuck" at her sides. The man was bigger than she and broader through the shoulders. The victim did not scream because she was scared and did not know what to do. She felt dizzy and confused. She told the man "to stop and to quit," but he did not stop. When the incident was over, the man got up, said he was going to the bathroom, and pushed the victim's pants and underwear back toward her. She did not recognize his voice, and he did not call her by name.

The victim lay on the floor for a few minutes, feeling paralyzed, scared, and confused. She then put on her underwear and pants and got up onto the couch. She questioned whether the incident actually occurred or if she had dreamed it, and she considered following the man to see who he was. The victim lay down on the couch again and fell asleep. She never saw anyone return from the bathroom.

The victim slept most of the next day. At about 3 p.m., she was awakened by two residents of the house and asked if she was all right. The victim inquired who had been at the party and whether the residents of the house heard anything or saw anyone come in or out after she moved to the couch. She then told them about the incident, and they called the school nurse, who recommended that the victim go to a hospital. The emergency room nurse testified that the victim was shaken, scared, withdrawn, and tearful at times, and had a "flat affect."

Evidence was presented which established that Freeman attended the party on the night in question and that he spent the night at the house. The State also presented evidence that the DNA from a semen stain on the victim's underwear matched Freeman's DNA.

The jury returned a guilty verdict, and the district court found that Freeman had committed a sexual offense which required him to register as a sexual offender under state law. The court found that the victim had suffered serious personal injury, and Freeman was sentenced to a term of 10 to 20 years in prison, with credit for time served. The court told Freeman that he would be eligible for

parole after serving 5 years and subject to discharge after serving 10 years.

ASSIGNMENTS OF ERROR

Freeman assigns as error that the district court erred (1) in allowing the State to designate a material witness as its representative to sit through the trial despite a sequestration order; (2) in allowing the jury to review a written transcript of Freeman's interview by a deputy sheriff while the jury listened to the tape recording; (3) in allowing the testimony of Jason Laferriere regarding conversations with Freeman prior to trial to show consciousness of guilt; (4) in overruling Freeman's motion for directed verdict or dismissal at the close of the State's case, which motion was based on the State's failure to prove venue and the State's failure to prove Freeman's identity; (5) in not allowing the jury to decide the issue of serious personal injury, which he suggests is an "aggravating factor" under § 28-319(2); (6) in allowing hearsay psychological/psychiatric reports at sentencing as proof of serious personal injury, violating Freeman's right to confrontation; and (7) in imposing an excessive sentence. He also assigns as error the jury's finding of guilt beyond a reasonable doubt.

ANALYSIS

DESIGNATION OF STATE'S REPRESENTATIVE

Prior to trial, the State filed a notice designating Brent Lottman, a deputy sheriff for Nemaha County, as its representative for trial, citing Neb. Rev. Stat. § 27-615(2) (Reissue 1995) and *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989). Freeman filed an objection to the designation, arguing that Lottman was not a contemplated party under § 27-615(2) and was a material witness of a factual nature. The district court entered an order granting the State's motion to designate Lottman as its representative for trial. Freeman argues that Lottman should not have been present during the entire trial because the court had previously entered a sequestration order and because Lottman was a roommate of Laferriere, a Peru State College student who danced with the victim at the party.

Section 27-615 provides that a party may request the exclusion of witnesses during a trial. The rule does not authorize exclusion

of, inter alia, "an officer or employee of a party which is not a natural person designated as its representative by its attorney." See *id.* In *Jackson*, the State designated its expert witness as its representative and the trial court allowed the expert, a doctor, to remain in the courtroom throughout the trial despite a sequestration order. On appeal, we affirmed the trial court's action in allowing the doctor to be present. Also, in *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000), an expert psychological witness was allowed to remain in the courtroom during the testimony of the defendant's psychological expert. This court approved, noting that the State was limited in its ability to obtain information prior to trial concerning the defendant's mental state.

Freeman argues that because Lottman was involved with the investigation into this incident and interviewed him, Lottman was a key witness for the State and should not have been allowed to hear the testimony of other witnesses. In *Jordan v. State*, 101 Neb. 430, 163 N.W. 801 (1917), this court held that it was not an abuse of discretion for the trial court to allow a sheriff, who was also a witness, to remain in the courtroom despite a sequestration order. The trial court told the defendant he could file an affidavit of prejudice, but the defendant did not file one, and this court found no error because the sheriff was an officer of the court.

While this court has not ruled on the issue recently, several federal cases have held that it is permissible for a law enforcement officer to be present during a trial even where a sequestration order has been entered. See, *United States v. Jones*, 687 F.2d 1265 (8th Cir. 1982); *United States v. Shearer*, 606 F.2d 819 (8th Cir. 1979); *United States v. Woody*, 588 F.2d 1212 (8th Cir. 1978), *cert. denied* 440 U.S. 928, 99 S. Ct. 1263, 59 L. Ed. 2d 484 (1979).

We find no error in the district court's permitting Lottman to remain in the courtroom as the State's representative throughout the trial. This assignment of error has no merit.

Written Transcript of Tape Recording

During the investigation, Lottman conducted a tape-recorded interview with Freeman in Lottman's patrol vehicle. The quality of the tape recording was poor and included background noise

from the vehicle's engine. The tape was taken to an audio engineer to filter out some of the background noise. Freeman did not object to the offer of the reproduced tape recording or to the method used to improve the quality of the tape. Because some portions of the tape remained difficult to understand, the State asked if it could provide the jurors with a transcript of the tape prepared by Lottman. Freeman objected to the use of a transcript as being cumulative. The district court allowed use of the transcript, but the jury was instructed that the transcript was to be used as an aid and that the transcript would not be permitted in the jury room.

Freeman complains that the district court erred in allowing the jury to review a written transcript of his interview by Lottman while it listened to the tape recording. He argues that a transcript destroys the purpose of an audio recording because the tonal inflection and strength of the voices are not portrayed. He suggests that the tape itself is the best evidence and that the court abused its discretion in allowing the jury to have a transcript.

The Nebraska Court of Appeals was presented with a similar question in *State v. Wade*, 7 Neb. App. 169, 581 N.W.2d 906 (1998). There, the jury was provided with a transcript prepared by an undercover officer who was present when a drug transaction was recorded. The appellate court stated:

> [I]t is well established that one who is present and hears the conversation in question at the time the recording is made may testify for the purpose of clarifying inaudible or unintelligible portions of the recording. *State v. Loveless*[, 209 Neb. 583, 308 N.W.2d 842 (1981)]. Additionally, the court specifically instructed the jury that the transcripts were to be used only as assistance in following the recordings and that they, as the finders of fact, were free to rely on their own judgment of what the recordings said . . . . With regard to the transcript, we find that it accurately reflects the decipherable statements and is of great value in helping the listener follow the conversations and identify the speakers. We conclude, based upon *State v. Loveless, supra*, that the court properly admitted the transcripts for the limited purpose of helping the jury follow along with the recordings.

Wade, 7 Neb. App. at 183-84, 581 N.W.2d at 916.

In *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981), this court approved the use of transcripts of audio recordings as an aid to the jury. The court cited *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976), in which the federal court noted that transcripts may be needed and allowed at the court's discretion in two instances: (1) if portions of the tape are relatively inaudible or (2) if it is difficult to identify the speakers.

In the present case, the district court was careful to instruct the jury that the transcript was provided merely as an aid and that the transcript would not be allowed into the jury room during deliberations. The court acted within its discretion, and this assignment of error is without merit.

Consciousness of Guilt

Freeman assigns as error the district court's admission of Laferriere's testimony concerning a conversation he had with Freeman prior to trial. Laferriere was at the party on February 15, 2001, and was seen dancing with the victim. The State offered the testimony to attempt to demonstrate that Freeman acted to influence Laferriere's testimony concerning the events of the night in question and to demonstrate Freeman's consciousness of guilt concerning his actions that night.

The district court conducted a hearing outside the presence of the jury, during which Laferriere testified that when he saw Freeman at a bar in Omaha on Memorial Day weekend in 2002, Freeman asked if Laferriere had been contacted by attorneys or police about this case. Laferriere stated that he had not been contacted. Freeman then asked Laferriere if he had kissed the victim the night of the party. When Laferriere stated that he had not kissed her, Freeman reportedly said, " 'Well, it would help me out if you did.' " Laferriere then turned and left. The court asked Laferriere if he accurately remembered whether Freeman had said, " 'It would help me out if you did,' " or if it was possible that Freeman said, " 'It would have helped me out if you did.' " Laferriere said he was not 100 percent sure of Freeman's words.

The district court made a finding that the testimony was admissible and that it would be the jury's determination as to the weight of the testimony. In the presence of the jury, Laferriere testified that Freeman asked Laferriere if he had kissed the victim the night

of the party. According to Laferriere, he stated that he had not kissed her, and Freeman reportedly said, " 'Well, it would help me if you did.' "

[4] In *State v. DeGroot*, 230 Neb. 101, 430 N.W.2d 290 (1988), evidence was presented that the defendant asked a witness to testify for him, telling the witness to give information that would provide the defendant with an alibi. The witness testified that he would have been lying if he had testified as requested by the defendant. We found no abuse of discretion in the trial court's determination that evidence of the defendant's attempt to procure false testimony was relevant. We cited *State v. Adair*, 106 Ariz. 4, 469 P.2d 823 (1970), in which the court held that evidence of the defendant's threatening witnesses was admissible to demonstrate a consciousness of guilt. We held that "[t]he State may properly argue and introduce evidence relating to the defendant's attempt to suppress evidence or otherwise avoid the fair adjudication of a dispute." *DeGroot*, 230 Neb. at 108, 430 N.W.2d at 294-95.

[5] This court has also held that "[a] defendant's attempted intimidation or intimidation of a State's witness is evidence of the defendant's 'conscious guilt' that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crime charged." *State v. Clancy*, 224 Neb. 492, 499, 398 N.W.2d 710, 716 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). Such attempted intimidation or intimidation is relevant evidence under Neb. Rev. Stat. § 27-404(2) (Reissue 1995) as to the defendant's consciousness of guilt that a crime has been committed. In *Clancy*, evidence was presented that the defendant had called a woman and threatened to kill her or her husband or to blow up their house if the woman provided further information to law enforcement authorities.

The testimony of Laferriere was offered to suggest that Freeman sought to have Laferriere testify that he had kissed the victim on the night of the assault. However, Laferriere was unable to state with assurance the exact words used by Freeman. The conversation took place at a chance encounter in a bar where loud music was playing in the background. The district court itself noted that admission of the testimony was a close call.

Laferriere's testimony alone does not show clearly and convincingly that Freeman committed any other crime, wrong, or

act. The facts here are dissimilar to other cases in which such testimony has been allowed. Freeman did not threaten Laferriere if he testified, and Freeman did not pursue the issue after Laferriere turned and walked away. Freeman did not suggest that Laferriere should commit perjury.

[6,7] We find that the district court's admission of this testimony was error; however, the error was harmless. In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003).

Other evidence at trial supported the jury's verdict, and we conclude that the verdict rendered was unattributable to the error. This assignment of error has no merit.

VENUE AND IDENTITY

Freeman asserts that the district court erred in overruling his motion for directed verdict or for dismissal at the close of the State's case, arguing that the State failed to prove venue and to prove his identity. Freeman argues that the State did not present competent evidence that the crime occurred in Nemaha County or that he was the William Brouder Freeman accused of the sexual assault.

[8] This court has held that venue may be proved like any other fact in a criminal case. *State v. Liberator*, 197 Neb. 857, 251 N.W.2d 709 (1977). " 'It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.'. . ." *Id.* at 858, 251 N.W.2d at 710, quoting *Gates v. State*, 160 Neb. 722, 71 N.W.2d 460 (1955). Accord *State v. Laflin*, 201 Neb. 824, 272 N.W.2d 376 (1978).

In *State v. Scott*, 225 Neb. 146, 152, 403 N.W.2d 351, 355 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989), the defendant asserted that the trial court erred in failing to dismiss the case against him when the State did not establish venue, "a jurisdictional element of the State's proof." This court reviewed the record and found that while the State had failed to directly prove venue, it provided evidence that the crimes occurred in Hitchcock County. A contract admitted into evidence included language identifying the property's location as Hitchcock County. Other evidence identified Hitchcock County as the location of the grain warehouse. Testimony was offered from the Hitchcock County sheriff, and another witness lived in that county. We held that sufficient proof was offered to demonstrate that the crimes were committed in Hitchcock County and that the trial court correctly overruled the defendant's motion for a directed verdict based on a failure to establish venue.

In the case at bar, the victim testified that she was a student at Peru State College and that the party she attended was in a house six blocks from campus. One of the residents of the house testified that she lived on Fifth Street in Peru in Nemaha County. Another of the house's residents testified to the specific address of the house. Lottman, a Nemaha County deputy sheriff, investigated the incident. A criminal investigator with the Nebraska State Patrol testified that he collected a comparative DNA sample from Freeman, and a criminalist with the Nebraska State Patrol crime laboratory testified as to the results of the DNA testing. The *Miranda* form signed by Freeman and entered into evidence indicates that it is the form used by the sheriff's office in Nemaha County. The only rational conclusion that can be drawn from this evidence is that the incident occurred in Peru, Nemaha County, Nebraska. Venue was adequately proved.

Freeman also argues that the district court erred in failing to grant his motion for directed verdict or dismissal because the State failed to prove his identity beyond a reasonable doubt. In his brief, Freeman states, "What is obvious is that no one was asked to identify or did identify the defendant as the William Freeman they were referring to." Brief for appellant at 32. Although DNA evidence linked Freeman to the assault, he argues

that the person who testified to collecting the swabs for the DNA test never identified him as the individual from whom the samples were collected.

A similar argument was made in *State v. Kaba*, 217 Neb. 81, 83, 349 N.W.2d 627, 630 (1984), where the court noted:

> [U]nfortunately, the county attorney failed to ask any State's witness two basic questions: (1) Is the defendant, Kenneth Kaba, in the courtroom today? (2) Would you point out the defendant, Kenneth Kaba? Contrary to the defendant's position, however, under the facts of this case the omission of an in-court identification does not require acquittal.

In *Kaba*, this court reviewed holdings on this issue from other states. In *State v. Hutchinson*, 99 N.M. 616, 661 P.2d 1315 (1983), the court ruled that sufficient evidence was presented to allow the jury to draw the inference that the person on trial had committed the crimes. In *State v. Hill*, 83 Wash. 2d 558, 520 P.2d 618 (1974), the appellate court held that while the omission of specific in-court identification was not recommended, the evidence was sufficient to establish the defendant's identity. The *Kaba* court then applied the rationale of these cases to the evidence and found, "beyond a reasonable doubt, that the Kenneth Kaba who appeared in the courtroom during the trial was the Kenneth Kaba whose behavior was reported by the witnesses." 217 Neb. at 86, 349 N.W.2d at 631.

This issue was also raised in *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984), where we concluded that the identity of the defendant was not at issue and that he was present at trial. This court also noted that the testimony was filled with references to the defendant by various witnesses.

In the present case, at the outset of the trial, the district court noted that Freeman was present with counsel. Five individuals who were friends or classmates of Freeman testified, and as we noted in *Kaba*, "It is inconceivable that [the witness] would sit silently by, knowing the wrong man had been brought to trial." 217 Neb. at 88, 349 N.W.2d at 632. Two law enforcement officers who had contact with Freeman also testified. None of these individuals suggested that the person on trial and present in the courtroom was not the same person they knew as William Freeman. The district court did not err in denying Freeman's motion for

directed verdict or for dismissal on the basis of a failure to prove identity. This assignment of error is without merit.

SERIOUS PERSONAL INJURY

Freeman argues that the district court erred in not allowing the jury to decide the issue of serious personal injury, which he describes as "an element of the crime," brief for appellant at 33, and an "aggravating factor" under § 28-319(2).

Section 28-319(2) provides that first degree sexual assault is a Class II felony and that "[t]he sentencing judge shall consider whether the actor caused serious personal injury to the victim in reaching a decision on the sentence." "Serious personal injury" is defined in Neb. Rev. Stat. § 28-318(4) (Reissue 1995) as "great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ."

[9] Serious personal injury is not an element of first degree sexual assault. Section 28-319(2) merely states that a sentencing judge shall take any serious personal injury into consideration in imposing sentence.

Freeman asserts that the issue of serious personal injury was not submitted to the jury for its determination and that the district court made no effort to address the issue until sentencing. At sentencing, the victim addressed the court to express the emotional toll taken by the incident. The court subsequently found that the victim had suffered "a major harm" or "serious personal injury" as defined in § 28-319.

[10] Freeman does not cite *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), but that case is apparently the basis for his argument. In *Apprendi*, the U.S. Supreme Court held that other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). *Apprendi* made clear that it was concerned only with cases involving an increase in penalty beyond the statutory maximum. See *Becerra, supra.*

Other courts have considered the impact of *Apprendi* on sentencing issues. In *People v. Allen*, 78 P.3d 751, 754 (Colo. App.

2001), the appellate court reviewed a statute which provided that the trial court was to consider " 'extraordinary aggravating circumstances' " in determining whether to impose a sentence in the "aggravated range." The court held that such circumstances are those normally considered by a trial court, including the defendant's character and history, and that the circumstances rise to the level of "extraordinary" because of their quantity or quality. The court found that *Apprendi* did not apply because the consideration of extraordinary aggravating circumstances did not mandate an increased penalty range or class of the offense, as did the Colorado statute that elevated sexual assault from a Class III felony to a Class II felony if it was accompanied by serious bodily injury. In Minnesota, the Court of Appeals has held that *Apprendi* applies only to situations where a sentence exceeds the statutory maximum. See *State v. McCoy*, 631 N.W.2d 446 (Minn. App. 2001).

Apprendi does not apply in this case. The key provision of the holding in *Apprendi* is that the jury must determine "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." See 530 U.S. at 490. Here, Freeman was sentenced to a term of 10 to 20 years in prison for a Class II felony, where the maximum possible term was 50 years. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002). Freeman's sentence was within the statutory limits.

In addition, prior to *Apprendi*, this court held that no evidentiary hearing is required prior to sentencing to determine whether a victim has sustained serious personal injury. See *State v. Bunner*, 234 Neb. 879, 453 N.W.2d 97 (1990). We held that a sentencing judge shall consider information appropriately before the court in the sentencing process, rather than conducting an evidentiary hearing. The holding of *Bunner* has not been altered by *Apprendi* because any injury sustained by the victim is not an element of the crime.

Freeman also relies on *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989). In that case, we stated:

> Whether "serious personal injury to the victim" . . . is an element of the crime of second degree sexual assault or simply a jury determination of the degree of the crime committed need not be decided in this case. The controlling fact

> is that for the defendant to be convicted of second degree sexual assault, there must be a jury determination as to whether the victim suffered "serious personal injury."

Id. at 399, 436 N.W.2d at 511.

The issue arose in *Beermann* in relation to charges of second degree sexual assault and sexual assault of a child under Neb. Rev. Stat. § 28-320 (Reissue 1985). The degree of sexual assault was determined by whether the actor caused serious personal injury to the victim. If such injury occurred, the crime was sexual assault in the second degree, and if no such injury occurred, the crime was sexual assault in the third degree. *Beermann* does not apply to the case at bar because serious personal injury is not an element of the crime charged, which was first degree sexual assault.

We conclude that the district court did not err in considering serious personal injury when determining Freeman's sentence. This assignment of error has no merit.

Right of Confrontation

According to Freeman, the district court erred in allowing hearsay psychological/psychiatric reports at sentencing as proof of serious bodily injury, violating his right to confrontation. He does not argue this error separately, but it is subsumed in his allegation that the court should have submitted the issue of injury to the jury.

It appears that Freeman is objecting to the district court's consideration of a report from a psychologist who testified for the State at a pretrial hearing because the State desired to present evidence at trial related to posttraumatic stress disorder and sexual assault. The evidence was not admitted at trial and was not heard by the jury, but the State submitted psychiatric evaluations of the victim as part of the presentence report.

At the sentencing hearing, the district court asked Freeman's counsel whether he had reviewed the presentence report. Counsel indicated that he had, and he raised no objection to the report's contents. At that point, Freeman was offered an opportunity to address the court, and he declined.

[11,12] This court has held that a defendant waives the right to personally review his presentence report with his counsel if he fails to notify the trial court that he has not reviewed it and that he

wishes to do so. See *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). The failure to object to the presentence report precludes a defendant from challenging it on appeal. See *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990). Freeman did not object to the psychological report in the presentence report on any basis, and he cannot now suggest that his right to confront the author of the report has been violated. This assignment of error is without merit.

Excessive Sentence

Freeman claims that the district court erred in imposing an excessive sentence. First degree sexual assault is a Class II felony and is punishable by a term of 1 to 50 years in prison. See §§ 28-105 and 28-319. Freeman was sentenced to a term of 10 to 20 years in prison.

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.* In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

The district court reviewed the presentence report, which indicated that Freeman had previously been convicted of possession of a controlled substance, for which he served 4 months in jail, and of false reporting and criminal mischief, for which he was sentenced to 45 days in jail. He has also been charged twice with driving while under the influence. The victim in this case addressed the court as to her emotional trauma following this incident.

The district court took this information into consideration and imposed a sentence within the statutory limits. We find no abuse of discretion in the sentence, and this assignment of error has no merit.

SUFFICIENCY OF EVIDENCE

Freeman asserts that the jury erred in finding him guilty beyond a reasonable doubt. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

The jury heard evidence that the victim was sexually assaulted as she lay sleeping. DNA evidence was presented which showed that Freeman's semen was present on the victim's underwear. The evidence established that the victim was incapacitated by alcohol, and her assailant knew or should have known that she was mentally or physically incapable of resisting or appraising the nature of her conduct. Construing the evidence in a light most favorable to the State, the evidence is sufficient to support the jury's verdict. This assignment of error is without merit.

CONCLUSION

We find no error or abuse of discretion on the part of the district court, and Freeman's conviction and sentence are affirmed.

AFFIRMED.

IN RE TRUST CREATED BY CARL LYMAN CEASE, SR., AND IRENE M. CEASE, SETTLORS.
PAULETTE S. GLOVER, APPELLANT, V. ROBERT LEAZENBY, PERSONAL REPRESENTATIVE, APPELLEE.

677 N.W.2d 495

Filed April 9, 2004. No. S-02-1447.

1. **Contracts: Appeal and Error.** Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision.

2. ____: ____. A document must be construed as a whole, and if possible, effect must be given to every part thereof.
3. **Contracts.** In interpreting a document, a court must first determine, as a matter of law, whether the document is ambiguous.
4. **Parol Evidence: Contracts.** Unless a document is ambiguous, parol evidence cannot be used to vary its terms.
5. ____: ____. The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement.
6. ____: ____. A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.
7. **Trial: Evidence: Presumptions: Appeal and Error.** In a trial to the court, the presumption is that the trial court considered only such evidence as is competent and relevant, and a reviewing court will not reverse such a case because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the judgment.
8. **Contracts.** The interpretation of the language of a document is a matter of law.
9. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.

Appeal from the County Court for Douglas County: LYN V. WHITE, Judge. Affirmed.

Robert C. McGowan, Jr., of McGowan & McGowan, for appellant.

Julie A. Frank, of Frank & Gryva, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

In this declaratory judgment action, the Douglas County Court found that a revocable inter vivos trust jointly created by Carl Lyman Cease, Sr., and Irene M. Cease (Cease Trust) had been effectively terminated by Carl's execution of a document entitled "Termination of Trust." Paulette S. Glover, a residuary beneficiary of the Cease Trust, appeals from the order of the county court.

SCOPE OF REVIEW

[1] Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated

to reach a conclusion independent of the trial court's decision. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002).

FACTS

Carl and Irene were married in either 1961 or 1962. This marriage was the second for each of them. Carl had five children from his previous marriage, one of whom is Dawn Blume. Glover was the only child from Irene's previous marriage.

On June 27, 1994, Carl and Irene created a revocable inter vivos trust. None of the parties involved in this matter challenge the terms of the Cease Trust or whether it was legitimately created, nor do they challenge which assets were conveyed into the trust. Among these assets were the following: a personal residence located in Omaha, Nebraska; certain items of tangible personal property; two motor vehicles; and bank accounts held on deposit in an Omaha federal credit union.

Carl and Irene were named cotrustees of the Cease Trust. Glover was nominated by the Cease Trust to be the successor trustee and was the sole residuary beneficiary of the trust.

Article III of the Cease Trust provided in relevant part:

> Each of the Settlors reserves the right at any time . . . to amend . . . or terminate this trust . . . by an instrument in writing signed by either of the Settlors and delivered to the Trustee in the lifetime of either of the Settlors . . . . If this trust or any trust created herein is revoked in its entirety, the revocation shall take effect upon the delivery of the required writing to the Trustee . . . .

Irene died on July 22, 2001. Sometime in the months following Irene's death, Carl moved from Omaha to Kansas. In August 2001, Carl and Blume met with Brian Carroll, an attorney practicing in Marysville, Kansas, to review the estate planning documents that Carl had executed in Nebraska. Carroll testified that Carl had concerns regarding the manner in which the trust property was to be distributed. Carl's concerns allegedly stemmed from the fact that Blume, who was providing Carl with 24-hour care, would receive nothing under the Cease Trust. Steven Gunderson, the attorney who prepared the Cease Trust in 1994, testified that Carroll contacted him in July or August 2001 and

requested copies of the documents that Gunderson had prepared for Carl.

At Carl's request, Carroll drafted a will, a power of attorney, a living will, and a document entitled "Termination of Trust," which document we will refer to hereafter as "exhibit C." Exhibit C, which was executed by Carl on September 24, 2001, stated:

> I, CARL LYMAN CEASE, SR., a resident of Geary County, Kansas, do hereby resign from my position as TRUSTEE of the Cease Revoca[b]le Trust . . . dated June 27, 1994. This resignation is pursuant to Article III of said trust agreement. This resignation is intended to terminate said trust, from and after the date indicated below. This resignation is being done voluntarily and by my own free will. Furthermore, the ownership of all assets of the Trust are [sic] hereby returned to myself as Settlor of the Trust.

Carl executed his will on November 6, 2001. In this document, the residential property that had previously been conveyed to the Cease Trust was bequeathed to Blume. The rest of Carl's property was bequeathed in various proportions to his children and to Glover. Glover did not challenge the validity of this will.

Carl died on December 3, 2001, and a petition for probate of his will was filed on February 11, 2002. Glover filed her petition for declaratory judgment on the same date. The petition asked the county court to declare that the Cease Trust was still valid, that Glover had succeeded Carl as trustee, and that the property conveyed to the trust still belonged to the trust.

The county court found that the greater weight of the evidence supported a finding that exhibit C did in fact terminate the Cease Trust. Glover filed a motion for new trial, which the court overruled. Glover filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

Glover assigns the following restated errors: (1) The county court erred in admitting parol evidence to explain, vary, or contradict exhibit C; (2) the court erred in concluding that Carl's execution of exhibit C terminated the Cease Trust; (3) the court erred in concluding that Glover did not become successor trustee of the Cease Trust; and (4) the court erred in failing to

find that there was no delivery of the required notice of termination of trust to Glover in her capacity as successor trustee.

ANALYSIS

We first consider whether the county court erred in determining that exhibit C terminated the Cease Trust. Glover alleged that exhibit C was effective only insofar as it served as a valid resignation of Carl from his position of trustee of the Cease Trust. In her motion in limine and throughout trial, Glover asserted that exhibit C was not susceptible to two interpretations. She argued that this document could be interpreted only as a resignation by Carl of his position as trustee and not as a termination of the trust.

Glover's argument is based upon examination of only the first sentence of exhibit C. The argument assumes a very specific order of events in which execution of the first sentence of exhibit C effectively removed Carl from his position of trustee. Glover asserts that this resignation caused her to immediately become the successor trustee of the Cease Trust. She claims that the attempt to terminate the trust set forth in the third sentence of exhibit C failed because article III of the trust required that a notice of termination be delivered to the successor trustee. She asserts that there was no evidence that she, as successor trustee, was given notice of the termination of the trust during Carl's lifetime as required by article III.

[2] The personal representative of Carl's estate argues that the rules of construction require that exhibit C be read as a whole. This assertion correlates with the requirement that a document must be construed as a whole, and if possible, effect must be given to every part thereof. See *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

[3] In interpreting a document, a court must first determine, as a matter of law, whether the document is ambiguous. See *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000). Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002). Upon reviewing exhibit C, we conclude that the document is not ambiguous. When exhibit C is construed

as a whole, and not sentence by sentence, the only reasonable interpretation is that Carl sought to have the document serve as a termination of the trust.

In connection with her claim that the county court erred in concluding that exhibit C terminated the Cease Trust, Glover argues that the court erred in admitting parol evidence regarding exhibit C. Glover argues that since exhibit C was not ambiguous, parol evidence was not admissible.

[4-6] Unless a document is ambiguous, parol evidence cannot be used to vary its terms. See *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement. *Id.* A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous. *Bank of Burwell v. Kelley*, 233 Neb. 396, 445 N.W.2d 871 (1989); *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976).

At trial, certain testimony was admitted over objection concerning the execution of exhibit C. Specifically, testimony was elicited by both parties regarding Carl's intentions at the time the document was executed. Before trial, Glover had filed a motion in limine seeking to prohibit the personal representative from offering extrinsic parol evidence at trial regarding exhibit C. The county court first declared that the motion was denied, but then stated that it would reserve judgment until after it had heard all of the evidence.

The admissibility of parol evidence arose next during Carroll's testimony. Carroll was asked on direct examination what Carl's concerns were with regard to the trust at the time of their first meeting. Glover's attorney objected that the testimony was attempting to explain or vary the language of exhibit C, which he characterized as unambiguous. This objection was overruled. Carroll answered that Carl was confused as to the contents of the trust. Later, Carroll was asked whether it was his understanding that Carl wished to make changes to his estate planning in order to benefit Blume. An objection by Glover's attorney was overruled. Carroll answered that Carl wanted to change his estate planning to benefit Blume.

Carroll was then asked why exhibit C was prepared in a manner that might be considered inconsistent. Again, an objection by Glover's attorney was overruled. Carroll answered that the document was intended to serve as "the final resignation and termination" of the trust pursuant to article III of the trust. When Carroll was asked about Carl's intent when he executed exhibit C, counsel for Glover objected on unspecified grounds. This objection was sustained.

Glover's attorney later raised the issue of Carl's intent during Carroll's cross-examination. Counsel asked whether Carl intended to resign as trustee. In answering, Carroll stated that "[i]t was his intention to terminate this Trust. And based on the research that I have done, we felt that — I felt that it would be best for him to resign also at the time the Trust is terminated." Counsel for Glover also asked Carroll whether exhibit C was intended to amend the Cease Trust. Carroll responded that the document was not intended to amend the trust.

On redirect, counsel for the personal representative asked Carroll if exhibit C was intended to act only as a resignation of Carl's position as trustee. This question was objected to on the grounds that the document speaks for itself and that parol evidence is therefore impermissible. This objection was sustained. Counsel for the personal representative responded by indicating that opposing counsel had been allowed to ask Carroll about Carl's intent with respect to exhibit C. The judge replied by stating: "I have been sustaining the objection both ways and I will continue to do so. This Court will determine what this document means."

[7] In the absence of fraud, mistake, or ambiguity, the only competent evidence was the written document. We have concluded that exhibit C is not ambiguous. Therefore, to the extent that parol evidence concerning exhibit C was admitted, it was error, but the error was harmless. In a trial to the court, the presumption is that the trial court considered only such evidence as is competent and relevant, and the reviewing court will not reverse such a case because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the judgment. *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999).

[8] The interpretation of the language of a document is a matter of law. See *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994). Whether the Cease Trust was terminated by exhibit C is therefore a question of law that we decide independently of the decision of the county court. See *id.*

In its final order, the county court found that the greater weight of the evidence adduced at trial supported a finding that exhibit C served to terminate the Cease Trust prior to Carl's death. However, the interpretation of exhibit C and the determination of whether it successfully terminated the trust were questions of law, not fact.

We conclude as a matter of law that exhibit C terminated the Cease Trust. Article III of the trust provided that the trust could be terminated by either settlor at any time by an instrument in writing signed by the settlor and delivered to the trustee during the lifetime of the settlor. Exhibit C was a written document signed by a settlor (Carl) that terminated the trust. Since Carl was also the trustee, termination of the trust occurred when he signed exhibit C on September 24, 2001.

Finally, Glover assigns as error the purported failure of Carl to deliver notice of termination of the Cease Trust to Glover in accordance with article III of the trust. This assignment of error is also without merit. As noted above, Carl's execution of exhibit C served to effectively terminate the trust. As such, notice to Glover was not required, since at the time the trust was terminated, Carl was the trustee. The only delivery of notice that was required by article III was by Carl to himself.

[9] Although the county court based its decision upon the weight of the evidence, the decision to be made by the court was one of law and not of fact. Since exhibit C was not ambiguous, parol evidence regarding the document should not have been admitted. However, the court reached the correct result. A proper result will not be reversed merely because it was reached for the wrong reason. *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002).

CONCLUSION

For the reasons stated herein, the decision of the Douglas County Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT McDERMOTT, APPELLANT.

677 N.W.2d 156

Filed April 9, 2004. No. S-02-1489.

1. **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.
2. **Postconviction: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.
3. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
4. **Constitutional Law: Effectiveness of Counsel: Proof.** Under the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
5. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness 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.
6. **Effectiveness of Counsel: Proof.** To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
7. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.
8. **Criminal Law: Pleas: Effectiveness of Counsel.** A defendant who pleads guilty upon the advice of counsel may attack only the voluntary and intelligent character of the plea by showing that the advice received was not within the range of competence demanded of attorneys in criminal cases.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed.

Gregory C. Damman, of Blevens & Damman, for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Under the terms of a plea agreement, Robert McDermott entered a guilty plea to possession of a controlled substance with intent to deliver in violation of Neb. Rev. Stat. § 28-416 (Reissue 1995). He appeals from an order denying his motion for post-conviction relief.

FACTS

In 1997, McDermott was charged in Seward County with a single count of possession of a controlled substance with intent to deliver in violation of § 28-416. A Seward County public defender was appointed as his attorney. McDermott was subsequently arraigned in the district court for Seward County on an amended information charging him with one count of possession of a controlled substance with intent to deliver in violation of § 28-416, and with being a habitual criminal pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1995).

McDermott appeared with counsel in district court on July 21, 1998, and, under the terms of a plea agreement, entered a guilty plea to the possession with intent to deliver charge in exchange for dismissal of the habitual criminal charge, as well as an agreement by the State not to file any additional charges. On August 18, a sentencing hearing was held. The court asked trial counsel if he had had an opportunity to review the presentence report and inquired as to whether he had any additions, corrections, or deletions he wished to make. Counsel submitted a handwritten statement from McDermott for inclusion in the presentence report but did not object to the accuracy of any of the information compiled by the probation officer. The district court sentenced McDermott to a term of incarceration of 6⅔ to 20 years in an institution under the jurisdiction of the Nebraska Department of Correctional Services. Counsel filed a timely direct appeal on the sole ground that McDermott's sentence was excessive. That appeal was summarily affirmed by the Nebraska Court of Appeals on February 5, 1999. See *State v. McDermott*, 8 Neb. App. xxix (No. A-98-949, Feb. 5, 1999).

On August 25, 2000, McDermott, represented by new counsel, filed a motion for postconviction relief alleging ineffective assistance of counsel. McDermott alleged that his presentence report erroneously included four felony convictions from Bakersfield, California, between 1982 and 1992 which were attributed to him but were actually committed by a different person. McDermott contended that his trial counsel performed deficiently by failing to adequately discuss McDermott's criminal history with him prior to sentencing. He alleged that if he had been given the opportunity to review the presentence report, he would have brought the incorrect information to the attention of his trial counsel and the court.

McDermott also alleged that his plea was not "knowingly, intelligently, and voluntarily" entered because he was not informed by his counsel that his prior criminal record would not support a habitual criminal conviction. McDermott alleged that a true report of his felony criminal history at the time of sentencing would have revealed that he had only two prior felony convictions, one of which was a felony solely because of repetition and therefore could not be counted as a felony for the purposes of the habitual criminal statute. McDermott alleged that if he had known that there was no basis for conviction under the habitual criminal statute, he would not have entered a plea and would have insisted upon a jury trial.

On October 3, 2000, the district court denied McDermott's motion without an evidentiary hearing. On appeal, the Court of Appeals determined that McDermott's motion for postconviction relief contained "factual allegations which, if proved, constitute an infringement of McDermott's right to effective assistance of counsel under the federal Constitution, and the records and files do not affirmatively show that McDermott is entitled to no relief." *State v. McDermott*, No. A-00-1126, 2002 WL 452189 at *3 (Neb. App. Mar. 26, 2002) (not designated for permanent publication). The Court of Appeals therefore remanded the matter for an evidentiary hearing.

Trial counsel, McDermott, and Shane Stutzman, the probation officer responsible for compiling McDermott's presentence report, each testified at an evidentiary hearing conducted on August 26, 2002. Trial counsel testified that he had a specific

recollection of discussing the presentence report with McDermott for approximately 20 minutes prior to the sentencing hearing. Trial counsel testified that during that meeting, he "would have told [McDermott] what needed to be proven to make a habitual criminal charge effective and — and whether or not those types of offenses would have been on his record." He stated that he was not aware of any errors in the presentence report prior to sentencing. Trial counsel testified that the State's agreement not to file additional charges as part of the plea bargain conferred a benefit on McDermott because there was "at least some potential" that other charges could have been filed.

McDermott testified that it had been his intention to go to trial but that he had accepted the plea agreement because his trial counsel told him that if convicted on the charge of possession with intent to deliver, his record "would support an habitual criminal finding and it would add an additional 10 to 60 years on top of whatever [he] got for the drug charge." McDermott testified that the State's offer not to file any additional charges did not affect his decision to accept the plea agreement because he was not worried about other charges. McDermott confirmed that he met with his trial counsel for 10 to 15 minutes prior to his sentencing, but stated that he was not shown a copy of the presentence report.

Stutzman testified that she met personally with McDermott to review his prior criminal record, and McDermott's testimony confirms that this meeting occurred. Stutzman admitted that in compiling McDermott's presentence report, she erroneously included four felony convictions involving another person. Stutzman also testified, however, that even without these convictions, her sentencing recommendation to the court would have been the same because of McDermott's extensive criminal record and history of substance abuse.

On September 16, 2002, the State filed a motion to supplement the record with newly discovered evidence. The evidence consisted of a copy of a December 1989 conviction for felony burglary that had not appeared in McDermott's original presentence report. On October 8, over the objection of McDermott's counsel, the newly discovered evidence was received as exhibit 23. Exhibit

23 does not indicate what sentence McDermott received as a result of this conviction.

On December 9, 2002, the district court filed a judgment denying and dismissing with prejudice McDermott's amended motion for postconviction relief. The district court concluded that McDermott had failed to show that he was prejudiced by the erroneous inclusion of the four felony convictions because he failed to prove how the result would have been different had they not been included. Regarding McDermott's plea agreement, the court found that McDermott had received a benefit by "avoiding the risk and uncertainty of a habitual criminal enhancement hearing" and the "potential for filing other felony charges" and that therefore, the plea agreement was not illusory. McDermott filed this timely appeal, and we moved the case to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

McDermott assigns, restated, that the district court erred in determining that he was not deprived of effective assistance of counsel and therefore denying his motion for postconviction relief. He argues that he was denied his Sixth Amendment right to effective assistance of counsel when his attorney (1) failed to adequately review the presentence report with him and failed to determine if the report accurately set forth his criminal record, (2) failed to determine whether his criminal record would support a habitual criminal charge and advised him to enter an illusory plea agreement dismissing that charge, and (3) failed to advise him that his prior criminal record would not support a habitual criminal charge, thereby resulting in his guilty plea to the controlled substance charge not being entered knowingly, intelligently, and voluntarily.

STANDARD OF REVIEW

[1] 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. *State v. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

ANALYSIS

[2,3] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights. *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002); *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). McDermott's postconviction claims are based solely upon alleged deprivation of his constitutional right to effective assistance of counsel. Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Gonzalez-Faguaga, supra*; *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002). Because McDermott was represented by his trial counsel on direct appeal, he is not procedurally barred from asserting a postconviction claim alleging ineffective assistance of counsel. See, *State v. Gonzalez-Faguaga, supra*; *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

[4,5] Under the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Buckman, supra*. The entire ineffectiveness 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.*; *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[6,7] To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. *State v. Gonzalez-Faguaga, supra*; *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). In an evidentiary hearing for postconviction relief, the postconviction trial

judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony. See, *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). In this case, there was a conflict between the testimony of McDermott and that of his trial counsel concerning their discussions about the presentence report prior to sentencing. The district court expressly found that counsel's testimony was "far more credible" than McDermott's. Therefore, we consider defense counsel's performance as described in his testimony.

McDermott's first assignment of error challenges the adequacy of trial counsel's performance in reviewing the presentence report and in failing to detect the inaccuracy noted above. The criminal history set forth in the presentence report included more than 70 entries. Stutzman testified that she met with McDermott personally to review his prior criminal record in the course of preparing the report. Trial counsel testified that he went over the report with McDermott for approximately 20 minutes prior to the sentencing hearing. During this meeting, no errors in the presentence report were discovered or brought to counsel's attention. Based upon this evidence, trial counsel's failure to detect errors in the presentence report cannot be considered deficient performance under the standard set forth above. In the absence of any indication by McDermott that the recitation of his prior criminal history was inaccurate, it was reasonable for counsel to rely upon the report. To conclude otherwise would impose an undue burden on criminal defense attorneys to independently verify the information presented in a presentence report, as compiled by the probation officer pursuant to Neb. Rev. Stat. § 29-2261 (Reissue 1995). Because we conclude that counsel's performance in this regard was not deficient, we need not reach the second prong of the *Strickland* test. McDermott's first assigned error is without merit.

We note that McDermott makes no claim that the inclusion of the erroneous information in the presentence report in and of itself deprived him of due process. In addition, the district judge made no specific reference to this information at the time of sentencing, but, rather, agreed with McDermott's position, as set forth in the lengthy written statement which he submitted to the

court, that he was a drug addict and would benefit from a sentence which would give him access to "drug [r]e-hab and/or counseling" and medical facilities and services.

With respect to his second assignment of error, McDermott contends that his counsel performed deficiently in not determining whether McDermott's criminal record would support a habitual criminal charge and in advising McDermott to enter into what he claims was an illusory plea agreement dismissing that charge. A habitual criminal is defined by § 29-2221, which provides in relevant part:

> (1) Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal and shall be punished by imprisonment in a Department of Correctional Services adult correctional facility for a mandatory minimum term of ten years and a maximum term of not more than sixty years[.]

In *State v. Chapman*, 205 Neb 368, 370, 287 N.W.2d 697, 698 (1980), this court limited those felonies which could be used under § 29-2221, holding that "offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute 'felonies' within the meaning of prior felonies that enhance penalties under the habitual criminal statute." Subsequently, this court stated:

> [W]e regard the holding in *State v. Chapman* . . . as resting upon two general principles: (1) A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute and (2) the specific enhancement mechanism contained in Nebraska's [driving under the influence] statutes precludes application of the general enhancement provisions set forth in the habitual criminal statute.

State v. Hittle, 257 Neb. 344, 355, 598 N.W.2d 20, 29 (1999) (holding felony conviction for driving under suspended license may not be used to trigger application of habitual criminal statute

because penalty has been enhanced by virtue of defendant's prior violations of other provisions within same statute).

In this case, McDermott's criminal record, as summarized in the presentence report at the time of sentencing, contained at least two felonies in addition to the four which were erroneously included. The first was a 1989 conviction in California for petty theft with priors which resulted in a 16-month jail sentence. The second was a 1994 conviction in California for possession of heroin which also resulted in a 16-month jail sentence.

McDermott argues that under *Chapman*, he could not have been found to be a habitual criminal because his 1989 conviction was elevated to felony status based solely on his prior petty theft convictions. The State contends that *Chapman* is distinguishable on several grounds and that thus, it cannot be categorically said that McDermott's record would not have supported a habitual criminal conviction. The State argues first that *Chapman* is distinguishable in that it "was decided as a matter of state statutory interpretation which is inapplicable to . . . McDermott's California convictions." Brief for appellee at 12. It is undisputed that McDermott's misdemeanor petty theft charge was enhanced to a felony by virtue of his previous offenses of that same nature. The State argues, however, that unlike *Hittle* and *Chapman*, McDermott's petty theft charge was not enhanced by virtue of a specific statute with a "specific enhancement mechanism," but, rather, McDermott was convicted under the California general penal code which specifically allows the elevation of misdemeanors to felony offenses through repetition. Brief for appellee at 13.

The State also argues that § 29-2221 does not require two prior "felonies." Rather, it states that the defendant has to have been "twice convicted of a crime, sentenced, and committed to prison . . . for terms of not less than one year each." § 29-2221(1). Based on the plain meaning of the statutory language, the State contends that any conviction—misdemeanor or felony—which results in a sentence of over a year would satisfy the plain meaning of "crime" for the purposes of § 29-2221(1). Accordingly, the State contends that McDermott's 1989 conviction, whether designated as a felony or misdemeanor, arguably satisfies this statutory requirement.

The State has thus demonstrated nonfrivolous arguments distinguishing *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980), which could have been made in support of the habitual criminal charge against McDermott, had the charge not been dismissed as a part of the plea agreement. In addition, McDermott's record now contains evidence of a third prior felony conviction for burglary. Despite the fact that there is no indication in the record of the disposition in that case, it is possible that additional information regarding the disposition of the burglary conviction, or any of the other 46 "unknown" dispositions in McDermott's presentence report, would have been discovered if the State had pursued the habitual criminal charge. McDermott conceded in his testimony that his prior misdemeanor convictions in California could have involved a sentence of incarceration for up to 1 year. The record thus reflects at least the possibility that McDermott could have been convicted as a habitual criminal had he not entered into the plea agreement and that his attorney advised him of this possibility. In addition, the plea agreement protected McDermott against the filing of additional charges in Nebraska. Accordingly, we agree with the district court that McDermott did not meet his burden of proving that the plea agreement was illusory or that trial counsel's advice with respect to the plea agreement was constitutionally deficient.

[8] In his final assignment of error, McDermott argues that counsel's deficient performance resulted in his guilty plea not being "entered knowingly, intelligently, and voluntarily because he was not aware, nor was he advised by his attorney, that his prior criminal record would not support [a] habitual criminal charge." A defendant who pleads guilty upon the advice of counsel may attack only the voluntary and intelligent character of the plea by showing that the advice received was not within the range of competence demanded of attorneys in criminal cases. *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002), citing *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), and *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973). Because we conclude that the performance of McDermott's counsel in advising him regarding the guilty plea was not constitutionally deficient, it follows that the plea was made knowingly, intelligently, and voluntarily.

CONCLUSION

Finding no error in the denial of postconviction relief, we affirm the judgment of the district court for Seward County.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JACK E. HARRIS, APPELLANT.

677 N.W.2d 147

Filed April 9, 2004. No. S-03-384.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. **Postconviction: Final Orders.** An order granting an evidentiary hearing on some issues and denying a hearing on others is a final order because a postconviction proceeding is a special proceeding.
5. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
6. **Postconviction: Proof: Appeal and Error.** The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
7. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.
8. **Trial: Appeal and Error.** When an issue has not been raised or ruled on at the trial level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
9. **Prosecutorial Misconduct: Case Disapproved: Appeal and Error.** To the extent *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), states that the issue of prosecutorial misconduct can be raised only on direct appeal, it is disapproved.
10. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Jack E. Harris appeals the district court's order denying him an evidentiary hearing on some of the issues he raised in a motion for postconviction relief. We determine that Harris is entitled to an evidentiary hearing regarding alleged prosecutorial misconduct concerning whether the prosecutor delivered a report to defense counsel. We also determine that Harris is entitled to a hearing about ineffective assistance of counsel concerning the report. We determine that he is not entitled to a hearing on the other issues raised. We affirm in part, and in part reverse and remand for further proceedings.

I. BACKGROUND

Harris was convicted of first degree murder and use of a deadly weapon to commit a felony. We affirmed on appeal. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). The following facts were described in *Harris*:

During the summer of 1995, Harris sold a green convertible automobile to Anthony Jones, an Omaha drug dealer. During the same summer, Harris was allegedly introduced to Howard "Homicide" Hicks through a mutual acquaintance, Corey Bass. On August 23, 1995, Jones was found dead inside his apartment. The cause of death was a gunshot wound to the head.

In 1996, Harris was incarcerated in the Douglas County Correctional Facility. Lee Warren and Tony Bass, Corey Bass' brother, were also inmates of the Douglas County Correctional Facility at that time. On December 8, 1996, Corey Bass was murdered. Tony Bass assisted authorities in investigating Corey Bass'

murder. During that investigation, Tony Bass told police that while in jail, Harris told him that Harris had been involved in the murder of Jones. According to Tony Bass, Harris said that Jones had been murdered by Harris and someone named "Homicide."

In February 1997, police investigating Jones' murder spoke to Warren. Warren told police that Harris had spoken to him about Jones' murder and had told him that Jones was killed because he recognized Harris while Harris was robbing Jones.

In May 1997, police arrested Hicks for the murder of Jones. Hicks confessed and said that he and Harris had planned to rob Jones. Hicks said that Harris had killed Jones when Jones recognized Harris during the robbery.

Harris was charged with murder in the first degree and use of a deadly weapon to commit a felony. After Harris' first trial ended in a mistrial, Harris was retried. Tony Bass, Warren, and Hicks testified at trial substantially in accord with the statements described above, as did Robert Paylor, another witness who claimed that Harris told him about the murder of Jones.

During trial, Leland Cass, an Omaha police detective, testified about an interview between himself and Harris in which Harris identified Hicks by the nickname "Homicide." Thus, Cass' testimony provided direct statements from Harris showing that he knew Hicks. On cross-examination, Cass stated that the information came from a December 10, 1996, interview report that he prepared (Cass report).

Harris objected to Cass' testimony and moved for a mistrial, arguing that he was entitled to a hearing on whether his statements were voluntary. At a hearing outside the presence of the jury, Harris presented evidence that the statements were made after he was promised they would not be used against him as part of a proffer agreement with the federal government and that the prosecutor was aware of that fact. Harris' attorney, who was not under oath, stated that he had not seen the Cass report before trial. According to Harris, part of his defense was that Harris and Hicks did not know each other and that Hicks was making up the story.

In response, the prosecutor, who also was not under oath, stated that she received two boxes of police reports and had a law clerk forward copies to defense counsel. The law clerk who made the copies did not testify. The prosecutor stated that she

believed the Cass report had been given to the defense because she found it in a box that had been separated by the law clerk and copied.

The trial judge stated that he would not resolve a "he said, she said" discovery dispute. The court determined that Harris had not made a showing that he was not given the Cass report of December 10, 1996, and thus denied a hearing on whether the statements were voluntary because the motion was untimely. The court also disagreed with Harris' argument that his defense claimed that Hicks and Harris had never met.

Harris was convicted of murder in the first degree and use of a deadly weapon to commit a felony. He was sentenced to consecutive sentences of life imprisonment on the murder charge and 10 to 20 years' imprisonment on the weapons charge. Harris appealed, arguing in part that the district court erred by (1) failing to grant a hearing about whether the statements were voluntary, (2) failing to grant a mistrial for the prosecutor's violation of a discovery order, and (3) allowing evidence of other bad acts or crimes in violation on Neb. Rev. Stat. § 27-404(2) (Reissue 1995). Harris was represented by the same counsel at trial and on direct appeal.

On appeal, we determined that the court did not abuse its discretion in determining that Harris' motion for a hearing about his statement was untimely. In reaching this determination, we stated:

> The district court was confronted with essentially a "he said, she said" scenario, as the prosecutor stated that Cass' police report regarding the December 10, 1996, interview had been provided to the defense, while defense counsel claimed that the defense had not received the report. Given the record before us, we have no basis to find that the district court abused its discretion in concluding that Harris' showing of surprise was insufficient, particularly given the court's greater familiarity with the course of the proceedings.
>
> We are not in a position to question the veracity of either the prosecution or defense on their contradictory claims regarding the process of discovery. It is possible that the prosecution overlooked the police report of the December 10, 1996, interview and failed to provide it to the defense, and it is equally possible that the defense either misplaced or

> failed to appreciate the significance of the report once it was received. Given the absence of dispositive proof, we cannot conclude that the district court abused its discretion.

State v. Harris, 263 Neb. 331, 337, 640 N.W.2d 24, 32 (2002).

Addressing the alleged discovery violation, we stated that assuming, without deciding, that the Cass report was within the scope of the discovery order, the court did not abuse its discretion when it determined that Harris failed to show that the Cass report was not provided to defense counsel. We also stated that Harris failed to seek a continuance to cure any prejudice caused by the belated disclosure of evidence.

Concerning evidence of prior bad acts, we held that Harris' counsel either failed to object or did not properly object. In each case, however, we also stated that had an objection been properly preserved, it would have been without merit. See *Harris, supra* (providing details of testimony).

II. POSTCONVICTION MOTION

Harris moved for postconviction relief. The court granted an evidentiary hearing on some of the issues raised in the motion. The court did not grant a hearing, however, on the following allegations: (1) Harris' convictions were obtained as the result of prosecutorial misconduct in violation of the Due Process Clauses of the U.S. and Nebraska Constitutions; (2) his counsel was ineffective when he failed to file motions to suppress the December 10, 1996, statements, failed to review the Cass report if it was received, and failed to obtain a proper discovery order if it was not received; (3) his appellate counsel was ineffective by failing to raise issues of prosecutorial misconduct and ineffective assistance of counsel, and by representing him both at trial and on appeal; (4) his counsel was ineffective when he failed to properly object to improper testimony under § 27-404.

The district court found that prosecutorial misconduct was an issue that could have been properly raised on direct appeal and would not be considered on postconviction. The court next found that any issues concerning the Cass report, including any failure of appellate counsel to raise the issue of prosecutorial misconduct on appeal, had been determined on direct appeal. In the alternative, the court concluded that whether Harris knew Hicks' nickname

was innocuous and did not injure his defense. The court further determined that even if Harris' counsel had objected to testimony about prior bad acts, the objections would have been without merit. Finally, the court determined that Harris' counsel was not ineffective merely because the same counsel represented Harris both at trial and on appeal. Accordingly, the court denied an evidentiary hearing on those issues. The court granted a hearing on other issues raised in the postconviction motion. Harris appeals.

III. ASSIGNMENTS OF ERROR

Harris assigns that the district court erred by denying an evidentiary hearing on (1) factual issues involving prosecutorial misconduct, (2) ineffective assistance of counsel for failure to properly move to suppress the Cass report and failure to properly object to inadmissible evidence, and (3) ineffective assistance of appellate counsel.

IV. STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Rath v. City of Sutton, ante* p. 265, 673 N.W.2d 869 (2004).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

V. ANALYSIS

1. JURISDICTION

In his brief, Harris notes a jurisdictional issue involving whether an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order in the light of Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002) (addressing multiple claims for relief and multiple parties). The State does not argue that jurisdiction is lacking.

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues

presented by a case. *Pennfield Oil Co. v. Winstrom, ante* p. 288, 673 N.W.2d 558 (2004). Section § 25-1315 provides in part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Section 25-1315 requires an express determination by the trial court that no just reason exists for delay and an express direction for the entry of judgment in order to create a final order for appeal when less than all claims have been decided. However, the adoption of § 25-1315 does not change the fact that an order in a special proceeding affecting a substantial right is also a final order that may be appealed. See, e.g., *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[4] Before the enactment of § 25-1315, we held that an order granting an evidentiary hearing on some issues and denying a hearing on others was a final order because a postconviction proceeding is a special proceeding. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). The enactment of § 25-1315 does not change the conclusion reached in *Silvers*. Accordingly, we determine that we have jurisdiction over this appeal.

2. Prosecutorial Misconduct

Harris contends that the district court should have granted an evidentiary hearing on allegations of prosecutorial misconduct that he could not have raised on direct appeal. He contends that he was denied a fair trial because the prosecutor failed to deliver the Cass report to his defense counsel before trial, thus

preventing his counsel from raising issues about the admissibility of Harris' statements. Relying on *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), the State argues that prosecutorial misconduct must always be raised on direct appeal or it is waived. In the alternative, the State argues that the issues were addressed on direct appeal.

[5,6] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[7,8] We have regularly held that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal. See, e.g., *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003). However, when an issue has not been raised or ruled on at the trial level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. See *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995).

In *Threet, supra*, it was alleged in a postconviction motion that a prosecutor's derogatory remarks during closing arguments resulted in prosecutorial misconduct. We concluded that the postconviction motion failed to set out facts and only alleged conclusions. We then additionally stated in dicta that "allegations of prosecutorial misconduct are proper subjects for a direct appeal, not a postconviction hearing, and in the absence of a direct appeal, the issue will not be considered in this hearing." *Id.* at 811-12, 438 N.W.2d at 748. We have held in other cases that an allegation of prosecutorial misconduct was barred in a postconviction action when the issues were known at the time of trial and were not raised on direct appeal. See, e.g., *Ortiz, supra*. We have also barred prosecutorial misconduct claims that were raised and rejected on direct appeal. See *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

[9] In many, if not most instances, a claim of prosecutorial misconduct would appropriately be raised on direct appeal. For example, allegations such as those in *Threet* about a prosecutor's statements will be in the record providing the facts necessary for a determination on direct appeal. However, when a determination of misconduct would require an evidentiary hearing that could not be conducted during trial, a defendant cannot properly present the issue on direct appeal. In such a limited case, a defendant is entitled to an evidentiary hearing on the matter if he or she has alleged facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. To the extent *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), states otherwise, it is disapproved.

Here, although Harris did not specifically raise prosecutorial misconduct on direct appeal, we noted in *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002), that the record was insufficient to conclude the district court abused its discretion when it determined there was no violation of a discovery order. We specifically noted that the case involved a "he said, she said" situation. *Id.* at 337, 640 N.W.2d at 32. Most important, a full evidentiary hearing about prosecutorial misconduct would have been unworkable at the trial level because the attorneys involved could not act as sworn witnesses to provide the testimony necessary to determine the matter. See *State ex rel. NSBA v Neumeister*, 234 Neb. 47, 449 N.W.2d 17 (1989) (describing advocate-witness rule in Nebraska). Thus, Harris is not barred from raising prosecutorial misconduct on postconviction.

The State contends, however, that Harris has not shown how any failure of the prosecutor to deliver the Cass report resulted in prejudice to his defense. The State argues that any statement that Harris knew Hicks' nickname of "Homicide" was innocuous because Harris' defense was that he was not present at the shooting, and it made no difference if he knew who Hicks was. Harris, however, contends that part of his defense theory was that Hicks was lying and had never met Harris before the murder. Thus, he argues he was prejudiced by allowance of the Cass report and testimony into evidence.

The record contains some support for Harris' argument. The prevailing theory of Harris' case was that Hicks was lying. Although there was little focus on whether the two knew each other before the murder, on cross-examination of Hicks, Harris' attorney asked questions to indicate that Hicks did not know Harris at the time of the crime. For example, Harris' attorney asked whether anyone ever saw Hicks and Harris together and asked questions about a pager that one allegedly gave to the other. Hicks could not provide names of any people who ever saw him and Harris together and did not know the pager number. Harris' attorney also argued these points in closing. We conclude that Harris has alleged facts to support an allegation that he was prejudiced by any misconduct that occurred. We determine that Harris is entitled to an evidentiary hearing on the issue of prosecutorial misconduct. Whether any misconduct occurred or whether he was prejudiced by any misconduct is best determined at an evidentiary hearing.

3. Ineffective Assistance of Counsel

(a) Cass Report

Harris contends that if the report was properly delivered, his counsel was ineffective for failing to timely request a hearing about whether Harris' statements were voluntary. In the alternative, he argues that if the report was not delivered, his counsel was ineffective because he failed to draft a proper discovery order. The district court did not grant a hearing because it determined that all issues about the Cass report had been addressed on direct appeal.

[10] When a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief. See *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002).

Harris had the same attorney at trial and on direct appeal. Further, this court did not determine any ineffective assistance of counsel issues about the report on direct appeal. We conclude that Harris is entitled to an evidentiary hearing on the issue of ineffective assistance of counsel concerning the delivery of the Cass report.

(b) Failure to Object to Testimony From Cass About Statements of Tony Bass

Harris argues that a hearing is needed to determine whether his counsel was ineffective when he did not object to hearsay evidence from Cass about statements from Tony Bass. Cass testified, without objection, that Bass told him that Harris said that Jones was bound, the location of the gunshot wound, the purpose of the crime, and other details of the murder. There was no objection. Tony Bass testified at trial and repeated the statements.

The court concluded that the statements were hearsay, but that the testimony was cumulative to Tony Bass' own testimony, and thus harmless. We agree and find Harris' arguments to be without merit. See *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001).

(c) Failure to Object to Testimony From Cass About Statements of Harris

Harris argues that his counsel was ineffective for failing to object to hearsay evidence from Cass about statements made by Harris. The district court concluded that the first statement, involving a denial that Harris knew various people, was hearsay, but not prejudicial. Concerning the other statements, the court found either that Harris' attorney properly objected or that Cass was not repeating statements made by Hicks. Without deciding whether the statements were hearsay, we agree with the reasoning of the district court that the statements were not prejudicial. Accordingly we find Harris' argument on this issue to be without merit.

(d) Failure to Object to Statements From Warren, Robert Sklenar, Tony Bass, and Paylor

Harris contends that he is entitled to an evidentiary hearing because (1) Warren stated without objection that for his personal safety, he would get to move to another state while on parole; (2) Robert Sklenar, an Omaha police detective, testified that he spoke to Harris about "this case and another case," and no § 27-404(2) objection was made; (3) Bass testified without objection that Harris told him about the murder and "other things" such as drug dealing by Bass; and (4) Paylor, who allegedly had been shot by Harris in the past, testified without proper objection that he met

with Harris so Harris could "let [Paylor] know" who had shot Paylor.

On direct appeal, we determined that even if a proper objection would have been made to the testimony, no basis exists for reversal on each of the above issues. We apply the same reasoning and conclude that Harris is not entitled to an evidentiary hearing on this issue. See *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

4. INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

Harris argues that his appellate counsel was ineffective in failing to raise issues of prosecutorial misconduct on direct appeal and had a conflict of interest in serving as both trial and appellate counsel. Harris will receive an evidentiary hearing on the issue of prosecutorial misconduct. We find no merit in Harris' argument about a conflict of interest and determine, as we did on direct appeal, that arguments about a failure to object to statements lack merit. We determine that this assignment of error is without merit.

VI. CONCLUSION

We determine that Harris is entitled to an evidentiary hearing on issues about prosecutorial misconduct concerning delivery of the Cass report. He is also entitled to a hearing about ineffective assistance of counsel concerning the report. We determine that he is not entitled to a hearing on the other issues raised.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
JAMES LOWE, APPELLANT.

677 N.W.2d 178

Filed April 9, 2004. No. S-03-445.

1. **Juries: Discrimination: Appeal and Error.** A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of credibility. The trial court's determination that there was no purposeful discrimination in the party's use of his or her peremptory

challenges is a factual determination which an appellate court will reverse only if clearly erroneous.

2. ____: ____: ____. A trial court's determination of the adequacy of a party's "neutral explanation" of its peremptory challenges will not be reversed on appeal unless clearly erroneous.
3. **Judgments: Appeal and Error.** An appellate court decides a question of law independently of the conclusion reached by the trial court.
4. **Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to show that a prosecutor has used peremptory challenges in a racially discriminatory manner, a defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. If the requisite showing has been made, the prosecutor must then articulate a race-neutral explanation for striking the juror in question. Finally, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination.
5. ____: ____: ____: ____. During the jury selection process, with regard to the burden on the prosecution to come forward with a gender-neutral explanation, the second step of the test in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), does not demand an explanation that is persuasive, or even plausible. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed gender neutral. The gender-neutral explanation need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender.
6. **Juries: Discrimination: Prosecuting Attorneys: Moot Question.** Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.
7. **Constitutional Law: Trial: Appeal and Error.** There are two types of constitutional infirmities: trial errors and structural errors.
8. **Trial: Appeal and Error.** Structural errors are those errors so affecting the framework within which the trial proceeds, that they demand automatic reversal.
9. ____: ____. A *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), violation is a structural error not subject to harmless error review.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Reversed and remanded for a new trial.

David B. Eubanks, of Pahlke, Smith, Snyder, Petitt & Eubanks, G.P., for appellant.

Jon Bruning, Attorney General, Susan J. Gustafson, and Erin E. Leuenberger, Senior Certified Law Student, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

McCormack, J.

NATURE OF CASE

In his appeal from a criminal conviction, James Lowe contends that the trial court erred when it rejected his claim of discrimination in the use of a peremptory challenge employed by the prosecution. Lowe claims that several male jurors were struck from the venire because of gender in violation of the Equal Protection Clause of the U.S. Constitution.

BACKGROUND

An information was filed in this case on December 18, 2002, charging Lowe with sexual assault of a child, a Class IIIA felony, pursuant to Neb. Rev. Stat. § 28-320.01(2) (Cum. Supp. 2002). The case proceeded to trial, and jury selection began on March 12, 2003. After voir dire was completed but before the jury was sworn, Lowe made a motion pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), outside the presence of the jury. Lowe asserted that the State had exercised all six of its peremptory challenges—all of them striking males. The trial court asked the prosecution to provide a gender-neutral reason for striking the six jurors in question. The prosecution responded as follows:

> Well, Your Honor, I think it's important to have a mix, I don't want all men or all women and basically there's a majority of men on the jury the way it is and I think you need to have some women on a jury on a case like this who bring a different sort of experience into the jury room than just having men. Oftentimes women in our society do provide a lot of the child caretaking and I think that's a legitimate reason for the State to try to have some women on a panel. If I'd have struck women I'd almost have a 12 person panel here, it just happens to be that there seems to be more men on this mix of people than there are women and so that's the mix that are left, I think is a legitimate mix for a 12 person jury.

Lowe's attorney responded, stating:

> Well, Judge, I don't know under Batson if that qualifies as an explanation for neutral striking of exclusively men to the exclusion of females. And essentially what I hear [the

> prosecutor] saying is, yeah, I wanted to get off as many men as I could so I can get as many women on the jury and that's not neutral, that isn't neutral gender obviously.

The trial court thereafter overruled Lowe's motion, stating:

> We'll, here's what it seems to me and I rule with probably not a lot of background on this because it has not come up but the idea of Batson and cases that extended Batson to other areas were allegations of denial of equal protection and so we end up with a jury of five of one gender and 7 of another. I can't see that that would be a violation of the equal protection.
>
> And in reviewing the strikes, the State struck [males] but, on the other hand, all of the defense strikes, the ones that were taken were all [females] and, again, we end up with a fairly equal blend of males and women which from my perspective anyway would not deny equal protection. In fact, if anything, it would comport to equal protection of having that type of a mix.

A review of the record reveals that the jury list for February and March 2003 consisted of 30 males and 30 females. Of those venirepersons appearing on the general jury list, 29 were assigned to the jury list in this case, 15 of which were males and 14 females. The record confirms that 6 females and 6 males were impaneled and sworn in this matter. The record does not contain a transcript or otherwise reveal the nature of the questions posed to members of the jury panel during voir dire.

Following a jury trial, Lowe was found guilty and sentenced to probation. Lowe appeals.

ASSIGNMENT OF ERROR

For his sole assignment of error, Lowe assigns, restated, that the trial court erred in overruling Lowe's *Batson* challenge which alleged that the State intentionally discriminated on the basis of gender in the jury selection process.

STANDARD OF REVIEW

[1] A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate

court because such a finding will largely turn on evaluation of credibility. The trial court's determination that there was no purposeful discrimination in the party's use of his or her peremptory challenges is a factual determination which an appellate court will reverse only if clearly erroneous. *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993).

[2] A trial court's determination of the adequacy of a party's "neutral explanation" of its peremptory challenges will not be reversed on appeal unless clearly erroneous. *Jacox v. Pegler, supra*; *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[3] An appellate court decides a question of law independently of the conclusion reached by the trial court. *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002).

ANALYSIS

Application of *Batson* Test

In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the U.S. Supreme Court held that the Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race. See, also, *Jacox v. Pegler, supra*. The Court extended this holding to gender-related discrimination in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). See, also, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). *J.E.B.* involved a suit for determination of paternity and child support. When the matter was called for trial, the trial court assembled a panel of 36 potential jurors, 12 males and 24 females. After the trial court excused three jurors for cause, the state then used 9 of its 10 peremptory challenges to remove male jurors. The petitioner used all but one of his strikes to remove female jurors. All of the remaining jurors were female. Before the jury was impaneled, the petitioner challenged the state's peremptory strikes on the ground that they were exercised against male jurors solely on the basis of gender in violation of the Equal Protection Clause of the 14th Amendment. The trial court rejected the petitioner's claim and impaneled the jury.

The U.S. Supreme Court held that it is axiomatic that intentional discrimination on the basis of gender in jury selection by

state actors violates the Equal Protection Clause. This is particularly so where the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women. *J.E.B. v. Alabama ex rel. T.B., supra.* The Court further stated that gender, like race, is an unconstitutional proxy for juror competence and impartiality. The Court noted that its decision and supporting rationale in *Hoyt v. Florida*, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961), in which the Court upheld a state statute exempting women from serving on juries on the ground that women, unlike men, occupied a unique position " 'as the center of home and family life,' " was later repudiated by the Court in *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 134.

In *J.E.B.*, the State of Alabama maintained that its decision to exercise its peremptory challenges to strike effectually all the males from the jury was

> "based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child."

511 U.S. at 137-38. The Court rejected this justification as embodying " 'the very stereotype the law condemns.' " 511 U.S. at 138.

The Court continued, holding that "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

[4] In *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003), we applied the three-step process established in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), for evaluating whether a party has used peremptory challenges

in a racially discriminatory manner. We stated that the defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. If the requisite showing has been made, the prosecutor must then articulate a race-neutral explanation for striking the juror in question. Finally, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination. We apply this same three-step process for evaluating whether the prosecution in this case discriminated on the basis of gender in exercising all six of its peremptory challenges to strike males from the venire. See *J.E.B. v. Alabama ex rel. T.B., supra* (applying *Batson* three-step process to gender discrimination claims).

[5] With regard to the burden on the prosecution to come forward with a gender-neutral explanation, " '[t]he second step of [the *Batson* test] does not demand an explanation that is persuasive, or even plausible.' " *Jacox v. Pegler*, 266 Neb. at 414, 665 N.W.2d at 612. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed gender neutral. See *id.* (articulating this principle with respect to race discrimination). The gender-neutral explanation "need not rise to the level of a 'for cause' challenge; rather, it merely must be based on a juror characteristic other than gender." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 145.

[6] With respect to the first step of the *Batson* test, we note that the trial court did not issue written or oral findings or otherwise comment regarding whether Lowe met his prima facie burden of showing the prosecution engaged in gender discrimination in the exercise of its peremptory challenges. However, whether Lowe made a prima facie showing is a moot issue in this case. The prosecution, at the trial court's request, offered a purported gender-neutral explanation before the trial court commented on the sufficiency of Lowe's prima facie showing. We noted in *Jacox* that " '[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.' " *Jacox v. Pegler*, 266 Neb. at 416, 665 N.W.2d at 613 (quoting *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). Accordingly, because the

prosecution offered a purported gender-neutral explanation, we do not comment on the adequacy of Lowe's prima facie showing of discrimination.

In this case, the trial court's application of a harmless error analysis presumes the court found that the prosecution engaged in gender-based discrimination in exercising all six of its peremptory strikes to exclude males from the venire. The trial court, however, did not expressly find that the prosecution failed to offer a gender-neutral reason for its peremptory challenges or that the explanation, while gender-neutral, was a pretext. Thus, we must independently determine whether the trial court's belief, implicit in its ruling, that the prosecution engaged in gender-based discrimination is supported in law. See *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002) (where record adequately demonstrates that 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). In so doing, we review the trial court's decision under a clearly erroneous standard. *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003).

The State contends, under the second step of the *Batson* test, that the prosecution provided a gender-neutral explanation for striking the jurors in question. At the *Batson* hearing, the prosecution explained that its purpose for using its peremptory strikes in the manner in question was not to remove all of the males from the jury, but was to have a mixture of both males and females on the final jury panel. The prosecution told the court that if it would have struck female jurors, the overwhelming majority of the final jury panel would have been males. The prosecution stated that it was important to have a mix of females and males on this jury.

The U.S. Supreme Court, in *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), rejected the State of Louisiana's purported facially neutral desire to achieve gender balance in the final jury panel. In *Taylor*, a case in which a Louisiana law excluding women from jury service was declared unconstitutional, the Court held that a jury must be drawn from venires representative of the community. As such, the Court stated, women as a class could no longer be excluded. *Id.* In so holding, the Court emphasized that "in holding that petit juries must be drawn from a source fairly representative of the

community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." 419 U.S. at 538.

The State further argues that the prosecution also expressed at the *Batson* hearing the importance in this case of having females on the jury because of the "child caretaking" experience females often possess. The State's explanation for exercising its peremptory strikes in the manner in question is anything but gender neutral. It invokes the very "invidious, archaic, and overbroad stereotypes about the relative abilities of men and women" that the U.S. Supreme Court rejected in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

Indeed, in *J.E.B.*, the U.S. Supreme Court expressly recognized its repudiation of the rationale it had previously relied upon to uphold state statutes exempting women from serving on juries on the ground that women, unlike men, occupied a unique position " 'as the center of home and family life.' " *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 134. In the present case, the State's explanation regarding the relative child caretaking experience of women is not too dissimilar from the explanation offered by the State of Louisiana and rejected by the Court in *J.E.B.* There, the state justified its decision to strike males from the jury in a paternity action because women might be more sympathetic and receptive to the arguments of the complaining witness who bore the child. *J.E.B. v. Alabama ex rel. T.B., supra.* The U.S. Supreme Court rejected this justification as embodying " 'the very stereotype the law condemns.' " 511 U.S. at 138. Here, the State's explanation that "[o]ftentimes women in our society do provide a lot of the child caretaking and I think that's a legitimate reason for the State to try to have some women on a panel" typifies the very stereotype rejected by the U.S. Supreme Court in *J.E.B.*

The Utah Court of Appeals, in *State v. Chatwin*, 58 P.3d 867 (Utah App. 2002), similarly rejected an explanation offered by the prosecution of achieving gender balance. In *Chatwin*, the prosecutor explained that he struck a male venireperson because he felt that " 'this jury would be better able to deliberate the evidence that I anticipate[d] presenting to it if [the jury was] balanced between men and women. I therefore made efforts to take

men off of the jury.' " 58 P.3d at 868. The trial court denied the defendant's challenge to the prosecutor's strike, finding the prosecutor sufficiently justified exercising the strike. Applying the U.S. Supreme Court's decision in *J.E.B. v. Alabama ex rel. T.B., supra*, the Utah Court of Appeals reversed. The court of appeals addressed the state's argument that the prosecutor's intent was to seat a jury composed of a fair cross section of the community rather than to remove jurors based on gender. Citing *J.E.B.* and *Batson*, the court of appeals stated that "the Constitution does not guarantee either the State or a defendant a jury comprised of any specific gender balance or composition. . . . Rather, the Constitution guarantees only that every defendant will be tried by a jury whose members are selected pursuant to 'nondiscriminatory criteria.' " (Citations omitted.) *State v. Chatwin*, 58 P.3d at 872. The court determined that the prosecutor failed to provide a facially neutral explanation for its peremptory strike. The court held that dismissing a potential juror on the basis of gender in an attempt to achieve gender balance in the jury was discriminatory and in violation of the Equal Protection Clause.

Other jurisdictions have similarly concluded that exercising peremptory strikes in an attempt to achieve gender balance in the final jury panel constitutes a gender discriminatory motivation. See, *U.S. v. Tokars*, 95 F.3d 1520 (11th Cir. 1996); *People v. Hudson*, 195 Ill. 2d 117, 745 N.E.2d 1246, 253 Ill. Dec. 712 (2001).

Based on the foregoing, we determine that the State failed to offer a gender-neutral explanation for using all six of its peremptory challenges to strike males. Accordingly, we need not address the third step under *Batson* and we conclude that the State improperly exercised all of its peremptory challenges on the basis of gender in violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. We turn now to a discussion of whether the trial court's decision to apply a harmless error analysis was proper.

Trial Error Versus Structural Error

During the hearing on the *Batson* motion, the trial court implicitly found that the prosecution engaged in gender discrimination in the exercise of its peremptory challenges. The trial court, applying a harmless error analysis, nonetheless overruled Lowe's

Batson motion, finding no equal protection violation because the final jury panel consisted of an equal number of males and females. We have never before addressed the issue of whether a harmless error analysis is appropriate in the context of a *Batson* challenge, and neither party has meaningfully addressed the issue in their respective briefs to this court. Accordingly, we must determine whether the trial court was correct to apply a harmless error analysis to a *Batson* challenge.

[7,8] In *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), we recognized two types of constitutional infirmities established and later refined by the U.S. Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991): trial errors and structural errors. In *Bjorklund*, we noted the U.S. Supreme Court defined structural errors as those so " 'affecting the framework within which the trial proceeds,' that they demand automatic reversal." 258 Neb. at 504, 604 N.W.2d at 225. The Court in *Fulminante* defined trial errors as those " 'which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.' " *State v. Bjorklund*, 258 Neb. at 504, 604 N.W.2d at 225. We noted that the U.S. Supreme Court limited structural errors to a few very specific categories—total deprivation of counsel, trial before a judge who is not impartial, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial. We also observed that the Court listed several errors, many of constitutional magnitude, which are properly termed trial errors and subject to harmless error review. Among those listed were the denial of counsel at a preliminary hearing, the admission of a defendant's coerced statement, and a jury instruction containing an erroneous conclusive presumption.

The federal courts of appeals that have considered the question have generally treated *Batson* violations as structural and thus subject to per se reversal. See, *U.S. v. Serino*, 163 F.3d 91, 93 (1st Cir. 1998) (finding *Batson* violation and reversing "without proof of prejudice or proceeding to consider harmlessness"); *Tankleff v. Senkowski*, 135 F.3d 235, 248 (2d Cir. 1998) (holding that

"[b]ecause the effects of racial discrimination during voir dire 'may persist through the whole course of the trial proceedings,' " *Batson* challenge structural error "not subject to harmless error review"); *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992) (holding harmless error analysis inappropriate in cases involving discrimination in jury selection process); *U.S. v. Broussard*, 987 F.2d 215 (5th Cir. 1993) (declining to apply harmless error analysis to trial court's misapplication of *Batson* test), *abrogated on other grounds, J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); *U.S. v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998) (finding *Batson* violation involves " 'structural error' " not subject to harmless error analysis); *Rosa v. Peters*, 36 F.3d 625 (7th Cir. 1994) (opining U.S. Supreme Court would not characterize *Batson* violation as trial error and concluding harmless error analysis inapplicable); *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995) (holding constitutional error involving *Batson* violation not subject to harmless error analysis); *U.S. v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (holding proper remedy for improper use of peremptory challenge under *Batson* is automatic reversal); *U.S. v. Thompson*, 827 F.2d 1254 (9th Cir. 1987) (finding harmless error inapplicable to *Batson* violation); *Davis v. Secretary for Dept. of Corrections*, 341 F.3d 1310 (11th Cir. 2003) (concluding harmless error review inapplicable in context of *Batson* violations); Pamela S. Karban, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001 (1998).

In *Davis v. Secretary for Dept. of Corrections, supra*, the 11th Circuit observed that the U.S. Supreme Court has not yet suggested that discriminatory exclusion of prospective jurors is subject to harmless error review. The 11th Circuit noted, however, that the U.S. Supreme Court has on several occasions reversed convictions without first determining whether the improper exclusion of jurors made any difference in the outcome of the trial. For example, the 11th Circuit noted that in *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the U.S. Supreme Court reversed, and remanded based upon a finding that the defendant was wrongfully barred from raising a *Batson* claim. *Davis v. Secretary for Dept. of Corrections, supra.* In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Court ordered that the defendant's conviction be reversed if

the defendant, on remand, was able to establish a prima facie case of discrimination and the state was unable to provide a neutral explanation for the challenged strikes. The Court has also required automatic reversal in a similar context of discrimination in the selection of members of a grand jury. *Batson v. Kentucky, supra* (citing *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986); *Rose v. Mitchell*, 443 U.S. 545, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979)).

The 11th Circuit further opined that the U.S. Supreme Court has expressly recognized that discrimination in the exercise of peremptory challenges harms not only the defendant's interests, but also the interests of jurors themselves in not being excluded improperly from jury service, as well as the interest of the community in the unbiased administration of justice. *Davis v. Secretary for Dept. of Corrections, supra* (citing *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); *Powers v. Ohio, supra*; and *Batson v. Kentucky, supra*). The court stated that the doctrine of third party standing enables defendants to act on behalf of improperly excluded jurors by raising *Batson* claims in their stead, even when the defendant and the improperly excluded juror are not of the same race. *Davis v. Secretary for Dept. of Corrections, supra* (citing *Powers v. Ohio, supra*). The court further observed that a defendant is no more entitled to exercise peremptory strikes on a racially discriminatory basis than the prosecution. As such, the court maintained, the harm proscribed by *Batson* must redound to interests beyond the defendant's if it constrains the defendant's own selection of trial strategies. *Davis v. Secretary for Dept. of Corrections, supra* (citing *Georgia v. McCollum, supra*). Accordingly, the 11th Circuit concluded that a *Batson* violation warrants automatic reversal and is not subject to harmless error review.

The Eighth Circuit reached a similar conclusion in *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995). In *Ford*, the court concluded that a constitutional error involving the race-based exclusion of jurors infects the entire trial process itself and is, therefore, a structural error not subject to a harmless error analysis. The court stated:

> "A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation

> committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The *voir dire* phase of the trial represents the jurors' first introduction to the substantive factual and legal issues in a case. The influence of the *voir dire* process may persist through the whole course of the trial proceedings."

Ford v. Norris, 67 F.3d at 171. The Eighth Circuit concluded that when jurors are excluded solely because of racial considerations, the irregularity may pervade all the proceedings that follow.

In the instant case, the fact that an equal number of males and females appeared on the final jury panel is inapposite. The U.S. Supreme Court stated in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994), that it is irrelevant to the constitutionality of gender-based peremptory challenges that women, unlike African-Americans, are not in the numerical minority and therefore are likely to remain on the jury if each side uses its peremptory challenges in an equally discriminatory fashion. The Court stated:

> Because the right to nondiscriminatory jury selection procedures belongs to the potential jurors, as well as to the litigants, the possibility that members of both genders will get on the jury despite the intentional discrimination is beside the point. The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.

511 U.S. at 142 n.13.

[9] We agree with the rationale of the federal circuit courts of appeals that have held that a *Batson* violation is a structural error not subject to harmless error review. Accordingly, we hold that the trial court erred in applying a harmless error analysis to Lowe's *Batson* challenge. It is of no consequence that the composition of the final jury panel in this case consisted of an equal number of men and women.

CONCLUSION

We conclude that the prosecution impermissibly exercised its peremptory challenges on the basis of gender in violation of the

Equal Protection Clause. Applying a structural error analysis, we reverse the decision of the trial court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DANIEL J. THAYER, RESPONDENT.

677 N.W.2d 188

Filed April 9, 2004. No. S-03-1204.

Original action. Judgment of public reprimand.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

Respondent, Daniel J. Thayer, was admitted to the practice of law in the State of Nebraska on September 14, 1990, and at all times relevant hereto was engaged in the private practice of law in Grand Island, Nebraska. On October 23, 2003, formal charges were filed against respondent. The formal charges set forth two counts, including charges that the respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), and DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997).

On February 25, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest the allegations that he violated DR 1-102(A)(1) and (5), as well as his oath of office as an attorney, and waived all proceedings against him in connection therewith in exchange for a public reprimand. Upon due consideration, the court approves the conditional admission and orders that respondent be publicly reprimanded.

FACTS

In summary, the formal charges allege that during the course of his representation of one client, respondent failed to manage his calendar, resulting in conflicting obligations for the same date and an inability to represent the client at certain case-related proceedings. The formal charges also allege that respondent failed to adequately review the client's billing statement, resulting in an inaccurate bill being sent to and paid by the client. The formal charges further allege that as to a second client, respondent improperly issued subpoenas under an incorrect case caption and failed to provide service and notice of the subpoenas to appropriate entities.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly does not challenge or contest the essential relevant facts outlined in the formal charges and knowingly does not challenge or contest that he violated DR 1-102(A)(1) and (5), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (5), as well as his oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROGER L. HARRIS, RESPONDENT.

677 N.W.2d 145

Filed April 9, 2004. No. S-04-038.

Original action. Judgment of suspension.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

Respondent, Roger L. Harris, was admitted to the practice of law in the State of Nebraska on September 18, 1981, and at all times relevant hereto was engaged in the private practice of law in Beatrice, Nebraska. On January 9, 2004, formal charges were filed against respondent. The formal charges set forth two counts, including charges that the respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); DR 1-102(A)(6) (engaging in conduct adversely reflecting on fitness to practice law); and Canon 6, DR 6-101(A)(3) (neglecting legal matter), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997).

On March 10, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest the truth of the allegations that he violated DR 1-102(A)(1), (5), and (6), and DR 6-101(A)(3), as well as his oath of office as an attorney, and waived all proceedings against him in connection therewith in exchange for a 30-day suspension of his license to practice law. Upon due consideration, the court approves the conditional admission and orders that respondent be suspended from the practice of law in the State of Nebraska for 30 days.

FACTS

In summary, the formal charges allege that during the course of his representation of one client, respondent neglected to act to protect the client's interests in certain court and administrative proceedings. The formal charges further allege that as to a second client, respondent delayed in handling a legal matter for that client. Finally, the formal charges allege that respondent failed to respond fully to inquiries from the Counsel for Discipline's office regarding his handling of these clients' legal matters.

The conditional admission filed by respondent includes a "Declaration of the Counsel for Discipline." The declaration states in part that "respondent's misconduct as stipulated to herein, arose, in part, from his depression and not the intentional disregard or indifference of his clients' interests. [As a result of treatment, r]espondent's requested 30-day suspension of his license to practice law is appropriate under the facts of this case."

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval

> by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly does not challenge or contest the essential relevant facts outlined in the formal charges and knowingly does not challenge or contest that he violated DR 1-102(A)(1), (5), and (6), and DR 6-101(A)(3), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1), (5), and (6), and DR 6-101(A)(3), as well as his oath of office as an attorney, and that respondent should be and hereby is suspended for a period of 30 days, effective immediately, after which time respondent may apply for reinstatement. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

MARIA AGUALLO, APPELLANT AND CROSS-APPELLEE, V. CITY OF SCOTTSBLUFF, A POLITICAL SUBDIVISION, APPELLEE AND CROSS-APPELLANT.

678 N.W.2d 82

Filed April 16, 2004. No. S-02-879.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party.
2. **Trial: Negligence: Damages.** The purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis.
3. **Trial: Negligence: Damages: Proof.** Determining apportionment is solely a matter for the fact finder, and its action will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.
4. **Negligence: Liability: Invitor-Invitee: Proximate Cause: Proof.** In cases when a lawful visitor claims that he or she was injured by a condition on the owner or occupier's premises, the owner or occupier is subject to liability if the lawful visitor proves (1) the owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor.
5. **Negligence: Damages.** Comparative negligence abrogates the common-law concept of contributory negligence, thus relieving both parties of an all-or-nothing situation, and substitutes apportionment of the damages by fault.
6. ____: ____. A fact finder cannot properly compare a plaintiff's negligence to a defendant's negligence when it uses the incorrect standard of care for either party.
7. **Negligence: Damages: New Trial: Appeal and Error.** When a fact finder has used an incorrect standard of care in apportioning fault between a plaintiff and a defendant, the appropriate appellate remedy generally will be to remand for a new trial so that the fact finder can employ the correct standard in its apportionment analysis.
8. **Political Subdivisions Tort Claims Act: Liability.** In determining if the discretionary function exemption to the Political Subdivisions Tort Claims Act applies, a court must first consider whether the action is a matter of choice for the acting employee.
9. ____: ____. In determining if the discretionary function exemption to the Political Subdivisions Tort Claims Act applies, once a court has concluded that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exemption was designed to shield.
10. **Witnesses: Testimony.** The rule that a party who changes his or her testimony during litigation is bound by his or her earlier statements does not apply when the party's earlier statements are ambiguous.

11. **Political Subdivisions: Negligence.** While a political subdivision is not an insurer of a pedestrian's safety, it can be held liable if it should have reasonably anticipated that a hole or depression in a public way presented an unreasonable danger.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for a new trial.

Maren Lynn Chaloupka and Robert Paul Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Steven W. Olsen, of Simmons Olsen Law Firm, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellant, Maria Aguallo, injured both of her ankles when she fell in a parking lot owned by the City of Scottsbluff (City). Aguallo claims that the City's failure to perform proper maintenance caused the surface of the parking lot to become dangerously eroded. She further claims that her fall occurred when she stepped onto the eroded area. Following a bench trial, the court determined that the City and Aguallo were equally negligent and entered judgment for the City. We conclude that because the court used the wrong standard to evaluate the City's negligence, its comparison of the City's and Aguallo's negligence was flawed. Accordingly, we reverse, and remand for a new trial.

I. FACTUAL BACKGROUND

1. PARKING LOT AND AGUALLO'S FALL

After finishing work on the night of July 20, 1999, Aguallo walked to her car, which was parked in a city-owned parking lot. Aguallo's employer had instructed her and her coworkers to park their vehicles in the parking lot.

The parking lot has three rows of diagonal parking. Concrete tire barriers separate the first row from the second and the second row from the third. The barriers, which are wide enough for people to walk on, are 8 inches high. Aguallo had parked her car next to one of these barriers on the day of the accident. Photographs

show erosion in the area where the asphalt meets this parking barrier. The erosion ran the length of the parking barrier, and the width of the eroded area varied from 8 to 14 inches. The depth of the eroded area was disputed, but the court determined that it was "somewhat more than an inch deep and somewhat less than two inches deep." According to Aguallo, when she was returning to her car, she stepped down off the barrier and onto the edge of the eroded area, the uneven surface caused her ankle to twist, and she fell.

2. City's Knowledge of Eroded Area

The parties dispute whether the City should have known about the erosion at the time that Aguallo fell. City workers inspect the city-owned parking lots once each year after the freeze-and-thaw cycle to determine if any repairs need to be made. In addition to this inspection, the City relies on the workers who sweep, paint, and weed the parking lot to report conditions that might need maintenance.

Aguallo presented expert testimony from a civil engineer that the erosion would most likely have taken 2 to 3 years to develop. Thus, according to Aguallo, the City, employing its normal inspection routine, would have had ample opportunity to discover and repair the eroded area in the parking lot before her fall.

The City presented testimony from its transportation supervisor, who has experience with asphalt erosion. He claimed that the 1998-99 freeze-and-thaw cycle caused cracking in the asphalt and that a heavy rain during a hailstorm on June 27, 1999, washed away the loosened asphalt, leaving behind the eroded area. The City further notes that it had no reasonable opportunity to discover the eroded area because the yearly inspection of the parking lot occurred in May 1999 and the only sweeping, painting, or weeding was done before the hailstorm.

3. Aguallo's Knowledge of Eroded Area

The parties also dispute whether Aguallo should have known about the eroded area when she fell. Before her fall, Aguallo had parked her vehicle in and walked through the parking lot several times during the previous 3 weeks. She testified, however, that up to the time of her fall, she had not noticed any defects in the surface of the parking lot other than a crack in one of the cement

parking barriers. She explained that when she walked through the parking lot, she was not generally "pinpointing anything."

Aguallo also claimed that she did not notice the eroded area before she stepped off the concrete barrier on the night of the accident. At the time, Aguallo was carrying materials which she had taken home from work. In addition, she testified that she looked down before she stepped, but that because of poor lighting in the parking lot, the eroded area was dark.

Several of Aguallo's coworkers also testified that the parking lot was poorly lit. However, a civil engineer who measured the lighting in the parking lot for the City testified that the lighting at the spot where Aguallo fell met the standards published by the Illuminating Engineering Society of North America.

II. PROCEDURAL BACKGROUND

Aguallo filed a petition under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), alleging that the City's negligence had caused her injuries. In its amended answer, the City denied Aguallo's allegations and affirmatively alleged that Aguallo had been contributorily negligent. In addition, the City alleged that Aguallo's claim was based upon the performance or the failure to perform a discretionary function and that thus, the City was exempt from liability under the discretionary function exemption of the Political Subdivisions Tort Claims Act. See § 13-910(2).

After a bench trial, the court determined that the eroded area was a "hazard" which was "prone to cause injury" and that the City was negligent in failing to discover and repair the eroded area. But the court further determined that Aguallo was equally negligent in failing to notice the eroded area and to take proper precautions to avoid injury. Accordingly, the court entered judgment for the City. Following the denial of her motion for a new trial, Aguallo appealed.

III. ASSIGNMENTS OF ERROR

Aguallo assigns that the court erred in (1) finding that her negligence was equal to the City's negligence and (2) overruling her motion for a new trial.

On cross-appeal, the City assigns that the court erred in failing to find that (1) the City was not negligent, (2) the City was

exempt from liability under the discretionary function exemption of the Political Subdivisions Tort Claims Act, and (3) Aguallo's claims were too speculative to be actionable.

IV. STANDARD OF REVIEW

[1] In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

V. ANALYSIS

1. Comparative Negligence

[2,3] Aguallo assigns as error the court's determination that her negligence was equal to the City's. The purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). Determining apportionment is solely a matter for the fact finder, and its action will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial. *Id.* But here, in determining that the City had been negligent, the court used the wrong standard of care. Our task is to determine how this affects our review of the trial court's apportionment decision.

(a) Specialized Standard of Care for Premises Liability Cases Involving Conditions on Premises

In *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), we abrogated the distinction between licensees and business invitees for premises liability cases. Before *Heins*, this court held that for a business invitee to recover from an owner or occupier for an injury caused by a condition on the owner or occupier's premises, it was not enough for the business invitee to show that his or her injuries were caused by the owner or occupier's failure to exercise the ordinary duty of reasonable care. Instead, we required the business invitee to prove that the owner or occupier had breached a specialized standard of care that included three

additional elements. Specifically, we required the business invitee to prove: *(1) the defendant created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition*; *(2) the defendant should have realized the condition involved an unreasonable risk of harm to the business invitee*; *(3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger*; (4) the defendant failed to use reasonable care to protect the business invitee against the danger; and (5) the condition was a proximate cause of damage to the business invitee. See, *Derr v. Columbus Convention Ctr.*, 258 Neb. 537, 604 N.W.2d 414 (2000); *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995).

The language we used in *Heins* created some confusion whether, in addition to abrogating the distinction between business invitees and licensees, we had also eliminated the specialized standard of care for cases in which the plaintiff claimed an injury caused by a condition on the owner or occupier's premises. In *Heins*, we stated:

> Our holding does not mean that owners and occupiers of land are now insurers of their premises, nor do we intend for them to undergo burdens in maintaining such premises. We impose upon owners and occupiers only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. Among the factors to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors will be (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.

Heins v. Webster County, 250 Neb. 750, 761, 552 N.W.2d 51, 57 (1996).

In *Herrera v. Fleming Cos.*, 10 Neb. App. 987, 641 N.W.2d 417 (2002), the Nebraska Court of Appeals construed the language in *Heins* as eliminating the specialized standard of care for cases in which a plaintiff claimed an injury caused by a condition on an owner or occupier's premises. According to the Court of Appeals, after *Heins*, a lawful visitor needed only to show that the owner or occupier failed to exercise reasonable care under all of the circumstances and that the failure to exercise reasonable care caused the lawful visitor injury. Whether the owner or occupier had exercised reasonable care was to be determined by evaluating the nonexhaustive list of factors set out in *Heins*.

[4] We reversed the Court of Appeals' *Herrera* decision, concluding that *Heins* had not "abrogate[d] the elements necessary to establish liability on the part of a possessor of land for injury caused to a lawful visitor by a condition on the land." *Herrera v. Fleming Cos.*, 265 Neb. 118, 122, 655 N.W.2d 378, 382 (2003). In other words, we reaffirmed our commitment to the specialized standard of care for the owner or occupier in cases when a lawful visitor claims that he or she was injured by a condition on the owner or occupier's premises. Thus, in such cases, the owner or occupier is subject to liability if the lawful visitor proves (1) the owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor. *Id.* The several factors described in *Heins* regarding reasonable care are to be considered under subsection (4) above. *Id.*

(b) Effect of Trial Court's Reliance on
Court of Appeals' *Herrera* Decision

The trial court, when it decided this case, did not have the benefit of our decision overruling the Court of Appeals' *Herrera*

decision. As a result, it did not use the specialized standard of care for cases involving an injury caused by a condition on an owner or occupier's premises. We need to determine how this error affected the court's comparison of negligence.

[5] Comparative negligence abrogates the common-law concept of contributory negligence, thus relieving both parties of an all-or-nothing situation, and substitutes apportionment of the damages by fault. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). To compare fault, it is critical that the fact finder knows the correct standard of care for each party. For example, in some situations, like the one here, the law imposes a specialized standard of care on one party (e.g., the City), while imposing only the ordinary standard of reasonable care on the other (e.g., Aguallo). That the one party fell short of the specialized standard of care, while the other party failed to meet only the ordinary standard of reasonable care is a legitimate factor to be considered in apportioning fault. Further, another important factor to be considered in apportioning fault is "the extent to which [each person's risk-creating] conduct failed to meet the applicable legal standard." Restatement (Third) of Torts: Apportionment of Liability § 8, comment *c*. at 87 (2000). That party X deviated substantially from its standard of care while party Y's deviation was only slight suggests that X should shoulder a higher burden for the damage done. But it would be impossible for a fact finder to accurately gauge how far a party has deviated from its standard of care if the fact finder does not have the correct understanding of the party's standard of care.

[6,7] Given the importance of a correct understanding of each party's standard of care, we conclude that a fact finder cannot properly compare a plaintiff's negligence to a defendant's negligence when it uses the incorrect standard of care for either party. Cf. *Dever v. Goranflo*, 473 S.W.2d 131 (Ky. 1971). Thus, when a fact finder has used an incorrect standard of care in apportioning fault between a plaintiff and a defendant, the appropriate appellate remedy generally will be to remand for a new trial so that the fact finder can employ the correct standard in its apportionment analysis.

2. City's Cross-Appeal

Because the trial court's comparative negligence analysis was flawed, the appropriate remedy for this case is to remand for a new trial unless the City can offer some reason why we should not do so. The City argues that remand is unnecessary for three reasons. First, it argues that it is immune from liability because the case falls within the discretionary function exemption of the Political Subdivisions Tort Claims Act. Second, the City argues that Aguallo made admissions in a pretrial deposition that makes her claim speculative. Third, the City argues that Aguallo cannot show that the City breached the specialized standard of care for injuries caused by a condition on its premises.

(a) Discretionary Function Exemption

The Political Subdivisions Tort Claims Act does not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused." § 13-910(2).

[8] A court engages in a two-step analysis to determine if the discretionary function exemption applies. First, the court must consider whether the action is a matter of choice for the acting employee. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999). This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. *Id.*

[9] If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exemption was designed to shield. *Id.* As we have explained,

> [t]he basis for the discretionary function exception was the desire to " ' " 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.' . . ." ' " . . . The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. " ' "In sum, the discretionary function exception insulates the Government from

> liability if the action challenged in the case involves the permissible exercise of policy judgment." ' "

Id. at 417, 591 N.W.2d at 540 (quoting *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994)).

Here, the City contends that the erosion to the parking lot occurred 3 to 4 weeks before Aguallo's fall, when a hailstorm washed loosened asphalt out of the parking lot. The hailstorm caused widespread damage throughout the City. According to the City, it decided to shift its resources to cleanup and repair of the storm damage. The employees the City relied on to report erosion in the parking lot—i.e., weeding, painting, and sweeping crews—were shifted to the cleanup and repair operation. Thus, according to the City, its decision to forgo the ordinary maintenance routine for the parking lot resulted in its failure to discover and repair the damage to the parking lot.

The City's argument is dependent upon its theory that the erosion in the parking lot occurred because of the hailstorm. But this is not Aguallo's theory of the case. She contends that the damage to the parking lot occurred 2 to 3 years before her fall. Under Aguallo's theory, the City's failure to discover the erosion in the parking lot was not the result of a conscious policy decision. Rather, it was the result of the failure of the City employees who were responsible for discovering parking lot erosion to discover the eroded area despite repeated opportunities to do so.

Thus, whether the discretionary function exemption applies depends upon whether the hailstorm caused the erosion. If Aguallo's theory that the hailstorm did not cause the erosion is accepted, the first part of the test for the discretionary function exemption is not met because the conduct of the pertinent employees did not involve "a matter of choice." See *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. at 417, 591 N.W.2d at 540. But if the City's theory is accepted, then the conduct did involve a matter of choice and the question would become whether the decision of the City officials to forgo the usual inspections at the parking lot involved a judgment the discretionary exemption was meant to shield.

Whether the hailstorm caused the erosion to the parking lot is a question of fact. The court did not specifically address whether the discretionary function exemption applied because it resolved

this case on the comparative negligence issue. Some evidence in the record supports the City's interpretation that the hailstorm caused the erosion; other evidence supports Aguallo's theory that the erosion predated the hailstorm. Given the conflicting evidence, we decline the City's invitation to resolve the discretionary function exemption issue as a matter of law. Instead, the trial court can resolve the issue on remand.

(b) Aguallo's Alleged Admissions During Her Deposition

At trial, Aguallo testified that she fell when she stepped down from the parking barrier onto the edge of the eroded area. According to the City, however, during her deposition, Aguallo admitted that she did not know if she fell when she stepped onto the eroded edge of the parking lot. The City claims that it was possible that she had simply lost her balance when she first began to step down from the parking barrier. The City claims that Aguallo's deposition testimony is fatal to her case because it would require the fact finder to guess whether the City's failure to repair the eroded area had caused her to fall. See *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997).

[10] A party who changes his or her testimony during litigation is bound by his or her earlier statements upon proof that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet exigencies of the pending case, and that there is no rational or sufficient explanation for the changes in testimony. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003). The rule does not apply, however, when the party's earlier statements are ambiguous. Here, Aguallo's deposition testimony could be interpreted as the City suggests. Alternatively, it is possible to interpret her testimony to mean that the fall occurred when she stepped onto the eroded asphalt, but that she was unsure which way her ankle twisted as she fell. Thus, we refuse to treat Aguallo's deposition testimony as an admission that she was unsure what had caused her to fall.

(c) City's Negligence Under Specialized Standard of Care for Owners or Occupiers

To show that the City is liable for her injuries, Aguallo needed to show that (1) the City either created the condition, knew of the

condition, or by the exercise of reasonable care would have discovered the condition; (2) the City should have realized the condition involved an unreasonable risk of harm to Aguallo; (3) the City should have expected that a lawful visitor such as Aguallo either (a) would not discover or realize the danger or (b) would fail to protect herself against the danger; (4) the City failed to use reasonable care to protect Aguallo against the danger; and (5) the condition was a proximate cause of damage to Aguallo. Because the trial court was relying on the Court of Appeals' decision in *Herrera v. Fleming Cos.*, 10 Neb. App. 987, 641 N.W.2d 417 (2002), it did not consider the first three of these elements. The City asks us to determine as a matter of law that Aguallo failed to prove these three elements.

(i) City's Failure to Discover Erosion

First, the City claims that there is no evidence that it created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition. We agree that there is no evidence that the City either created or knew of the condition. Aguallo, however, presented evidence which, if believed, would have allowed a reasonable fact finder to determine that the erosion had existed for 2 to 3 years, but that the City's inspection process had failed to discover it. The City, as noted in our discussion of the discretionary function exemption, presented evidence suggesting the hailstorm had caused the erosion and that between the time of the hailstorm and the time of Aguallo's fall, the City did not have a reasonable opportunity to discover the erosion. The trial court, because it did not use the specialized standard of care, did not resolve this disputed factual question, and we decline to do so.

(ii) Unreasonable Risk of Harm

Next, the City claims that the erosion, as a matter of law, did not present an unreasonable risk of harm to Aguallo. The City relies on *Doht v. Village of Walthill*, 207 Neb. 377, 299 N.W.2d 177 (1980). In *Doht*, the plaintiff fell when she stepped on a raised portion of a sidewalk. The rise in the sidewalk was 1½ to 1¾ inches. The trial court entered judgment for the plaintiff. We reversed, concluding that the 1½- to 1¾-inch rise in the sidewalk

was such a minor irregularity that negligence could not be predicated upon it. *Id.*

[11] The City argues that, like *Doht*, this case involves only a slight hole or depression and that as a matter of law, we should conclude that it did not present an unreasonable risk of harm. But *Doht* does not state a per se rule that a political subdivision is automatically not liable for slight holes or depressions in public ways. See *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). While a political subdivision is not an insurer of a pedestrian's safety, it can be held liable if it should have reasonably anticipated that a hole or depression presented an unreasonable danger. See, *id.*; *Doht v. Village of Walthill, supra.*

Here, the erosion was only 1 to 2 inches deep. But, unlike *Doht*, the erosion was at the bottom of an 8-inch-high parking barrier. A reasonable fact finder could conclude that because pedestrians would be forced to encounter the erosion as they stepped off the 8-inch-high parking barrier, the City should have reasonably anticipated that the hole or depression presented an unreasonable danger. Thus, we refuse to resolve the question as a matter of law.

(iii) Open and Obvious Danger

To show that the City breached its specialized standard of care, Aguallo also needed to show that the City should have expected that a lawful visitor such as Aguallo either (1) would not discover or realize the danger or (2) would fail to protect herself against the danger. The City argues that the court made an express ruling that Aguallo failed to prove this element of the specialized standard of care. It relies on the following comments made by the court after closing arguments:

> Now on the law, I don't agree with counsel for both parties that NJI 8.22 [i.e., the specialized standard of care] determines the law of this case because if it does, the plaintiff loses. There's no question that the plaintiff cannot prove the elements *because the plaintiff cannot prove that the defendant should have expected that a one-inch hole would be something that people would not discover or realize the danger.* It can't be proved. So if that was the standard, I think I would find — I know that I would find that the

> plaintiff didn't prove what they have to prove to show negligence, but I don't think 8.22 applies, I never have.

(Emphasis supplied.)

Generally, when the danger posed by a condition is open and obvious, the owner or occupier is not liable for harm caused by the condition. See *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982). However, "[d]espite the fact that the danger may be open and obvious or known, the possessor of the land may owe the duty if he should expect that the [lawful visitor] will fail to protect himself against the hazard." *Id.* at 222, 322 N.W.2d at 632. See, also, Restatement (Second) of Torts § 343 A (1965). As the comments to the Restatement explain:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
>
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.

Restatement, *supra*, comment *f.* at 220. See *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

Assuming, without deciding, that the trial court's comments following the trial constitute findings of fact, the court's analysis of the open and obvious danger rule was incomplete. Although it determined that the danger was open and obvious, it did not decide whether the City should have anticipated that persons, such as Aguallo, would fail to protect themselves despite the open and obvious risk. Our case law requires this analysis. See, *Burns v. Veterans of Foreign Wars, supra*; *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988).

Further, the evidence presented at trial shows that whether the City should have anticipated that persons such as Aguallo would fail to protect themselves despite the open and obvious risk was a disputed question. Aguallo presented evidence showing that the lot was meant to provide parking for those shopping and working in downtown Scottsbluff. A reasonable fact finder could conclude that the City should have anticipated that the users of the parking lot would fail to protect themselves from the erosion because they might have forgotten about it while shopping or at work, or because they were distracted by items they were carrying. Cf., *Burns v. Veterans of Foreign Wars, supra*; Restatement, *supra*, illustration 4. In addition, the fall occurred at night and Aguallo presented evidence showing that the lighting in the parking lot was of questionable quality. Thus, a fact finder could also reasonably conclude that the City should have anticipated that persons using the parking lot would fail to protect themselves because the poor lighting did not illuminate the eroded area. Given that the trial court did not resolve whether the City should have anticipated that persons, such as Aguallo, would fail to protect themselves despite the open and obvious nature of the risk, we will not do so on appeal.

VI. CONCLUSION

We determine that the failure of the court to use the appropriate standard of care in determining the City was negligent rendered its comparison of negligence analysis invalid and entitles Aguallo to a new trial. On remand, Aguallo will have the burden to prove the five elements previously set out. If the court concludes that Aguallo has met her burden of proof on these five elements, then the City will have the burden to show that Aguallo was contributorily negligent.

REVERSED AND REMANDED FOR A NEW TRIAL.

HAMAKO I. HAMILTON, APPELLEE, V. DR. HAROLD R. BARES, APPELLANT.

678 N.W.2d 74

Filed April 16, 2004. No. S-02-1475.

1. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
2. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
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 a proximate cause of the plaintiff's alleged injuries.
4. **Negligence: Proximate Cause.** A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them.
5. **Malpractice: Physician and Patient: Proof: Proximate Cause.** Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
6. **Physicians and Surgeons: Health Care Providers: Informed Consent: Words and Phrases.** A physician's duty to obtain informed consent is measured by what information would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities.
7. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed and remanded for further proceedings.

Mark E. Novotny and Shun Lee Fong, of Lamson, Dugan & Murray, L.L.P., for appellant.

Mandy L. Strigenz and E. Terry Sibbernsen, of E. Terry Sibbernsen, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Hamako I. Hamilton brought this medical malpractice action against Dr. Harold R. Bares, alleging that she suffered damages resulting from Bares' treatment of her vision problems. The district court overruled motions for directed verdict made by both parties. The jury was unable to reach a verdict, and the court declared a mistrial. The court overruled Bares' motions for new trial and for judgment notwithstanding the verdict, and Bares appeals.

SCOPE OF REVIEW

[1] On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

[2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003).

FACTS

In the summer of 1997, Hamilton sought medical attention for vision problems in her right eye. She consulted with Bares, an ophthalmologist practicing in Bellevue, Nebraska. Bares advised her that she required cataract surgery. Hamilton underwent such surgery on August 7. Bares reported that the surgery was successful and that she could expect a full recovery in approximately 6 weeks. At that time, she would be given a new prescription for eyeglasses.

Following surgery, Hamilton suffered from decreased visual clarity, abnormal drooping and closure of the eye, and excessive watering of the eye, for which Bares prescribed a pain reliever and

antibiotic eye drops. He took x rays of Hamilton's eye and advised her that there was bleeding surrounding the retina which caused the decreased vision and excessive watering and that the condition would improve over time. Bares told her that laser treatment to attempt to stop the bleeding would be risky and could cause further damage to her vision.

On January 30, 1998, Hamilton went to Bares for a followup appointment, at which time Bares performed a capsulotomy. In her petition, Hamilton alleged that her right eye became more distressed and that she had diminished visual ability after the capsulotomy. She also alleged that Bares performed the procedure without proper advance notice to her, denying her the opportunity to obtain a second opinion. Hamilton continued to see Bares until November 1998, when she sought alternative medical attention.

Hamilton brought suit in August 1999, asserting that Bares had breached his duty to her. She alleged that Bares had negligently failed to conduct an adequate examination of her right eye and failed to perform diagnostic tests on her eye. She claimed that Bares failed to note and treat an existing retinal problem, negligently performed the cataract surgery and capsulotomy, and failed to advise her of the risks to her retina during cataract surgery.

At trial, Dr. Frederick Mausolf, an ophthalmologist who practices in Lincoln, Nebraska, testified as an expert for Hamilton. Mausolf had examined Hamilton in November 1998 and observed that she had "severe surface wrinkling with fibrosis at the macula on the right side," meaning that the inner layer of the retina was wrinkled. Mausolf told her that the only treatment available was surgery to remove the membrane and smooth out the retina.

From his review of Hamilton's medical records, Mausolf noted that her vision was 20/60 prior to the cataract surgery and that it decreased dramatically after the surgery. He also noted that in 1995, Hamilton had been seen at the Offutt Air Force Base hospital, and the records indicated that she had "macular pucker secondary to retina ERM, epiretinal membrane," a condition where the surface of the retina is wrinkled. Mausolf testified that he saw no mention or diagnosis of epiretinal membrane in the medical records made by Bares.

Mausolf was asked whether he had an opinion within a reasonable degree of medical certainty as to whether Bares had

followed the standard of care required for an ophthalmologist practicing in Bellevue on August 1, 1997. Following a relevancy objection that was overruled, Mausolf gave his opinion that the epiretinal membrane was not seen, noted, or taken into account prior to the cataract surgery, and he opined that Hamilton "wasn't given proper informed consent regarding the epiretinal membrane in order to make an informed decision as to whether to proceed with the cataract surgery or not." Mausolf stated that the cataract was of enough clarity that the epiretinal membrane could have been seen.

Mausolf testified that Hamilton should have been informed that she had two problems causing visual loss, the cataract and the epiretinal membrane, and that removing the cataract alone would not compensate for the loss of vision due to the epiretinal membrane. He found no evidence in the records he reviewed to indicate that she was informed about the epiretinal membrane.

Mausolf was asked if, in his opinion, Bares had breached the standard of care for an ophthalmologist practicing in Bellevue based on his failure to provide Hamilton with sufficient information to permit her to make an informed decision whether to have the cataract surgery. Mausolf stated that "it was required of the doctor to do a complete examination to find out the possible causes for her visual loss." Mausolf opined that Hamilton should have been informed that her visual loss was "partially due to the epiretinal membrane disease and due to the cataract." This information could have been taken into consideration in deciding whether to have the cataract removed. Mausolf said he did not see in the records that Bares discussed with Hamilton any alternative methods of treatment.

Hamilton's visual acuity was 20/80 when Mausolf saw her in November 1998 and when he saw her again in June 2001. In September 2001, her visual acuity was 20/200. Mausolf stated to a reasonable degree of medical certainty that the cataract surgery aggravated Hamilton's preexisting epiretinal membrane condition and caused her vision to further decrease.

Dr. Ira Priluck, an ophthalmologist in Omaha, Nebraska, testified for Bares. Priluck specialized in retinal problems and performed retinal surgeries. Priluck said that Hamilton came to him for a second opinion concerning her retinal problem and that he

recommended additional surgery, but she refused. Priluck testified to a reasonable degree of medical certainty that he believed Bares met the standard of care in diagnosing the retinal problem before cataract surgery and in advising Hamilton as to the risks, complications, and benefits of the cataract surgery.

Priluck testified that many patients do not remember having given informed consent prior to eye surgery, an issue which he has studied and about which he has published articles. Priluck's studies showed that about 80 percent of the patients remembered being told about the positive aspects of the surgery, while almost 80 percent denied they were ever told about the possibility of a bad outcome. Priluck said that because Hamilton's macular problem existed previously, her diminished vision would not have been caused by Bares' failure to diagnose the epiretinal membrane prior to surgery or his failure to obtain informed consent.

Dr. Gerald Christensen, an ophthalmologist who also testified for Bares, said that he was familiar with the generally accepted standard of care for ophthalmologists in the Sarpy County area as to the diagnosis, treatment, and informed consent related to cataracts, macular problems, and epiretinal membranes. To a reasonable degree of probability or medical certainty, Christensen said he believed that Bares met the appropriate standard of care in advising Hamilton of her retinal problem prior to surgery and that Bares met the standard of care in advising Hamilton of the risks of cataract surgery prior to the procedure.

Both parties made motions for directed verdict during trial that were overruled by the district court. The motions were renewed at the close of all the evidence and were again overruled. The jury was unable to reach a verdict, and a mistrial was declared. Bares subsequently filed motions for new trial and for judgment notwithstanding the verdict. The motions were overruled, and Bares filed this appeal.

ASSIGNMENTS OF ERROR

Bares asserts that the district court erred in overruling his motions for directed verdict, for new trial, and for judgment notwithstanding the verdict.

ANALYSIS

We first note that we have jurisdiction over this appeal pursuant to Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2002), which authorizes an appeal from the denial of a judgment notwithstanding the verdict after the jury has been discharged as the result of an inability to reach a verdict. See *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

[3-5] In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was a proximate cause of the plaintiff's alleged injuries. *Neill v. Hemphill*, 258 Neb. 949, 607 N.W.2d 500 (2000). The plaintiff must prove each essential element of the claim asserted by a preponderance of the evidence. *Snyder v. Contemporary Obstetrics & Gyn., supra.* A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them. *Id.* Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff. *Id.*

Bares argues that Hamilton did not prove that he deviated from the standard of care or that his actions were a proximate cause of the alleged injury to Hamilton. We have held that ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony. *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003). Thus, in order to meet the burden of proof, Hamilton was required to present expert testimony establishing that Bares did not meet the standard of care and that his actions proximately caused Hamilton's injury.

Because this case concerns informed consent, we first consider whether Mausolf's testimony was sufficient to demonstrate that Bares failed to obtain informed consent from Hamilton prior to the cataract surgery and, therefore, failed to meet the standard of care required in Bellevue.

Informed consent is defined in state law as follows:

> Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers

> engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

Neb. Rev. Stat. § 44-2816 (Reissue 1998).

The statute refers to the locality standard in two phrases: "in the locality or in similar localities" and "in the community or similar communities." *Id.* It is apparent that the Legislature intended that the question of the appropriate standard of care regarding informed consent could be addressed by physicians familiar with medical treatment in similar localities or communities, and not necessarily by only those physicians in the same locality or community in which the alleged malpractice occurred.

Bares asserts that although Mausolf testified that the standard of care regarding informed consent in Bellevue was not met, his opinion should be disregarded due to lack of foundation. Bares' objection to the opinion on the basis of relevance was overruled. Bares argues that Hamilton's expert, Mausolf, did not know the standard of care for informed consent in Bellevue because he practiced in Lincoln and that, therefore, Hamilton has not shown that Bares deviated from the standard of care in Bellevue.

We have previously addressed the standard of care for informed consent. In *Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992), this court noted that two theories have been developed concerning the extent of a physician's duty to disclose risks of a particular treatment or procedure: the "material risk theory" and the "professional theory." We held that the adoption of § 44-2816 committed the citizens of Nebraska to abide by the professional theory, " 'under which expert evidence is indispensable to establish what information would ordinarily be provided under the prevailing circumstances by physicians in the relevant and similar localities.' " *Eccleston v. Chait*, 241 Neb. at 968, 492 N.W.2d at 864, quoting *Smith v. Weaver*, 225 Neb. 569, 407 N.W.2d 174 (1987).

In *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997), Charles and Josephine Robinson proffered the testimony

of one expert regarding the issue of informed consent. The expert had no experience in Lincoln or anywhere else in Nebraska, and the trial court refused to allow the expert to testify. The Robinsons cited *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990), for the proposition that a medical expert from one medical community is competent to testify as an expert witness as to the standard of care or skill required in another community if the expert has knowledge of or familiarity with the practice and standard of the locality or a similar community. We stated that since the Robinsons' action was based upon a lack of informed consent, the locality standard was applicable and the rule set forth in *Capps* was not applicable. We concluded that the expert witness had no knowledge "with respect to the standard of informed consent in Lincoln on March 24, 1988," and that it was not an abuse of discretion for the district court to exclude his testimony. *Robinson v. Bleicher*, 251 Neb. at 760, 559 N.W.2d at 479.

Our decision in *Robinson* may be interpreted to be in conflict with § 44-2816. The comment to NJI2d Civ. 12.03 states that *Robinson* created a conflict with § 44-2816 and disagrees with previous cases that used a same-or-similar-locality standard. It goes on to state that the rule from *Robinson* provides that in an informed consent case, the standard of the reasonable medical practitioner is the prevailing standard of the locality in question, and not " 'the locality in question *or a similar or like community*,' " as provided in § 44-2816. See NJI2d Civ. 12.03 comment at 799.

More recently, this court considered the locality standard in *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003). Therein, we reviewed the evidence to determine whether the plaintiff had established by expert testimony the standard of care in North Platte, Nebraska, and similar communities for obtaining informed consent and whether there was sufficient evidence to establish that the physician had violated the standard.

In *Walls*, the plaintiff met with the physician in his office to discuss strabismus surgery on the plaintiff's left eye. During surgery, the physician found excessive scar tissue on the left eye and elected to adjust the muscles of the right eye instead. The patient subsequently experienced problems with the right eye and sued the physician for medical malpractice. The surgery was

conducted in North Platte, and at trial, an ophthalmologist from Scottsbluff, Nebraska, testified on behalf of the plaintiff. This witness testified that informed consent was required ethically " 'in our country.' " *Id.* at 688, 658 N.W.2d at 691. We found that this testimony established the standard of care in North Platte and similar communities.

[6] In order to resolve any perceived conflict among *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997); other informed consent cases; and § 44-2816, we hold that a physician's duty to obtain informed consent is measured by what information would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. This language mirrors the provisions of § 44-2816. To the extent that *Robinson* can be interpreted to conflict with § 44-2816 and the same-or-similar-locality standard regarding informed consent, that interpretation is disapproved.

In the case at bar, Bares' practice was in Bellevue. Hamilton's expert witness who testified as to the standard of care regarding informed consent was an ophthalmologist practicing in Lincoln. The witness testified that Bares had breached the standard of care for an ophthalmologist practicing in Bellevue based on his failure to provide Hamilton with sufficient information to permit her to make an informed decision regarding whether to have the cataract surgery. Therefore, Hamilton offered evidence concerning the standard of care in Bellevue.

Section 44-2816 specifies that the standard of care regarding informed consent is based on the practice of health care providers engaged in a similar practice in the locality or similar localities. We conclude that it is reasonable to infer that the cities of Bellevue and Lincoln are similar localities.

On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001). Assuming the truth of all relevant evidence which is favorable to Hamilton and giving

her the benefit of all proper inferences therefrom, we conclude that Mausolf's testimony was sufficient to show that Bares deviated from the generally recognized medical standard of care.

We must then consider whether Hamilton offered expert testimony that the deviation was a proximate cause of her alleged injury. See *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003). Mausolf stated that Hamilton's medical records showed that she was seen at the Offutt hospital in 1995, prior to the cataract surgery, and found to have "macular pucker secondary to retina ERM, epiretinal membrane," a condition where the surface of the retina is wrinkled. The cataract surgery was performed in August 1997. When Mausolf saw Hamilton in November 1998, her visual acuity was 20/80. In June 2001, it remained 20/80. By September 2001, her visual acuity was 20/200. Mausolf opined that the cataract surgery aggravated Hamilton's preexisting epiretinal membrane condition and caused her vision to further deteriorate. This evidence, if believed by the finder of fact, would satisfy Hamilton's burden to show that the cataract surgery was a proximate cause of her injury.

[7] Bares also claims that the district court should have granted his motion for a directed verdict at the close of all the evidence. In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003). A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003). At the close of evidence, it was possible for reasonable minds to differ as to whether Hamilton had met the burden of proof to establish medical malpractice. Thus, the court did not abuse its discretion in failing to grant Bares' motion for directed verdict.

CONCLUSION

The district court did not abuse its discretion in failing to grant Bares' motions for directed verdict, for new trial, and for judgment notwithstanding the verdict. The judgment of the district court is affirmed, and the cause is remanded for further proceedings.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. BYRON J. WEAVER, APPELLANT.

677 N.W.2d 502

Filed April 16, 2004. No. S-03-458.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** 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.
4. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
5. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
6. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
7. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense 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.
8. **Homicide: Jury Instructions: Circumstantial Evidence.** Ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence

is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter.

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. **Jury Instructions.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
11. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
12. **Sentences.** In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
13. ____. In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
14. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Scott P. Helvie, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN, Chief Judge.

WRIGHT, J.

NATURE OF CASE

Byron J. Weaver was charged by information with first degree murder. After a trial, the jury returned a verdict finding Weaver guilty of the lesser-included offense of second degree murder. Weaver was sentenced to a term of 60 years to life in prison. We are presented with Weaver's direct appeal of this judgment and sentence.

SCOPE OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). On a question of law, an appellate court is obligated to

reach a conclusion independent of the determination reached by the court below. *Id.*

[3] 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. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

[4] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

[5] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

FACTS

Weaver was charged with first degree murder following the death of Marie Hall, his maternal grandmother. At the time of her death, Hall was 70 years old and living in an apartment in Lincoln, Nebraska. Hall had spoken with her son by telephone on the evening of August 6, 2001. The following morning, Hall failed to show up to perform some volunteer work. When a friend who volunteered with Hall tried to telephone her and Hall did not answer, the friend left a message on Hall's answering machine. The friend then attempted to contact Hall's daughter, leaving a message on her answering machine as well. Hall's daughter returned from a vacation on August 12 and was unable to contact Hall. She then drove to Lincoln from Nebraska City and discovered Hall's body.

The police found Hall's body in a closet in her apartment underneath a layer of blankets and pillows. The body was in a state of advanced decomposition. The police found no signs of forced entry. A newspaper dated August 6, 2001, which appeared

to have been read, was found in the apartment. Newspapers dated August 8 and 9 were found in the apartment but did not appear to have been read. Outside the door to the apartment, newspapers dated August 10, 11, and 12 were found in a stack. The police were unable to find Hall's car in the apartment's parking lot.

Dr. Patrick Keelan performed the autopsy on Hall's body. At trial, Keelan testified that in his opinion, Hall died as a result of asphyxiation by ligature strangulation. He estimated that she died 5 to 7 days before the autopsy.

Dr. Mathias Okoye issued the final autopsy report. This report indicated that Hall's death was the result of asphyxia by strangulation and that the manner of her death was homicide. At trial, Okoye reiterated his opinion as to the cause and manner of death.

Weaver was 20 years old in August 2001. He had moved back to Lincoln after living for more than a year in Wyoming. After returning to Lincoln, he had some contact with Hall.

At trial, Weaver testified as to his version of the events of August 7, 2001. That morning, Weaver was to begin work at a new job, and he was driven to the worksite by a friend. Upon arriving at the worksite, Weaver decided that he did not want to work that day, and he walked off the site. He then walked to Hall's apartment to inquire about temporarily staying with her.

Weaver stated that when he arrived at Hall's apartment complex, she did not respond to his request to be allowed inside the security door. Weaver said he then walked around to the back of Hall's apartment. When he looked through a glass door, he observed Hall lying face down in the apartment. The back door was open, so Weaver let himself into the apartment and turned Hall over, which caused blood to trickle from her mouth. He then unsuccessfully attempted to resuscitate Hall using CPR.

Weaver said that once it became clear Hall was dead, he thought about calling the 911 emergency dispatch service, but he panicked at the thought of potentially being a suspect in her death. He also decided against calling his father or paternal grandparents. Weaver testified that his thinking became "mixed" and "non-logical" and that he decided to try to put Hall "at rest." He placed her in a closet, a decision that he stated was "obviously a wrong or poor" one. According to Weaver, he arranged pillows and blankets around the body once he had placed it in the closet.

He said he locked the back door, grabbed Hall's purse, and left the apartment. Weaver took Hall's purse because he thought her car keys might be inside.

That night, Weaver and a friend drove Hall's car to a party in Lincoln and then set out toward Omaha. En route, Hall's car was involved in a one-vehicle accident. The car had to be towed due to the damage sustained in the accident. While completing an inventory of the car's contents, the police found Hall's purse. Weaver did not tell the police about the death of Hall. He later returned to Lincoln.

A few days later, the Lincoln Police Department learned that Hall's car was located in a Sarpy County tow lot. A shirt found in the car was stained with blood that matched Hall's DNA. On August 13, 2001, Weaver was interviewed by a Lincoln police officer, and Weaver said that he had not seen Hall for 1½ weeks. In an information filed in the Lancaster County District Court on October 9, Weaver was charged with first degree murder. He was arraigned on October 10 and entered a plea of not guilty.

At the conclusion of the trial, the jury was instructed that, depending on the evidence, it could find Weaver guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, or not guilty. On January 31, 2003, the jury returned a verdict finding Weaver guilty of second degree murder. Weaver was sentenced to a term of 60 years to life in prison.

ASSIGNMENTS OF ERROR

Weaver assigns the following errors: (1) The district court erred in permitting the jury to consider the lesser-included offenses of second degree murder and manslaughter, (2) the court erred in the manner in which it instructed the jury on the material elements of second degree murder, (3) the court erred in the manner in which it instructed the jury on the definition of premeditation, (4) the evidence was not sufficient for the jury to find Weaver guilty of second degree murder, and (5) the court erred in imposing an excessive sentence.

ANALYSIS

Instruction on Lesser-Included Offenses

[6] Weaver argues that it was error for the district court to instruct the jury on the lesser-included offenses of second degree

murder and manslaughter. Whether jury instructions given by a trial court are correct is a question of law. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.* In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

Neb. Rev. Stat. § 29-2027 (Supp. 2003) states in pertinent part: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it is murder in the first or second degree or manslaughter . . . ." In *State v. Archbold*, 217 Neb. 345, 350, 350 N.W.2d 500, 504 (1984), we stated that "[w]hen a proper, factual basis is present, a court must instruct a jury on the degrees of criminal homicide, that is, the provisions of § 29-2027 are mandatory."

In the case at bar, Weaver asserts that the district court's instruction on second degree murder and manslaughter was erroneous. He first argues there was insufficient evidence to justify instructing on the lesser-included offenses. In support of this argument, Weaver cites *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), a homicide case wherein we upheld a trial court's refusal to instruct on lesser-included offenses.

[7] In *McCracken*, we quoted the two-pronged test enunciated in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), with regard to determining whether an instruction on lesser-included offenses is proper:

> "[A] court must instruct on a lesser-included offense if (1) the elements of the lesser offense . . . 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."

McCracken, 260 Neb. at 250, 615 N.W.2d at 917. In *McCracken*, the record showed that the defendant had deliberately planned the murder. Therefore, there was no basis for giving an instruction on

second degree murder or manslaughter. Accordingly, the trial court's refusal to instruct the jury on lesser-included offenses was proper.

[8] We also interpreted § 29-2027 in *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981), which involved the direct appeal of a defendant who had been convicted of manslaughter. One of the errors assigned was the trial court's instructions regarding first and second degree murder. The evidence linking the defendant to the crime was largely of a circumstantial nature. The victim was discovered in a secluded area, and there were no eyewitnesses to her death. We stated that "ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter." *Id.* at 389, 303 N.W.2d at 748, citing *Bourne v. State*, 116 Neb. 141, 216 N.W. 173 (1927). Under the facts presented, we held that the jury was properly instructed by the trial court.

In the case at bar, as in *Ellis*, there were no eyewitnesses to the death of Hall. In addition, the evidence linking Weaver to Hall's death was largely circumstantial. The State presented evidence of encounters between Weaver and Hall during the summer of 2001 during which Weaver's requests for money were denied. The police found no signs of forced entry into Hall's apartment, which could have suggested to the jury that Hall was familiar with whomever killed her. Weaver admitted to taking Hall's car and purse after her death and admitted to lying to law enforcement officers in the days following Hall's death. The testimony of Keelan and Okoye established that Hall died by ligature strangulation during a period of time when Weaver's admissions and other evidence placed him at the scene.

[9] 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. *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997). Because of this duty, the trial court, on its own motion, must correctly instruct on the law. *Id.* In view of the fact that there were no eyewitnesses to Hall's death and that the evidence adduced was largely circumstantial, the district court was required to instruct the jury as to the lesser-included offenses of second

degree murder and manslaughter. The instruction given was correct. Weaver's argument that the State presented insufficient evidence to justify this instruction is without merit.

Weaver's second argument regarding the jury instruction on lesser-included offenses is that *Ellis* stands only as a "rule of thumb" for the application of § 29-2027. He asserts that given advances in DNA technology and his own admission that he was in the apartment near the time of Hall's death, the lack of an eyewitness to the death did not justify giving the instruction on lesser-included offenses. However, this argument ignores that it is the combination of the circumstantial evidence and the fact that there were no eyewitnesses that requires the application of § 29-2027.

Weaver has not sustained his burden of showing that the instruction on second degree murder and manslaughter was prejudicial or otherwise adversely affected a substantial right. Accordingly, this assignment of error is without merit.

Second Degree Murder Instruction

Weaver assigns as error the manner in which the district court instructed the jury as to the material elements of second degree murder. Under Neb. Rev. Stat. § 28-304 (Reissue 1995), a person commits second degree murder if he causes the death of a person intentionally, but without premeditation.

> Essentially, Weaver argues that the current way in which the [L]egislature has chosen to define first degree and second degree murder does not make logical sense, and therefore, an accused runs the risk of being convicted by a jury as a result of a compromise verdict rather than a verdict based upon proof beyond a reasonable doubt as to all material elements.

Brief for appellant at 40. Weaver argues that the court should "consider the jury instruction for first degree and second degree murder together." See *id.* "[I]t is logical to conclude . . . that the jury would consider the instructions together." *Id.* at 41. Weaver claims that due to this fundamental flaw in the manner in which the district court instructed the jury as to first and second degree murder, the verdict was unreliable, since it could have been based upon a compromise rather than proof beyond a reasonable doubt.

The district court gave the following instruction on second degree murder:

> The material elements which the [S]tate must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:
>
> 1. That the defendant, Byron J. Weaver, killed Marie Hall.
> 2. That he did so intentionally, but without premeditation.
> 3. That he did so on or about August 7, 2001.
> 4. That he did so in Lancaster County, Nebraska.

[10] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999). A comparison of § 28-304 and the jury instruction given shows that the instruction, read as a whole, fairly presented the law. All of the material elements that constitute the statutory definition were reflected in the instruction. As such, we must conclude that the giving of this instruction was not error. Weaver has failed to satisfy his burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right, and this assignment of error is without merit.

Instruction Defining Premeditation

Weaver argues that the district court erred in the manner in which it instructed the jury on the definition of premeditation. Premeditation was defined in the instructions as "a design formed to do something before it is done." The jury was instructed that the time needed for premeditation may be "so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with the act." Neb. Rev. Stat. § 28-302(3) (Reissue 1995) defines premeditation as "a design formed to do something before it is done."

Weaver is asking this court to overrule our decision in *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). *McBride* involved the direct appeal of a conviction for first degree murder wherein the appellant challenged a jury instruction defining premeditation. Premeditation was defined almost exactly as it was defined in the present case. The appellant argued that the nonstatutory language confused and misled the jury by blurring the distinctions between first degree murder, second degree murder,

and manslaughter. We held that "[t]he additional statement in the instruction given by the court merely stated a correct proposition of the law," and we found that the appellant was not prejudiced by the instruction. See *id.* at 664, 550 N.W.2d at 678.

Unlike the appellant in *McBride*, who was convicted of first degree murder, Weaver was convicted of second degree murder. The jury found that Weaver acted without premeditation. Therefore, Weaver could not have been prejudiced by the instruction defining premeditation. Weaver has not shown that this instruction was prejudicial or otherwise adversely affected a substantial right. This assignment of error is without merit.

SUFFICIENCY OF EVIDENCE

Weaver argues that the evidence presented at trial was insufficient for the jury to conclude that he was guilty beyond a reasonable doubt of second degree murder. Specifically, he suggests that the State failed to present sufficient evidence that Hall's death was an act of homicide and not the result of natural causes.

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. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

To prove its case that Hall was murdered and did not die from natural causes, the State presented the testimony of two pathologists: Keelan and Okoye. Keelan, an assistant coroner's physician for Lancaster County, testified as to the performance of Hall's autopsy and the conclusions that he ultimately drew from the examination. Keelan testified that his external examination revealed an area on Hall's neck that suggested injury, not merely

decomposition. This was supported by his internal examination, which revealed evidence of injury in an area extending from underneath the chin to the posterior of the neck. Keelan opined that Hall died as a result of ligature strangulation. He stated that aside from decomposition, he saw no disease process at work during his internal examination, and that decomposition would have made it impossible to tell whether Hall was suffering from heart disease.

Okoye, a forensic pathologist and the Lancaster County coroner's physician, testified to having performed more than 10,000 autopsies. He did not perform Hall's autopsy, but he issued the final report on the autopsy. Okoye confirmed Keelan's findings of internal and external neck injury caused by strangulation, not decomposition. Okoye's examination of Hall's eyes revealed evidence of hemorrhaging, which he testified was an indication of asphyxiation. He also found hemorrhaging in the neck strap muscles that was not caused by decomposition. Okoye also concluded that Hall died as a result of ligature strangulation. He testified that the evidence he reviewed did not suggest that Hall died of a heart attack.

Weaver presented the testimony of Hall's physician and a pathologist who had reviewed her autopsy report. The testimony of the physicians who served as witnesses during the trial presented the jury with a number of possible conclusions that could be drawn from the evidence. Pursuant to our scope of review, this court does not resolve these conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence.

The State presented the testimony of two pathologists who concluded that Hall's death was caused by ligature strangulation. When viewing this evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found the essential elements of the crime of second degree murder were proved beyond a reasonable doubt. The record contains sufficient evidence to sustain Weaver's conviction, and this assignment of error has no merit.

Excessive Sentence

Weaver asserts that the district court imposed an excessive sentence. Weaver was convicted of second degree murder, a Class IB

felony punishable by a minimum of 20 years' imprisonment and a maximum of life imprisonment. See § 28-304(2) and Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002). Weaver was sentenced to a term of imprisonment of 60 years to life.

[11] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Smith*, 266 Neb. 707, 668 N.W.2d 482 (2003).

[12-14] In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *Id.*

In arguing that the district court abused its discretion in imposing his sentence, Weaver points to his minimal criminal record. Weaver was never arrested as a juvenile, but was arrested twice as an adult before his arrest on this charge. He was first arrested for assault, a charge that was reduced to disturbing the peace, for which he paid a $200 fine. His second arrest was for robbery. This charge was dismissed so that Weaver could take part in a pretrial diversion program. However, his entry into the program was rejected after his arrest for first degree murder.

Weaver also argues that the district court abused its discretion by failing to consider his age and his troubled upbringing. At the time of his arrest, Weaver was 20 years old. His parents divorced when he was 9 years old, and he has stated that his parents have had problems with alcohol abuse. Weaver described a deterioration in his relationship with his mother over the years and stated

that his mother verbally abused him. A woman with whom he and his father lived became somewhat of a stepmother to Weaver, but she committed suicide when Weaver was 13 years old.

It appears from the presentence investigation report that the district court was aware of these circumstances when it considered the sentence to be imposed. The court also had before it the evidence presented with regard to Weaver's actions before, during, and after arriving at Hall's apartment on August 7, 2001. Considering the totality of the circumstances, we cannot say that the district court abused its discretion in sentencing Weaver as it did. Weaver's assignment of error regarding the imposition of an excessive sentence is without merit.

CONCLUSION

For the reasons stated herein, Weaver's conviction and sentence are affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA EX REL. SPECIAL COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. RICHARD M. FELLMAN, RESPONDENT.

678 N.W.2d 491

Filed April 23, 2004. No. S-02-540.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.

4. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
5. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension and probation.

Dean Skokan, Special Counsel for Discipline, for relator.

John R. Douglas and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for respondent.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

NATURE OF CASE

The office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against Richard M. Fellman alleging that Fellman violated several provisions of the Code of Professional Responsibility and his oath of office as an attorney. After a formal hearing, the referee concluded that Fellman had violated the Code of Professional Responsibility and his oath of office and recommended a suspension of 90 days followed by 2 years' probation. Fellman takes exception to the referee's findings and recommended sanction.

BACKGROUND

Fellman was admitted to the practice of law in Nebraska on June 19, 1959. He has practiced law in Douglas County, Nebraska, since 1960. For the last 15 or 20 years, his practice has primarily involved domestic relations, personal injury, and workers' compensation matters.

The formal charges filed against Fellman in this case arise out of his representation of Henry Peoples in a child support and visitation case. Peoples, of Las Vegas, Nevada, initially contacted Fellman on February 28, 2000, regarding his son, who lived in Omaha with his mother, Valerie Davis. Fellman's notes of the conversation indicate that Peoples sought joint custody of his son as well as visitation in Las Vegas, telephone contact with his son, notification of his son's progress in school, and some photographs. During their telephone conversation, Fellman estimated

that the total fee for his services would be $2,500 to $3,500. Fellman also required a retainer of $1,000 and a cost deposit of $100. Shortly thereafter, Peoples paid Fellman $1,100. It is undisputed that Fellman deposited the $1,100 in his regular business account. Fellman never billed Peoples for any additional amount, nor did he ever refund any of the $1,100 to Peoples. Fellman testified that if Peoples had asked for a refund, he would have refunded any unearned money to Peoples.

Fellman testified that he was not in contact with Peoples again until May 17, 2000, at which time Peoples provided the Omaha address of Davis. However, the record indicates Peoples attempted to communicate with Fellman several times in April and May 2000, although Fellman contends the notes from these communications were actually from 2001. Nevertheless, on May 17, 2000, Fellman began preparing a petition to file on Peoples' behalf. On May 19, Fellman sent a draft petition to Peoples for his review. A few days later, Peoples returned the draft with corrections and suggestions. This process of revising the petition continued several more times until the petition was finally filed on June 28.

On July 24, 2000, an answer and cross-petition was filed by Davis through her attorney. Davis' cross-petition sought child support and contribution for unreimbursed medical and daycare expenses. On August 2, interrogatories and document requests were served upon Fellman. The interrogatories and document requests went unanswered; therefore, on September 19, Davis' attorney filed a motion to compel answers to discovery and requested that the court impose sanctions. Fellman was given an additional 10 days to answer the interrogatories, but when he again failed to do so, a second motion to compel was filed. Fellman finally answered the cross-petition and interrogatories on November 3.

Fellman's November 3, 2000, answer to the cross-petition and interrogatories came shortly after he informed Peoples, apparently for the first time, that a cross-petition and interrogatories had been filed. This communication occurred by letter dated October 25. Fellman claims that he did not inform Peoples of Davis' cross-petition and interrogatories until October because Fellman believed Peoples would be "inflame[d]" if he learned

of the discovery requests and also because Fellman wanted to settle the case without having to respond to discovery.

On January 2, 2001, Fellman received a notice from the district court advising him that a certificate of readiness must be filed within 30 days. By stipulation between the parties, the deadline for a certificate of readiness was extended until April 30. Fellman did not file a certificate. On May 1, 2001, the district court dismissed Peoples' petition without prejudice for failing to file a certificate of readiness. Fellman described such a dismissal as a common occurrence. The case was reinstated on June 1. A third motion to compel was served on Fellman on June 22, requesting additional income documentation from Peoples that had not been provided with the initial discovery requests. That motion was sustained, and the court ordered Peoples to pay $600 toward Davis' attorney fee. Thereafter, Fellman testified that Peoples, contrary to his initial position, wanted to challenge his paternity. This led Fellman to eventually withdraw from representing Peoples on August 15, 2001.

PROCEDURAL BACKGROUND

On April 10, 2001, the Counsel for Discipline notified Fellman that he was the subject of a grievance filed by Peoples. Pursuant to Neb. Ct. R. of Discipline 9(E) (rev. 2001), Fellman was required to file an appropriate written response to the grievance within 15 working days. He did not respond. By letter dated May 2, 2001, the Counsel for Discipline notified Fellman that it had not received a response to Peoples' grievance and directed Fellman to respond upon receipt of the letter. Again, Fellman did not respond. Another letter, dated May 17, 2001, was sent to Fellman indicating that the Counsel for Discipline would seek temporary suspension if Fellman failed to respond. On May 25, Fellman filed a response to Peoples' grievance. In his response, Fellman indicated that "[t]he case is again moving along in a normal manner," despite the fact that the case had been dismissed on May 1.

In late July 2001, the Counsel for Discipline requested from Fellman that it be allowed to review Peoples' file. Assistant Counsel for Discipline Kent Frobish visited Fellman's office on August 1. According to Fellman, after Frobish reviewed the file,

Frobish accused Fellman of fraud, dishonesty, and the mishandling of client funds. Fellman testified that Frobish's accusation caused him to panic. Frobish denied making any such accusations. According to Frobish, Fellman appeared nervous during the entire visit, but was cooperative.

On August 7, 2001, the Counsel for Discipline sent a letter to Fellman seeking Fellman's response to several specific questions regarding Peoples' case. Fellman did not respond. The Counsel for Discipline sent another letter to Fellman on November 29, requesting a response within 7 days. No response came. On March 26, 2002, the Counsel for Discipline sent a complaint to Fellman. Fellman finally responded on July 10.

Fellman testified that he could not bring himself to open the letters that he had received from the Counsel for Discipline. He eventually sought professional help. Dr. Bruce Gutnik diagnosed Fellman as suffering from "Specific Phobia," which results in Fellman's feeling anxiety, fear, and panic. Fellman's phobia is triggered by public censure or ridicule.

Formal charges were filed against Fellman on May 17, 2002. Fellman was formally charged with violating his oath of office as well as Canon 1, DR 1-102(A)(1), (5), and (6); Canon 6, DR 6-101(A)(3); and Canon 9, DR 9-102(A)(1) and (2).

Referee's Findings

After a formal hearing, the referee found Fellman guilty of neglect under DR 6-101(A)(3) in four respects. First, the referee found that Fellman failed to promptly advise Peoples that his custody and visitation requests were not reasonable. Second, the referee found that Fellman delayed the discovery process in failing to promptly notify Peoples that he had been served with interrogatories and in failing to answer those interrogatories. Third, the referee found that Fellman did nothing to bring the case to trial after discovery was essentially completed in December 2000. Finally, the referee found that Fellman failed to return Peoples' telephone calls and e-mails and, more generally, to keep Peoples apprised of the status of his case.

The referee also found clear and convincing evidence of a violation of DR 9-102(A)(2). The referee found that the "retainer" in this case was an advance fee representing work to be done in

the future and should have been initially deposited in Fellman's trust account and withdrawn only as it was earned.

Finally, the referee found that Fellman violated DR 1-102(A)(1), (5), and (6) and his oath of office as an attorney. The referee recommended that Fellman be suspended for 90 days. Upon applying for reinstatement, the referee recommended that Fellman prove that he is fit to practice law under the terms of his probation, including that treatment for his phobia has resulted in a meaningful and sustained recovery. Upon reinstatement, the referee recommended that Fellman be subject to probation for 2 years, during which time he should engage a practicing attorney to act as a practice monitor, subject to approval by the Counsel for Discipline.

ASSIGNMENTS OF ERROR

Fellman contends, rephrased and consolidated, that the Counsel for Discipline failed to prove by clear and convincing evidence that he violated the Code of Professional Responsibility and his oath of office. Fellman also takes exception to the referee's recommended sanction.

STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Counsel for Dis. v. James, ante* p. 186, 673 N.W.2d 214 (2004). To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence. *Id.*

ANALYSIS

NEGLECT

Fellman was charged with violating DR 6-101(A)(3), which provides in part that "[a] lawyer shall not . . . [n]eglect a legal matter entrusted to him or her." The referee found that Fellman neglected Peoples' case under DR 6-101(A)(3) in four respects.

First, the referee found that Fellman failed to promptly advise Peoples that his custody and visitation requests were not reasonable. During their initial conversation on February 28, 2000, Peoples told Fellman that he wanted joint custody of his son and visitation with his son in Las Vegas, among other things. Fellman testified that in his experience as an attorney practicing law in the domestic relations field, Peoples' expectations were unrealistic. However, Fellman failed to share this opinion with Peoples until shortly before his withdrawal as Peoples' attorney. "A lawyer as adviser furthers the interest of a client by giving a professional opinion as to what the lawyer believes would likely be the ultimate decision of the courts on the matter at hand . . . ." Canon 7, EC 7-5, of the Code of Professional Responsibility. Clients are ill served by attorneys when the attorney cannot be trusted to give frank legal advice.

Second, the referee found that Fellman delayed the discovery process in failing to promptly notify Peoples that he had been served with interrogatories and in failing to answer those interrogatories. The evidence establishes that an answer and cross-petition was filed by Davis on July 24, 2000, and that interrogatories and document requests were served on August 2. Despite this, Fellman neglected to even inform Peoples of these events until October 25.

Third, the referee found that Fellman did nothing to bring the case to trial after discovery was essentially completed in December 2000. Finally, the referee found that Fellman failed to return many of Peoples' telephone calls and e-mails and, more generally, to keep Peoples apprised of the status of his case. Based on all of the above, we find clear and convincing evidence that Fellman neglected a legal matter entrusted to him in violation of DR 6-101(A)(3).

Client Funds

Fellman was also charged with violating the following provisions of the Code of Professional Responsibility:

> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts

> maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> . . . .
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The facts surrounding this charge of commingling client funds are undisputed. When first contacted by Peoples, Fellman indicated that he initially required a payment of $1,100—$1,000 in the form of a retainer and a cost deposit of $100. Upon receipt, Fellman deposited the entire $1,100 into his regular business account rather than his trust account. Peoples never asked for the return of any portion of the $1,100, and no allegation was ever made that Fellman did not eventually earn the $1,100. Fellman's handling of the retainer did not serve as a basis for Peoples' complaint to the Counsel for Discipline and was discovered only during the Counsel for Discipline's own investigation of the matter.

Fellman argues that the $1,100 belonged to him upon receipt. He distinguishes it from an advance fee that would have been required to be deposited into a trust account and withdrawn only as earned. Other courts have recognized such distinctions. "General retainers" or "engagement retainers" compensate an attorney for agreeing to take a case and making other commitments to a client that benefit a client immediately. These types of retainers belong to the attorney on receipt. On the other hand, advance fees are payments made by a client for the performance of legal services and belong to the client until earned by the attorney. See, *In re Sather*, 3 P.3d 403 (Colo. 2000); *Iowa Supreme Court Bd. of Ethics v. Apland*, 577 N.W.2d 50 (Iowa 1998). The record in this case reveals no basis to find that the $1,100 was an engagement retainer that belonged to Fellman upon receipt. Upon

receipt of the $1,100, Fellman had not yet done any work on Peoples' case other than discussing the case during their initial telephone call of February 28, 2000. Furthermore, Fellman testified that if Peoples had asked for a refund at any time, he would have refunded any unearned portion of the $1,100 to Peoples. Peoples' payment was still unearned when Fellman received it; i.e., Fellman had yet to provide a benefit or service to Peoples. See *In re Sather, supra.* Therefore, Fellman was required to deposit the $1,100 in his trust account. See, also, *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001) (attorney violated DR 9-102(A) when he deposited unearned attorney fees into his personal account rather than his trust account). We find clear and convincing evidence that Fellman violated DR 9-102(A)(2).

MISCONDUCT

Fellman was also charged with violating the following provisions of the Code of Professional Responsibility: "DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (5) Engage in conduct that is prejudicial to the administration of justice. . . . (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law."

The record establishes that on April 10, 2001, Fellman was notified by the Counsel for Discipline that he was the subject of a grievance filed by Peoples. Rule 9(E) requires that an appropriate written response to a grievance be filed with the Counsel for Discipline within 15 working days. Fellman did not file a timely response, nor did he respond to a subsequent letter from the Counsel for Discipline. Only after a third attempt by the Counsel for Discipline, and when faced with an impending temporary suspension, did Fellman file a response to Peoples' grievance. This pattern repeated itself beginning in August 2001, when Fellman failed to respond to the Counsel for Discipline's inquiries regarding Peoples' case. Once again, it took three attempts by the Counsel for Discipline (and nearly a year) before Fellman responded. We find clear and convincing evidence that Fellman violated DR 1-102(A)(1), (5), and (6). We also find, based on all of the above, that there is clear and convincing evidence that Fellman violated his oath of office as an attorney.

DISCIPLINE

[3] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Villarreal, ante* p. 353, 673 N.W.2d 889 (2004).

[4] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases. *State ex rel. Counsel for Dis. v. Janousek, ante* p. 328, 674 N.W.2d 464 (2004). In *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001), an attorney received an initial payment of $5,000, which he believed was an engagement retainer that was earned when received, and deposited it into his personal account. We found that the attorney's actions violated DR 9-102(A) because the fee had yet to be earned when it was deposited into the personal account. In addition, the attorney was also guilty of collecting an excessive fee. The attorney was suspended for 6 months. In *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 374 N.W.2d 833 (1985), the attorney received bond receipts from his clients in lieu of a cash retainer. The attorney forged one of the clients' names and cashed the bond receipts to apply to his fee. Noting the attorney's alcohol dependence, we declined to disbar him and instead suspended him for 1 year.

[5] The above-cited cases aid us in determining the appropriate sanction in this case involving commingling of client funds, as well as neglect and misconduct. In addition, the determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors. *Janousek, supra*; *Huston, supra*; *Kelly, supra.* As aggravating factors, we note that Fellman has received four private reprimands from the Counsel for Discipline since 1994 for conduct similar to what occurred in this case. In each of those four matters, Fellman was privately reprimanded for failing to respond to inquiries from the

Counsel for Discipline, in violation of DR 1-102(A). Two of the private reprimands were also based upon Fellman's neglect of a legal matter, in violation of DR 6-101(A)(3).

The mitigating factors in this case include 29 affidavits from active and retired judges and attorneys familiar with Fellman. Each attests to Fellman's integrity, honesty, professionalism, and overall competence to act as an attorney. In addition to these affidavits, we also note Fellman's admirable record of service to the bar and his community. We also consider the phobia that Fellman has been diagnosed with, which causes anxiety and panic in Fellman and which, in the words of Fellman's doctor, "interfere significantly with [Fellman's] normal routine and occupational functioning." Fellman testified that he is taking medication and receiving therapy for his condition. Finally, we note that once Fellman answered the Counsel for Discipline, he was fully cooperative and worked to promptly resolve Peoples' case.

In our de novo review, we conclude that Fellman should be suspended from the practice of law for a period of 1 year. Following his period of suspension, Fellman may apply for reinstatement and shall prove that he is fit to practice law under the terms of his probation. Upon reinstatement, Fellman shall be subject to probation for a period of 2 years and shall be required to engage a practicing attorney to act as a practice monitor during his probation, subject to approval by the Counsel for Discipline.

CONCLUSION

We find by clear and convincing evidence that Fellman violated DR 1-102(A)(1), (5), and (6); DR 6-101(A)(3); DR 9-102(A)(2); and his oath of office as an attorney. It is the judgment of this court that Fellman be suspended from the practice of law for a period of 1 year and, if reinstated, shall be subject to 2 years' probation as outlined above. He is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Fellman is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION AND PROBATION.

HENDRY, C.J., and MILLER-LERMAN, J., not participating.

MICHELLE SMITH, APPELLANT, V. LINCOLN MEADOWS HOMEOWNERS ASSOCIATION, INC., A NEBRASKA CORPORATION, APPELLEE.

678 N.W.2d 726

Filed April 23, 2004. No. S-02-1467.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Dismissal and Nonsuit.** When a case is dismissed by a party, the controversy between the parties upon which a trial court may act ends.
5. ____. Parties to a case are incapable of pursuing judicial relief in the case after it has been voluntarily dismissed.
6. **Dismissal and Nonsuit: Final Orders: Appeal and Error.** Where a case is voluntarily dismissed, there is no final order on the law or facts of the case, nor has there been a decision on the merits; accordingly, no appeal will lie.
7. **Final Orders: Appeal and Error.** If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court.
8. ____: ____. A party cannot move to voluntarily dismiss a case without prejudice, consent to entry of such an order, and then seek interlocutory appellate review of an adverse pretrial order.
9. **Jurisdiction: Final Orders: Dismissal and Nonsuit: Appeal and Error.** In the absence of a judgment or a valid order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.
10. **Judgments: Jurisdiction: Final Orders: Appeal and Error.** Though an extrajudicial act of a lower court cannot vest the appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Vacated and dismissed.

Thomas E. Zimmerman, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., for appellant.

Mark A. Christensen and Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

BACKGROUND

This is a premises liability action, in which the plaintiff, Michelle Smith, alleged that she was injured on the premises of Lincoln Meadows Homeowners Association, Inc. (Homeowners Association), when the Homeowners Association's swing set broke. Smith sued the Homeowners Association, alleging damages including broken bones, spinal injuries, disability, lost wages, and, most pertinent, that her fall triggered the onset of multiple sclerosis (MS). The Homeowners Association filed a pretrial motion for partial summary judgment on the allegation of MS, in conjunction with a motion in limine to exclude the plaintiff's expert testimony supporting that allegation.

The district court held a hearing to determine if the plaintiff's expert testimony satisfied the standards adopted in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). The court concluded that the plaintiff's expert testimony was inadmissible and granted the Homeowners Association's motion in limine. Because Smith was without admissible expert testimony to support her MS allegation, the court entered partial summary judgment with respect to that component of Smith's damages.

Smith then filed a motion to dismiss her sole cause of action, without prejudice, purporting to reserve her right to appeal from the partial summary judgment. In particular, the motion asked the court

> for a final ORDER dismissing the above-entitled action without prejudice in accordance with Neb. Rev. Stat. § 25-601(1) (Reissue 1995). In keeping with this Motion, Plaintiff expressly reserves her right to appeal this Court's Order dated January 18, 2002 granting partial summary judgment on the issue of multiple sclerosis to the Defendant.

The court granted the motion to dismiss without prejudice, stating, in an order prepared by Smith's counsel, that "the Plaintiff shall have the right if she so elects to timely appeal this Court's now final ruling on the issue of multiple sclerosis as contained in the Court's order dated January 18, 2002." The court's order

dismissed Smith's petition without prejudice. Smith then filed a notice of appeal.

ASSIGNMENTS OF ERROR

Smith assigns, consolidated and restated, that the court erred in granting the Homeowners Association's motion in limine excluding the testimony of Smith's expert witness and in granting the Homeowners Association's motion for partial summary judgment.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Pennfield Oil Co. v. Winstrom*, *ante* p. 288, 673 N.W.2d 558 (2004).

In this appeal, Smith's voluntary dismissal without prejudice of her only cause of action is, quite clearly, an attempt to obtain interlocutory review of an order that would otherwise not be appealable. See, e.g., *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003) (explaining limited circumstances under which partial summary judgment may be appealed). Because of doubts concerning our appellate jurisdiction, prior to oral argument in this matter, we entered an order to show cause why this appeal should not be dismissed for lack of a final, appealable order. Smith's argument in response to our order to show cause is unpersuasive, and we conclude that there is no final order in this case.

Smith does not dispute that absent her voluntary dismissal, the partial summary judgment and the court's ruling on the motion in limine would not be appealable orders. See *Cerny,*

supra. Therefore, the question presented here is whether a voluntary dismissal without prejudice, under these circumstances, can effectively create finality and confer appellate jurisdiction.

Our case law makes clear that it cannot. We have previously explained that a plaintiff cannot consent to an order of dismissal and seek review of the order. *Hill v. Women's Med. Ctr. of Neb.*, 254 Neb. 827, 580 N.W.2d 102 (1998). Only a party aggrieved by an order or judgment can appeal; one who has been granted that which he or she sought has not been aggrieved. *Federal Dep. Ins. Corp. v. Swanson*, 231 Neb. 148, 435 N.W.2d 659 (1989), *overruled in part on other grounds, Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992). See, also, *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995) (recognizing overruling in part). Simply put, "a party is not entitled to prosecute error upon the granting of an order or the rendition of a judgment when the same was made with his [or her] consent, or upon his [or her] application." *Robins v. Sandoz*, 175 Neb. 5, 11-12, 120 N.W.2d 360, 364 (1963). Accord *Hill, supra*.

[4-6] In *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999), Michael Dorcey was charged in the county court with driving under the influence of alcohol. The county court granted Dorcey's pretrial motion to suppress evidence, and the county attorney, on behalf of the State, voluntarily dismissed the complaint. Thereafter, the State filed a notice of its intent to appeal the county court's order sustaining the motion to suppress. On appeal, the district court concluded that it had no jurisdiction to consider the State's appeal because the notice of appeal was filed by the State in a voluntarily dismissed case. We agreed, stating that "[w]hen a case is dismissed by a party, the controversy between the parties upon which a trial court may act ends." *Id.* at 799, 592 N.W.2d at 498.

> Parties to a case are incapable of pursuing judicial relief in the case after it has been voluntarily dismissed. . . . Where the case is voluntarily dismissed, there is no final order on the law or facts of the case . . . nor has there been a decision on the merits. . . . Accordingly, no appeal will lie.

(Citations omitted.) *Id.* at 799-800, 592 N.W.2d at 498. See, also, *State v. Jacob*, 256 Neb. 492, 591 N.W.2d 541 (1999).

In response to our order to show cause, Smith relies on *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000), which Smith claims presents an analogous situation to the instant case. In that case, Judy Iwanski sued her physician and former employer, William Gomes, for professional negligence and intentional infliction of emotional distress, attributing her severe emotional distress to the lingering effects of a defunct sexual relationship with Gomes. The district court granted partial summary judgment for Gomes. First, the court concluded that Gomes' conduct did not constitute intentional infliction of emotional distress, as a matter of law. Second, the court concluded that the sexual contact between the parties was not sufficiently linked to medical treatment to support the theory of professional negligence. The court denied summary judgment, however, as to any acts arising in the course of medical treatment. Iwanski voluntarily dismissed the remaining allegations and filed a timely appeal from the court's order dismissing the operative petition. This court, without discussing appellate jurisdiction, disposed of Iwanski's appeal on the merits. See *id.*

However, *Iwanski* is distinguishable from the case at bar. In *Iwanski*, the district court dismissed distinct theories of recovery and Iwanski voluntarily dismissed her other allegations in order to resolve all the matters pending before the court. Even setting aside the voluntarily dismissed allegations, the two theories of recovery against which partial summary judgment had been entered remained for appellate review. Iwanski did not attempt to prosecute error with respect to any of the allegations she voluntarily dismissed.

In this case, however, Smith brought a single cause of action, with a single theory of recovery. That cause of action remained viable after the district court's partial summary judgment as to one element of damages. Smith voluntarily dismissed her only cause of action, without prejudice, and the errors she assigns on appeal relate solely to the cause of action she dismissed. The holdings of *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999), and *Robins v. Sandoz*, 175 Neb. 5, 120 N.W.2d 360 (1963), are squarely on point in this circumstance.

Smith also relies on federal authority that, according to her, supports the exercise of appellate jurisdiction over a case that

has been voluntarily dismissed at the trial level. But the authority cited does not support Smith's argument. For instance, Smith cites *Hicks v. NLO, Inc.*, 825 F.2d 118 (6th Cir. 1987), for the proposition that "parties can stipulate under [Fed. R. Civ. P.] 41(a) to dismissals of remaining claims without prejudice to obtain finality for an otherwise interlocutory order that the parties seek to appeal before proceeding to trial." Memorandum brief for appellant in response to order to show cause at 3. But *Hicks*, 825 F.2d at 120, specifically holds that

> [w]here a court has entered judgment against a plaintiff in a case involving more than one claim and the plaintiff voluntarily dismisses the claim or claims, which made the judgment non-appealable and the dismissal is brought to the attention of the district court, this Court will not penalize the plaintiff by dismissing his or her appeal.

That rule has no application here. A claim, for these purposes, is equivalent to a separate cause of action. See *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). Even if we were to adopt the *Hicks* holding—a matter we have no occasion to decide here—this case does not present more than one claim.

Smith also directs our attention to authority from the Eighth Circuit apparently holding that a party may voluntarily dismiss claims, without prejudice, in order to expedite appellate review. See, e.g., *Helm Financial Corp. v. MNVA R.R., Inc.*, 212 F.3d 1076 (8th Cir. 2000); *Great Rivers Co-op. of S.E. Iowa v. Farmland Ind.*, 198 F.3d 685 (8th Cir. 1999). As with *Hicks, supra*, we have no cause to adopt or reject this holding in the instant case, because Smith voluntarily dismissed her only claim. But we note that the Eighth Circuit's holding is a minority view; the general rule is that a plaintiff cannot appeal from the dismissal of some claims when the balance of his or her claims have been voluntarily dismissed without prejudice. See, e.g., *Construction Aggregates v. Forest Commodities Corp.*, 147 F.3d 1334 (11th Cir. 1998); *Chappelle v. Beacon Communications Corp.*, 84 F.3d 652 (2d Cir. 1996); *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995); *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147 (10th Cir. 1992); *Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431 (7th Cir. 1992); *Management Investors v. United Mine Wkrs., Etc.*, 610 F.2d 384 (6th Cir. 1979). See, generally, 15A Charles Alan Wright

et al., Federal Practice and Procedure § 3914.8 (1992 & Supp. 2002). Those courts have reasoned that "because a dismissal without prejudice does not preclude another action on the same claims, a plaintiff who is permitted to appeal following a voluntary dismissal without prejudice will effectively have secured an otherwise unavailable interlocutory appeal." *Chappelle*, 84 F.3d at 654.

We also note that although these federal decisions are not on point with respect to the instant case, the underlying reasoning of these decisions supports our determination here. As in *Chappelle*, 84 F.3d at 654, were we to conclude that appellate jurisdiction was proper in this case, we would effectively abrogate our long-established rules governing the finality and appealability of orders, as " 'the policy against piecemeal litigation and review would be severely weakened.' " When causes of action or theories of recovery are dismissed without prejudice, a plaintiff remains free to file another complaint raising those same claims. *Cook, supra.* "Thus, the litigation is not finally over for all parties on all claims." *Hood v. Plantation General Medical Center, Ltd.*, 251 F.3d 932, 934 (11th Cir. 2001). An order lacks finality, and concerns about piecemeal litigation are raised, unless a party's remaining claims are finally abandoned, i.e., dismissed with prejudice. See *Adonican v. City of Los Angeles*, 297 F.3d 1106 (9th Cir. 2002).

[7] If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999). To that end, the availability of interlocutory review has generally been limited to orders which affect substantial rights, or contain an express direction from the trial court that there is no just reason for delay, or where an appeal from a judgment dispositive of the entire case would not be likely to protect a party's interests. See, *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997). If a "voluntary dismissal exception" were to provide a mechanism for securing appellate review of any trial court order, the "exception" would quickly subsume

the rule, and we would be left without any meaningful way to regulate interlocutory appeals.

[8] We conclude that this case is subject to the rule that a party cannot move to voluntarily dismiss a case without prejudice, consent to entry of such an order, and then seek interlocutory appellate review of an adverse pretrial order. See *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999). The remaining question is how to dispose of this appeal.

[9,10] Generally, in the absence of a judgment or a valid order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003). However, though an extrajudicial act of a lower court cannot vest the appellate court with jurisdiction to review the merits of the appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed. See *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999). In the present case, Smith sought to voluntarily dismiss her petition on the condition that she could reserve her right to appeal from the district court's partial summary judgment. This was a condition that the court was powerless to grant, and the court both erred and acted beyond its statutory authority when it purported to reserve Smith's right to appeal from a nonappealable order. We view the court's dismissal of Smith's petition as inextricable from its ultra vires reservation of the plaintiff's purported right to appeal. Consequently, we conclude that the appropriate disposition of this appeal is to vacate the district court's order dismissing Smith's petition, and dismiss this appeal.

CONCLUSION

Smith's voluntary dismissal of her cause of action without prejudice did not create a final order from which an appeal could be brought to this court, and the district court acted beyond its authority when it dismissed Smith's petition while purporting to reserve her right to appeal from a nonappealable order. We vacate the district court's order dismissing Smith's petition and dismiss the appeal.

VACATED AND DISMISSED.

WRIGHT and STEPHAN, JJ., not participating.

ROBERT G. CURRY AND PAMELA CURRY, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, V. LEWIS & CLARK NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION, APPELLEE AND CROSS-APPELLANT.

678 N.W.2d 95

Filed April 23, 2004. No. S-03-086.

1. **Eminent Domain: Verdicts: Appeal and Error.** A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.
2. **Trial: Expert Witnesses: Appeal and Error.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question. A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.
3. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
5. **Jury Instructions.** The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.
6. **Jury Instructions: Appeal and Error.** If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. It may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Appeal from the District Court for Dixon County: MAURICE REDMOND, Judge. Reversed and remanded for a new trial.

David Domina, James F. Cann, and Claudia L. Stringfield, of Domina Law, P.C., for appellants.

John Thomas for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This is a condemnation action involving two parcels of land in Dixon County, Nebraska, which were owned by Robert G. Curry and Pamela Curry and condemned by the Lewis & Clark Natural Resources District (NRD) for a flood control and erosion prevention project. Following a jury trial, the district court for Dixon County entered judgment in favor of the Currys in the amount of $367,000. The Currys appeal from an order denying their motion for attorney fees. The NRD cross-appeals, contending that the district court erred in excluding certain expert testimony and in instructing the jury.

FACTS

At all relevant times, the Currys resided in Dixon County and owned two parcels of land situated in that county which we will refer to as "Parcel 1" and "Parcel 2." The NRD determined that Parcel 1 was required for the construction of a flood control and erosion prevention project known as the Powder Creek Project, or more formally referred to as the "Aowa Creek Watershed Project Structure #31-20A." The NRD further determined that a perpetual easement over Parcel 2 was required for the project.

Appraisers appointed by the county court for Dixon County determined damages attributable to the taking of Parcel 1 to be $371,750 and damages attributable to a perpetual easement over Parcel 2 to be $500. The Currys filed notices of their intention to appeal both awards to the district court, asserting that the appraisers' awards did not reflect the fair market value of the property and therefore were not just compensation as required by law. The NRD appealed only the award for Parcel 1, claiming that it was excessive. The cases were consolidated for appeal to the district court. Before the jury was convened, the parties informed the court that they had agreed to an award of $500 for the perpetual easement on Parcel 2 and asked to remove that issue from consideration by the jury.

Also prior to trial, the district court sustained that portion of a motion in limine filed by the NRD which sought to preclude the Currys from offering any evidence regarding "[m]oving expenses, relocation expenses, interest on funds deposited or withdrawn, [or] real estate tax differentials." The district court also sustained

the Currys' motion in limine which sought to preclude the NRD from offering the testimony of Gary Way, an appraiser consulted by Robert, on the ground that Way's opinions lacked foundation.

Despite the pretrial order granting the NRD's motion in limine with respect to evidence of the Currys' relocation expenses, Robert testified in this regard without timely objection by the NRD. Robert testified that he was asking the jury to award $70,000 of the $89,000 he spent to construct a replacement farm building; $36,000 he spent on relocation of the livestock facilities, corrals, bunks, silage pit, and fences; $172,000 of the $191,000 the family spent on their replacement house; and $1,500 per acre for each of the 160 acres condemned. On cross-examination, Robert conceded that in a separate proceeding, the NRD had agreed to award the Currys a differential between the value of the house on the condemned property and the house they purchased to replace it and admitted that a jury award of the differential would be "doubling up." Pamela likewise acknowledged that she did not expect double payment of the relocation expenses. The NRD moved to strike the Currys' testimony regarding the "replacement house differential costs, the moving the cattle operation, and the [farm building] on the grounds that those are the subject of the separate relocation proceeding" through the NRD with rights of appeal to this court under the Administrative Procedure Act. The district court denied the motion.

In its case in chief, the NRD presented the testimony of Kenneth Beckstrom, a certified real estate appraiser retained by the NRD. Based upon his analysis of sales of comparable farmland in Dixon County, Beckstrom testified that the damage attributable to the taking of Parcel 1 was $224,000, or $1,400 per acre, which included a value of $58,000 attributed to the house which was situated on the property. The NRD offered Way's deposition, and the Currys objected on grounds of relevance, foundation, and hearsay. The district court overruled the offer and excluded Way's deposition testimony.

Tom Moser, the manager of the NRD, testified that the NRD had offered the Currys $105,960 as a replacement housing payment; $20,000 for relocating the farm; $1,560 for moving residential items; and $5,864.85 in real estate tax differential incurred with respect to their new residence. Moser explained that under

Nebraska law, such relocation expenses are determined and paid in a separate administrative proceeding which is subject to judicial review. On cross-examination, the Currys' counsel asked Moser if he would agree to "just dispose of it all here" and Moser replied that he personally had no objection.

The parties further addressed this issue by offering a stipulation requiring that the jury be given a special verdict form with stipulated relocation costs entered on the form. The stipulation provided that there would not be a separate proceeding in which the Currys could receive any additional funds or compensation.

At the instruction conference following submission of the evidence, the NRD objected to the court's proposed jury instructions Nos. 3 and 4 on the issue of fair market value and requested that the Nebraska Jury Instructions be given in their stead. In rejecting the NRD's objection and request, the court indicated that instruction No. 3 was in fact NJI2d Civ. 13.02 "a little bit modified" by *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998), and *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996). The court also noted that instruction No. 4 was a direct quote from this court's opinion in *Westgate Rec. Assn., supra.*

The jury returned the following verdict in favor of the Currys:

A) Land and Buildings, excluding house SW ¼, Section 10	$216,000[.00]
B) House on SW ¼, Section 10	$ 65[,]000[.00]
C) Cost for New House Over B	$ 70[,]000[.00]
D) Severance Damages to Land Excluding SW ¼ Section 10	$ 86[,]000[.00]
E) Relocation Costs — Residence	$ 1,560.00
F) Relocation Costs — Farming	$ 20,000.00
G) Tax Differential for C	$ 5,864.85
H) Incidental Allowance	$ 378.25

The court entered judgment in favor of the Currys on items A, B, and D, for a total of $367,000. The judgment also provided that pursuant to the stipulation of the parties, the Currys should claim directly from the NRD amounts due under parts C and E through H of the jury verdict.

The Currys filed a motion for taxation of costs and award of attorney fees. The NRD filed a motion for new trial alleging that

there were irregularities in the proceedings, the damages were excessive, the verdict was not sustained by sufficient evidence, and errors of law occurred at trial. A hearing was held on these motion on August 7, 2002. At the hearing, the NRD argued against awarding attorney fees based on the fact that the $367,000 judgment awarded by the district court was not greater than the appraisers' award of $371,750. The NRD further argued that the damages awarded under parts C and E through H were not part of the condemnation action, but, rather, they were amounts properly claimed under an administrative proceeding. See Neb. Rev. Stat. § 76-1214 et seq. (Reissue 1995).

In a January 22, 2003, journal entry, the district court denied the Currys' application for attorney fees as well as the NRD's motion for new trial. The Currys perfected this timely appeal, and the NRD cross-appealed.

ASSIGNMENTS OF ERROR

The Currys assign, restated, that the district court erred in (1) entering judgment that did not reflect the entire jury award and (2) failing to award reasonable attorney fees.

The NRD assigns on cross-appeal, restated, that the district court erred in (1) modifying the Nebraska Jury Instructions regarding the determination of fair market value in instructions Nos. 3 and 4 and (2) refusing to admit Way's testimony.

STANDARD OF REVIEW

[1] A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong. *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001); *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998); *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996).

[2] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question. *Walkenhorst, supra.* A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[3] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003); *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

ANALYSIS

We address the parties' assignments of error in the order that they are alleged to have occurred. We begin with the NRD's claim on cross-appeal that the district court erred in excluding the deposition testimony of Way, a real estate appraiser who was consulted by Robert but not called as a witness at trial. At Robert's request, Way reviewed the appraisal which had been completed by Beckstrom on behalf of the NRD in order to determine if Robert was being "low-balled." Based on his cursory review of the Beckstrom appraisal, Way informed Robert that in his opinion, the appraisal was " 'strong' " and he could not " 'beat it.' " Robert decided not to have Way undertake a separate appraisal. The NRD argues that Way's testimony was relevant to buttress the credibility and opinion of Beckstrom, and cites *Gerken v. Hy-Vee, Inc.*, 11 Neb. App. 778, 660 N.W.2d 893 (2003). *Gerken* was a personal injury case involving a slip and fall in a grocery store. The Nebraska Court of Appeals held that the trial court erred in excluding a store manager's statement that a new maintenance employee had applied too much wax to the floor because the statement was admissible under Neb. Rev. Stat. § 27-801(4)(b)(iv) (Reissue 1995) as a statement offered against a party by its agent or servant within the scope of his agency or employment.

Here, there is no evidence that Way was an agent or employee of the Currys. The record reflects that he was at most an independent contractor who was requested to render a preliminary opinion, on the basis of which the Currys chose not to retain him to conduct a formal appraisal. We acknowledge that there may be circumstances in which an expert who performs an appraisal at the request of a party to a condemnation proceeding can be compelled by the opposing party to testify regarding that appraisal at trial. See 7 Patrick J. Rohan & Melvin A. Reskin, Nichols on Eminent Domain § 7A.03 (rev. 3d ed. 2003). In this

case, however, Way did not actually appraise the Currys' property but merely rendered a preliminary opinion as to whether any appraisal he might perform would meet or exceed the fair market value as determined by the NRD's appraiser. Such an opinion is inherently speculative, and we therefore conclude that the trial court did not abuse its discretion in excluding it.

[4] The NRD also contends in its cross-appeal that the district court erred in giving jury instructions Nos. 3 and 4 over its objection instead of giving the requested NJI2d Civ. 13.02, which provides:

> The "fair market value" of a piece of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for the property, and that someone ready to buy, but not required to do so, would be willing to pay for the property.
>
> In determining fair market value, you may consider the uses to which the property has been put and the uses to which it might reasonably be put in the immediate future.
>
> [In determining the amount of compensation to be paid, you must not consider any change in the fair market value of the property caused by the public improvement or by the knowledge that the improvement would be (constructed, altered, et cetera).
>
> [You must not compensate the plaintiff for any decrease in the property's fair market value caused by physical deterioration that the plaintiff could reasonably have prevented.]]

To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003); *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002).

[5] The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). NJI2d Civ. 13.02 is a correct statement of the law approved by this court in *Walkenhorst*. It was clearly warranted by the evidence. The remaining question is

whether the NRD was prejudiced by the giving of the following instructions instead of NJI2d Civ. 13.02:

INSTRUCTION NO. 3

A person whose property is taken by condemnation or eminent domain is entitled to recover compensation. This requires that the party whose property is condemned be awarded the fair market value of the property taken.

The "fair market value" of a parcel of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for property, and the price that someone ready to buy, but not required to do so, would be willing to pay for the property.

In determining fair market value, you may consider the uses to which the property has been put and the uses to which it might reasonably be put in the immediate future.

In determining fair market value, you may consider all relevant conditions concerning a value including, but not limited to:

1. The presence or absence of active competitors in the market in the area of the property;

2. The trends of prices in the area;

3. Comparable sales of similar properties in arms-length transactions between willing buyers and willing sellers;

4. Replacement cost of the property taken and improvements thereon; and

5. Other relevant factors.

You may consider only legally permissible uses as potential uses for the property.

. . . .

INSTRUCTION NO. 4

There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases:

1. The market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties;

2. The income or capitalization of income approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and

3. The replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation.

Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole.

[6] "If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal." *Walkenhorst v. State*, 253 Neb. 986, 997, 573 N.W.2d 474, 484 (1998). The district court noted that instruction No. 4 was taken directly from language in *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996), and subsequently approved in *Walkenhorst, supra.* While the quotation is indeed accurate as far as it goes, when viewed in isolation, it conveys the impression that any of the three valuation approaches are appropriate under any circumstances. That impression is contrary to the law. In *Westgate Rec. Assn.*, we agreed with the majority rule that the reproduction cost method as an independent test of value "may be used only in rare cases where there is a lack of comparable sales of similar property, where the structures on the property are in some sense unique, or where the character of the improvements is unusually well adapted to the kind of land upon which they exist." 250 Neb. at 22, 547 N.W.2d at 494. We further noted that an appraiser utilizing the reproduction cost method "cannot include as a factor the value of existing improvements, unless the improvements enhance the value of the land." *Id.* at 24, 547 N.W.2d at 495. See, also, 4 Julius L. Sackman, Nichols on Eminent Domain § 13.01[10] at 13-18 (rev. 3d ed. 2003) (noting although replacement cost approach is generally accepted method of fair market valuation, it is least preferred method and "tends to be used when the market data approach or income approach fail to establish fair market value").

In *Walkenhorst, supra*, we held that the district court properly excluded evidence regarding the separate value of a shelterbelt situated on the condemned farmland. Citing our holding in *Westgate Rec. Assn., supra*, that the replacement or reproduction cost method could be utilized only in "rare cases," we reasoned

that the shelterbelt was not "of such a unique nature as to render use of the fair market value standard unjust, to render the determination of the market value impossible, or to require use of one of the other valuation methods described in *Westgate Rec. Assn.*" *Walkenhorst*, 253 Neb. at 992-93, 573 N.W.2d at 481. We held that "[t]he condemnees cannot be compensated for the value of the shelterbelt as a shelterbelt; instead, the only relevant inquiry is how the presence of the shelterbelt on the condemned land affects the fair market value of the land taken." *Id.* at 992, 573 N.W.2d at 481.

The record in this case does not establish any of the factual prerequisites for application of the replacement or reproduction cost method of valuing real property, and there is no expert testimony employing this method of valuation. However, Robert testified on direct examination as to the replacement cost of his house, his farm building, and other improvements including corrals, fences, and a silo. Robert testified that unless the jury awarded him replacement costs, he would be unable to recover them, and further stated that he was asking the jury to award him the fair market value of his land, which he estimated to be $1,500 per acre, *plus* the replacement costs on the house, the farm building, and the other improvements.

We conclude that on this record, instruction No. 4 was not a complete statement of the law and was misleading and prejudicial because it improperly suggested that the jury was free to award the replacement cost of improvements in addition to the fair market value of the farmland on which they were situated. See *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). The prejudicial nature of this instruction was exacerbated by the statements in instruction No. 3 that the jury could consider "[r]eplacement cost of the property taken and improvements thereon" and "[o]ther relevant factors." No other instructions given to the jury serve to ameliorate the misleading and prejudicial effect of instructions Nos. 3 and 4. Thus, the giving of these instructions instead of NJI2d Civ. 13.02 constitutes reversible error which necessitates a new trial.

[7] The remaining issues relate to the Currys' assignments of error pertaining to the denial of attorney fees. An appellate court is not obligated to engage in an analysis which is not needed to

adjudicate the controversy before it. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003); *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). It may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002). Resolution of the Currys' assignments of error are unnecessary to the disposition of this matter, and inasmuch as we are unable to assess the likelihood that these issues will recur at the new trial necessitated by our disposition of the cross-appeal, we do not address them here.

CONCLUSION

Although we determine that the district court did not abuse its discretion in excluding the testimony of appraiser Way, we conclude that the giving of instructions Nos. 3 and 4 instead of NJI2d Civ. 13.02 constituted reversible error. Accordingly, the judgment of the district court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CARL R. HOLM, APPELLANT, V. BARBARA K. HOLM, NOW KNOWN AS BARBARA K. ASHBRIDGE, APPELLEE.

678 N.W.2d 499

Filed April 23, 2004. No. S-03-290.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
4. **Supreme Court: Appeal and Error.** While the doctrine of stare decisis forms the bedrock of our common-law jurisprudence, it does not require the Nebraska Supreme Court to blindly perpetuate a prior interpretation of the law if the court concludes that it was clearly incorrect.
5. **Divorce: Alimony: Statutes.** With respect to any alimony award included in a decree of dissolution entered on or after July 1, 2004, the statutory grounds for termination set forth in Neb. Rev. Stat. § 42-365 (Reissue 1998) will apply unless the decree, or

a written agreement of the parties, includes explicit language stating that the death of either party and/or the remarriage of the alimony recipient shall not terminate the alimony order.

Appeal from the District Court for Otoe County: JOHN F. STEINHEIDER, County Judge. Affirmed.

Timothy W. Nelsen, of Fankhauser, Nelsen & Werts, P.C., for appellant.

Jeffery R. Kirkpatrick and Mary K. Hansen, of McHenry, Haszard, Hansen, Roth & Hupp, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This appeal presents the question of whether an obligation to pay alimony terminates upon remarriage of the recipient by operation of Neb. Rev. Stat. § 42-365 (Reissue 1998) where the decree provides that "alimony shall terminate upon the death of either party" but makes no reference to termination upon remarriage.

FACTS

A decree dissolving the marriage of Carl R. Holm and Barbara K. Holm, now known as Barbara K. Ashbridge, was entered by the district court for Otoe County on August 18, 2000. The decree provided in relevant part:

> The Petitioner, Carl R. Holm, should be and is hereby Ordered and directed to pay alimony to the Respondent, Barbara K. Holm, in the sum of ONE THOUSAND DOLLARS ($1,000.00), each month, for a period of SIXTY (60) consecutive months, the first payment being due on the 1st day of August, 2000, and continuing on the 1st day of each month thereafter for a total of SIXTY (60) consecutive months. The petitioner should be and is further Ordered and directed, in this respect, to thereafter pay alimony to the respondent in the sum of SEVEN HUNDRED FIFTY DOLLARS ($750.00), each month, for a period of SIXTY (60) consecutive months, the first of said payments being due on the 1st day August, 2005, and continuing on the 1st day of each month thereafter for a total of SIXTY (60) consecutive

> months. *Said alimony shall terminate upon the death of either party.*

(Emphasis supplied.)

Barbara remarried on October 5, 2002. On November 12, Carl filed a petition to modify the decree, asserting that Barbara's remarriage was a material change in circumstances. He further asserted that the remarriage should operate to terminate the alimony obligation as a matter of law under § 42-365, which provides in relevant part that "[e]xcept as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient."

Following a hearing, the district court denied the petition to modify. The court reasoned that its specific finding that "'alimony shall terminate upon the death of either party'" was incorporated into the decree and fell within the exception to the general termination rule stated in § 42-365 and, thus, declined to terminate alimony as requested in Carl's petition to modify. Carl filed this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Carl assigns, restated, that the district court erred in its interpretation of § 42-365 when it determined that silence in the decree as to the effect of remarriage was the same as if the decree specifically ordered alimony to continue after remarriage.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004); *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004); *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003).

ANALYSIS

Section 42-365 provides, in relevant part, that "[e]xcept as otherwise agreed by the parties in writing or by order of the

court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient." In this case, it is undisputed that there was no agreement by the parties in writing. The issue, therefore, is whether the decree is an order of the court providing the requisite exception.

We addressed a similar circumstance in *Watters v. Foreman*, 204 Neb. 670, 284 N.W.2d 850 (1979). In that case, the divorce decree provided in relevant part that the alimony payments " 'shall cease upon the death of [the recipient] prior to the making of all of such payments' " and that " 'said provisions for alimony and property settlement are final and complete and not subject to revision or amendment.' " (Emphasis omitted.) *Id.* at 673, 284 N.W.2d at 852. We determined that the language in the decree fell within the exception in § 42-365, reasoning that although the decree would have been clearer if it had addressed the issue of remarriage, its meaning was that the alimony obligation would terminate only in the event of the recipient's death, and not upon her remarriage. We wrote:

> Had the court intended to subject the decree to the provisions of section 42-365 . . . *both* as to death *or* remarriage, it would not have been necessary to say anything about death. Section 42-365 . . . would have taken care of that situation, just as it would have taken care of remarriage. However, by including *only* the death provision of section 42-365 . . . and otherwise prohibiting any other act from modifying or amending the decree, it appears clear beyond question that the trial court intended that *only* death could terminate the required payments.

Watters, 204 Neb. at 675, 284 N.W.2d at 853.

We have also addressed decrees that are silent as to the effect of both the alimony recipient's remarriage and the recipient's death. *Kingery v. Kingery*, 211 Neb. 795, 320 N.W.2d 441 (1982); *Euler v. Euler*, 207 Neb. 4, 295 N.W.2d 397 (1980). In *Kingery*, we concluded that language in the decree awarding alimony " 'until the total alimony award of $10,000.00 is paid in full' " was not an order of the court falling within the exception in § 42-365. 211 Neb. at 798, 320 N.W.2d at 443. We reasoned that the words said no more than if the court had simply calculated the date upon which the payments would end and thus did not alter the general

rule of § 42-365 that alimony was to terminate at either death or remarriage. Similarly, the decree in *Euler* provided that alimony payments were to " 'continue . . . for a period of One Hundred Twenty-one (121) months, or a total of ten (10) years and one (1) month.' " 207 Neb. at 6, 295 N.W.2d at 399. Reasoning that this language failed to provide for the termination of alimony upon the occurrence of a specified event and included no provision that the alimony was not modifiable, we held that it did not fall within the exception in § 42-365.

Unlike *Kingery* and *Euler*, the language of the decree at issue in this case is not silent regarding the effect on alimony of both remarriage and death of the recipient. Rather, as in *Watters v. Foreman*, 204 Neb. 670, 284 N.W.2d 850 (1979), the decree here specifically sets forth a specified event—the death of either party—upon which alimony is to terminate. Applying the reasoning of *Watters*, if the district court had intended the default rule to apply, it would not have made the specific finding that the alimony was to terminate upon the death of either party. Although the decree in *Watters* contained an express provision that the alimony award was not modifiable and no similar provision is contained in the decree in the instant case, we find this to be a distinction without a difference.

Watters constituted controlling precedent when the decree in this case was entered and became final. Because we perceive no meaningful distinction between the facts in this case and those in *Watters*, we conclude that the district court did not err in determining that under the decree, Carl's obligation to pay alimony would terminate only when all required payments were made or upon the death of either party, but not upon Barbara's remarriage.

[3,4] We are nevertheless persuaded that the *Watters* rule should not enjoy continued vitality. The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). See, also, *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). While the doctrine of stare decisis forms the bedrock of

our common-law jurisprudence, it does not require us to blindly perpetuate a prior interpretation of the law if we conclude that it was clearly incorrect. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). The plain language of § 42-365 states that "alimony orders shall terminate upon the death of either party or the remarriage of the recipient" *except* where the parties agree otherwise "or by order of the court." If a court chooses to exercise its authority to override the default termination provisions of § 42-365, it easily can and should do so explicitly, leaving no doubt as to its intent. We agree that "[a]n order of the court 'otherwise' in an alimony decree should be specific and in clear terms negate the specific condition or conditions which do not operate to terminate the obligation." *Watters v. Foreman*, 204 Neb. 670, 678, 284 N.W.2d 850, 855 (1979) (Clinton, J., dissenting).

[5] Accordingly, we overrule *Watters* prospectively and hold that with respect to any alimony award included in a decree of dissolution entered on or after July 1, 2004, the statutory grounds for termination set forth in § 42-365 will apply unless the decree, or a written agreement of the parties, includes explicit language stating that the death of either party and/or the remarriage of the alimony recipient *shall not* terminate the alimony order.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. EDWARD L. WINTROUB, RESPONDENT.

678 N.W.2d 103

Filed April 23, 2004. No. S-03-452.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and

may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
4. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
5. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
6. **Disciplinary Proceedings: Words and Phrases.** In the context of attorney discipline proceedings, "misappropriation" is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.
7. **Disciplinary Proceedings.** Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.
8. **Disciplinary Proceedings: Presumptions.** In cases involving misappropriation and commingling of client funds, mitigating factors overcome the presumption of disbarment only if they are extraordinary.
9. **Disciplinary Proceedings.** Misappropriation of client funds by an attorney violates basic notions of honesty and endangers public confidence in the legal profession.
10. ____. Misappropriation as the result of a serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing.

Original action. Judgment of suspension and probation.

John W. Steele, Assistant Counsel for Discipline, for relator.

Waldine H. Olson, of Nolan, Olson, Hansen, Fieber & Lautenbaugh, L.L.P., for respondent.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

The office of the Counsel for Discipline of the Nebraska Supreme Court, as relator, commenced this disciplinary proceeding against attorney Edward L. Wintroub, respondent. Following

an evidentiary hearing, a referee appointed by this court found multiple violations of the Code of Professional Responsibility and recommended a 1-year period of suspension, with readmission subject to a period of probation. Both parties have filed exceptions to the referee's report.

BACKGROUND

Wintroub was admitted to the practice of law in Nebraska on June 28, 1965. At all relevant times, he was engaged in private practice in Omaha. From 1974 to 2001, Wintroub's practice consisted of insurance defense work regarding liquor liability laws for one principal client. Sometime in 2001, Wintroub's relationship with this client ended, causing significant financial pressures on his law practice.

At all relevant times, Wintroub maintained a trust account at First Westroads Bank. He did not, however, keep a separate ledger for each client's account. Instead, when a settlement draft was received, he would obtain a statement of the case expenses found in the client's file and prepare two checks; one for his fee and expenses and the other for the client.

On December 30, 2002, this court granted the application of the Committee on Inquiry of the Second Disciplinary District for a temporary suspension of Wintroub's license pursuant to Neb. Ct. R. of Discipline 12 (rev. 2002) on the basis of alleged multiple irregularities in Wintroub's trust account. On April 22, 2003, the Counsel for Discipline filed formal charges consisting of five counts alleging multiple trust account violations occurring in 2001 and 2002. Wintroub filed an answer which neither admitted nor denied the factual allegations, but placed the Counsel for Discipline on strict proof. At the hearing before the referee, Wintroub admitted the factual allegations of counts I through IV while denying the legal conclusions asserted by relator. During the hearing, relator voluntarily dismissed the fifth count. We summarize the factual allegations thus admitted and the referee's findings with respect thereto.

COUNT I

On or about November 7, 2001, Wintroub purported to settle a personal injury case on behalf of his client, Debra Gillam, for $30,000, apparently believing that he had the requisite authority

to do so. He negotiated the settlement draft issued by an insurance company by signing Gillam's name and his, and then deposited the draft in his trust account. He then issued a check to himself in the amount of $10,150 for fees and expenses relating to the settlement.

At some time thereafter, Gillam informed Wintroub that she had not authorized him to settle her case for $30,000. Wintroub sent a check in the amount of $30,000 to the insurance company, but then notified the company that he was stopping payment on the check. He did not refund the settlement proceeds to the insurance company until December 2002, after being requested to do so by Gillam's new attorney.

At the point that Wintroub realized that Gillam had not authorized the settlement, there should have been at least $19,850, representing Gillam's share of the failed settlement, on deposit in Wintroub's trust account. When Wintroub sent the initial refund check to the insurance company, his trust account balance should have been at least $30,000. Between November 1 and 30, 2001, the balance in Wintroub's trust account fell to a low of $122.13. Between December 1, 2001, and July 1, 2002, Wintroub's trust account balance fell below $30,000 on numerous occasions and in fact had a negative balance on March 18, 2002. Relator alleged that the foregoing constituted a violation of Wintroub's oath of office as an attorney and the following disciplinary rules:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance

> Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay account charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
>
> (B) A lawyer shall:
>
> . . . .
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.

With respect to count I, the referee found by clear and convincing evidence that Wintroub failed to preserve client funds regarding the settlement proceeds, constituting a violation of Canon 9, DR 9-102(A), and his oath of office as an attorney. The referee rejected Wintroub's argument that because Gillam refused the funds and denied authorizing the settlement, the proceeds which he received from the insurance company never became client funds. The referee further concluded that such conduct was a violation of a disciplinary rule prohibited by Canon 1, DR 1-102(A)(1), and Wintroub's oath of office as an attorney. He concluded, however, that there was not clear and convincing evidence that Wintroub engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

COUNT II

On January 23 and 30, 2002, Wintroub deposited two checks from the Great Northern Insurance Company into his trust account. The checks, both payable to Wintroub and his wife, were in the amounts of $54,500 and $27,250. On December 13, 2001, and January 3, February 15 and 25, and March 18, 2002, Wintroub made deposits into his trust account in the amounts of $40,000, $55,000, $30,000, $5,000, and $5,000, respectively.

The deposit slips did not disclose the source of the funds. On March 4 and April 8 and 22, 2002, Wintroub deposited $30,000, $9,500, and $9,600 into his trust account, respectively. Wintroub was identified as the remitter for the cashier's checks used to make the deposits. On June 17, 2002, Wintroub deposited a check from an Omaha jeweler in the amount of $20,000, payable to him, into his trust account. The memorandum portion of the check indicates it was for a purchase.

Relator alleged that the foregoing conduct constituted a violation of Wintroub's oath of office as an attorney, as well as DR 1-102(A)(1) and (4) and DR 9-102(A) and (B).

With respect to this count, the referee found by clear and convincing evidence that Wintroub had commingled personal funds in his trust account, constituting a violation of DR 9-102(A), and that he had failed to maintain a complete record of client funds, constituting a violation of DR 9-102(B). As such, the referee found clear and convincing evidence that Wintroub violated a disciplinary rule, constituting a violation of DR 1-102(A)(1), and that he violated his oath of office as an attorney. He found, however, that there was not clear and convincing evidence that Wintroub engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation. The referee's findings with respect to count II include the following:

> The greater weight of the evidence suggests that respondent may have been parking personal funds in the trust account for unexplained reasons. The greater weight of the evidence also shows that respondent was engaged in a kiting scheme by withdrawing fees before he deposited the insurance proceeds attributable to the fee. It is undisputed, however, that no client was actually injured, although the potential for injury was great.

Count III

On or about November 14, 2001, a lawyer in Wintroub's firm settled a claim on behalf of Francis Haiar and deposited the $30,000 insurance proceeds into the trust account. On or about January 16, 2002, Wintroub issued a check payable to Haiar drawn on the trust account in the amount of $19,581.37 as proceeds of the settlement. Between November 14, 2001, and January 16, 2002,

the balance of Wintroub's trust account fell below the settlement proceeds payable to Haiar.

Relator alleged that the foregoing conduct violated Wintroub's oath of office as an attorney, DR 1-102(A)(1) and (4), and DR 9-102(A). The referee found clear and convincing evidence that Wintroub failed to preserve the identity of client funds regarding the settlement proceeds obtained on behalf of Haiar, constituting a violation of DR 9-102(A). The referee further determined from this evidence that Wintroub violated a disciplinary rule, constituting a violation of DR 1-102(A)(1), and that he violated his oath of office as an attorney. The referee found no clear and convincing evidence, however, that Wintroub engaged in conduct involving dishonestly, deceit, fraud, or misrepresentation.

COUNT IV

On or about December 21, 2001, Wintroub or a member of his firm settled a case on behalf of Jamie North and deposited the $25,000 insurance check into the trust account. On or about January 3, 2002, Wintroub issued a trust account check to North in the amount of $16,432.09 as her share of the settlement proceeds. Between December 21, 2001, and January 3, 2002, the balance in Wintroub's trust account fell to $7,317.70. The referee found that Wintroub "appears to have issued three trust account checks to himself for his fee in the North matter," the first for $6,000, issued 5 days before the insurance proceeds were deposited in the trust account; the second for $7,000, issued 3 days before the deposit; and the third for $8,000, issued 3 days after the deposit. Relator alleged that these facts constituted violations of Wintroub's oath of office as an attorney, DR 1-102(A)(1) and (4), and DR 9-102(A). With respect to this count, the referee found clear and convincing evidence that Wintroub failed to preserve the identity of client funds regarding the North settlement proceeds, in violation of DR 9-102(A). As such, he found clear and convincing evidence that Wintroub violated a disciplinary rule, constituting a violation of DR 1-102(A)(1), and that he violated his oath of office as an attorney. However, the referee found there was not clear and convincing evidence that Wintroub had engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation.

MITIGATION AND SANCTIONS

The referee correctly noted that commingling and misappropriation of client funds typically warrants disbarment, but that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. He found the following mitigating factors in this case: (1) Wintroub has not been the subject of other disciplinary actions, (2) he truly regrets his conduct and is remorseful, (3) he cooperated fully and completely with the inquiry, (4) the conduct occurred over a relatively isolated period of time, and (5) the conduct is inconsistent with Wintroub's record as an attorney over the 36-year period prior to 2001.

The referee then addressed Wintroub's contention that his use of prescription medications during the time period at issue was a mitigating factor to be considered. In this regard, the referee found that Wintroub began taking prescription medications on the advice of his physician three times per day in 1998 to reduce his stress and chronic anxiety. Over the next several years, Wintroub continued to take prescribed medications to control his anxiety, and the amount of medications taken would generally depend on his stress level. At times, he was taking as many as 16 pills in a single day.

Beginning in approximately August 1999, Wintroub began to exhibit behavior which his friends and coworkers found bizarre. This behavior included memory lapses, confusion, trouble concentrating and remembering, slurred speech, and mood disturbances. Wintroub was observed singing and throwing food at people during lunch at a local restaurant. When questioned about this behavior the following day, Wintroub had no recollection. Friends and coworkers also testified that during this time period, Wintroub failed to recognize traffic signals when driving, fell out of a booth at a local restaurant, and authored hostile interoffice memorandums. He also apparently believed that a longtime friend had accused him of kidnapping the friend's granddaughter. In addition, Wintroub began missing meetings and appointments, and on at least one occasion, he fell asleep during a meeting with a client. Wintroub's trust account records indicate that during this time period, he would often type the wrong date on a check,

sometimes being off by a month, sometimes by several months, and sometimes transposing the date and month.

After considering all of the evidence, the referee concluded that Wintroub's use of prescription medications was consistent with his doctors' recommendations for treating his chronic anxiety. He further concluded that the use of the prescription medications and the side effects caused by such use were mitigating factors. The referee found that Wintroub has ceased using the medications. The referee recommended that Wintroub be suspended from the practice of law for a period of 1 year, with credit given for the period of his "voluntary temporary suspension." The referee further recommended that upon readmission, Wintroub should be subject to a period of probation for a period of not less than 2 years.

During the pendency of this appeal, the bill of exceptions was amended by agreement of the parties and leave of this court to include two documents which were not considered by the referee. The first document is entitled "Monitoring Contract Substance Abuse Recovery" and dated January 15, 2004, and is signed by Wintroub and the director of the Nebraska Lawyers Assistance Program. The second document is an affidavit signed by Wintroub on March 4, 2004, attesting to his compliance with the conditions of the monitoring contract, which conditions include ongoing counseling, participation in a 12-step program, and weekly contact with an attorney monitor. Wintroub further states that he has not taken any of the medications which had previously been prescribed for him since January 2003, when he suffered a grand mal seizure and was advised by his physician that the medications were the likely cause of his behavior problems and impairment of his cognitive abilities.

EXCEPTIONS

Both parties filed exceptions to the referee's report. Relator alleged that the referee erred in (1) finding there was not clear and convincing evidence that Wintroub's conduct violated DR 1-102(A)(4), i.e., dishonesty, deceit, fraud, and misrepresentation; (2) finding that Wintroub's excessive use of prescribed medications mitigates against the presumption of disbarment in this case; (3) finding that Wintroub should be given credit for the

time period of his "voluntary temporary suspension"; and (4) recommending a sanction that is too lenient.

Wintroub alleged that the referee erred in (1) concluding that Wintroub received $21,000 in fees and that he paid North $16,432.09 out of insurance proceeds totaling $25,000; (2) finding that he failed to preserve the identity of client funds regarding the settlement proceeds obtained on behalf of Gillam; (3) speculating that Wintroub "may have been parking personal funds in the trust account for unexplained reasons"; and (4) inferring that Wintroub was engaged in a "kiting scheme."

STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003). Disciplinary charges against an attorney must be established by clear and convincing evidence. *Id.*

ANALYSIS

WINTROUB'S EXCEPTIONS

Wintroub contends that the funds associated with the failed Gillam settlement were not client funds within the meaning of DR 9-102(A) because Gillam denied authorizing the settlement and therefore disclaimed any interest in the funds. We agree with the referee that this argument is without merit. The insurance company sent the funds to Wintroub, in his capacity as Gillam's attorney, based upon his representation that Gillam had agreed to the settlement. When he realized that she had not, Wintroub was obligated, in his capacity as her attorney, to return the funds to the insurance company, which he eventually did. He had no right to treat the funds as his own prior to making the refund. Thus, the referee properly considered this transaction in determining that Wintroub had committed the disciplinary violations alleged in count I of the formal charges.

Although Wintroub does not deny that the evidence submitted with respect to count II establishes the commingling of client funds with personal funds, he takes exception to the referee's findings, with respect to count II, that Wintroub "was engaged in a kiting scheme by withdrawing fees before he deposited the insurance proceeds attributable to the fee" and that Wintroub "may have been parking personal funds in the trust account for unexplained reasons." We conclude that there is clear and convincing evidence that Wintroub did in fact withdraw fees from his trust account before depositing settlement proceeds. However, Wintroub was not charged with engaging in a "kiting scheme," and there is no clear and convincing evidence that he did so. There is, however, clear and convincing evidence that Wintroub deposited personal funds in his trust account.

Wintroub takes exception to the findings of the referee, with respect to count IV, that Wintroub received $21,000 in fees and that he paid North $16,432.09 out of settlement proceeds totaling $25,000. It is not disputed that the North claim was settled for a total of $25,000 and that Wintroub disbursed $16,432.09 to North as net settlement proceeds. The record also reflects that Wintroub issued a trust account check to himself for $6,000, designated "FeeNorth" on the memorandum line; that he issued another check to himself for $7,000, designated "partialNorth"; and that he issued a third check to himself for $8,000, designated "North." While we acknowledge the mathematical inconsistency, we determine by clear and convincing evidence that the aforementioned checks drawn on Wintroub's trust account were issued as reflected above.

Relator's Exceptions

Relator takes exception to the referee's findings that there was not clear and convincing evidence that Wintroub engaged in conduct involving dishonesty, deceit, fraud, and misrepresentation, so as to constitute a violation of DR 1-102(A)(4) with respect to each of the four counts. Based upon our review of the record, we agree with the referee's findings in this regard. Relator's remaining exceptions involve the sanction recommended by the referee. We will address those issues *infra* in our independent determination of the appropriate sanction.

SANCTION

[3] We agree with the referee's determination that there is clear and convincing evidence that Wintroub violated DR 1-102(A)(1) and DR 9-102(A) with respect to count I; that he violated DR 1-102(A)(1) as well as DR 9-102(A) and (B) with respect to count II; that he violated DR 1-102(A)(1) and DR 9-102(A) with respect to count III; that he violated DR 1-102(A)(1) and DR 9-102(A) with respect to count IV; and that he violated his oath of office as an attorney with respect to all counts. We must therefore determine an appropriate disciplinary sanction. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *State ex rel. Counsel for Dis. v. James, ante* p. 186, 673 N.W.2d 214 (2004).

[4,5] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Villareal, ante* p. 353, 673 N.W.2d 889 (2004); *State ex rel. Counsel for Dis. v. Janousek, ante* p. 328, 674 N.W.2d 464 (2004). For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. James, supra*; *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003).

[6] In the context of attorney discipline proceedings, "misappropriation" is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom. *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997). The evidence in this case establishes both misappropriation of client funds and commingling of personal funds with client funds.

[7,8] Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds

is disbarment. *State ex rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003). The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel. Counsel for Dis. v. Janousek, supra*. In cases involving misappropriation and commingling of client funds, we have stated that mitigating factors overcome the presumption of disbarment only if they are extraordinary. *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001). However, this court has not adopted a "bright line rule" that misappropriation of funds will always result in disbarment. *State ex rel. Counsel for Dis. v. Achola, supra*. In this as in any other disciplinary action, the determination of the appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel Counsel for Dis. v. Janousek, supra*; *State ex rel. Counsel for Dis. v. Achola, supra*.

There are factors present in the instant case which we have considered as mitigating in prior disciplinary cases. It is undisputed that Wintroub cooperated throughout the course of the disciplinary proceedings and that he is genuinely remorseful about his conduct. See, *State ex rel. Counsel for Dis. v. Mills, ante* p. 57, 671 N.W.2d 765 (2003) (cooperation); *State ex rel. Counsel for Dis. v. Achola, supra* (remorse). It also appears to be undisputed that no client was actually injured by Wintroub's conduct and that any restitution was completed prior to the time disciplinary proceedings were commenced. See *State ex rel. Counsel for Dis. v. Achola, supra*. The record does not reflect any previous disciplinary action against Wintroub during the more than 30 years that he has practiced law in this state. The record includes several letters from employees and attorneys attesting to Wintroub's character and fitness as an attorney. See *id.*

These mitigating factors alone, however, are insufficient to overcome the presumption of disbarment in a case such as this involving numerous instances of misappropriation and commingling of client funds. Thus, the primary question in this action is whether Wintroub's impairment from use of prescription medications, combined with the mitigating factors previously listed, is so extraordinary as to overcome the presumption of disbarment. Wintroub argues that given the nature and degree of his impairment, the disciplinary violations were the result of mistake,

confusion, and negligence as opposed to dishonesty, fraud, deceit, or misrepresentation. Having the benefit of observing Wintroub's testimony and the other evidence offered on this point, the referee concluded that "there is too much evidence of respondent's confusion and gross negligence, and too much evidence of 36-years of spotless service for this referee to recommend disbarment."

Based upon our de novo review, we reach the same conclusion. Viewed in the context of Wintroub's long legal career, the time period at issue in this disciplinary proceeding was marked by aberrant personal and professional behavior. The record reflects that during this period, Wintroub suffered from concentration problems, slurred speech, memory lapses, disorientation, and mood disturbances. There is medical evidence that during this period, Wintroub's judgment and ability to function normally were significantly impaired by his lawful use of three different medications prescribed for stress and anxiety, some of which were to be taken on an "as needed" basis. We agree with the conclusion of the referee that the impairment was genuine and severe. The record reflects that Wintroub has recognized and confronted his impairment, has eliminated its cause, and has taken affirmative steps to prevent its recurrence.

Although it did not involve misappropriation or commingling of funds, our decision in *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002), provides a framework for assessing psychological impairment as a mitigating factor in a disciplinary case. In that case, we held that in order to establish depression as a mitigating factor, the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct. Here, we conclude that these requirements have been satisfied with respect to Wintroub's addiction to prescription medications. See, also, *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000).

[9,10] Although we conclude that there are sufficient mitigating factors in this case to overcome the presumption that a lawyer who misappropriates and commingles client funds should

be disbarred, we also conclude that Wintroub's conduct was of a nature as to warrant a substantial disciplinary sanction more severe than that recommended by the referee. Misappropriation of client funds by an attorney violates basic notions of honesty and endangers public confidence in the legal profession. *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003). Misappropriation as the result of a serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing. *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991). Although Wintroub was significantly impaired by his use of prescription medications, he was not totally without the ability to control his actions. While the mitigating factors in this case are sufficient to overcome the presumption that misappropriation and commingling of client funds warrants disbarment, the egregious conduct must nevertheless have a significant disciplinary consequence.

Wintroub has been suspended from the practice of law since December 30, 2002, a period of more than 15 months. We hereby enter a judgment of suspension retroactive to that date with no possibility of readmission prior to December 30, 2004. Upon application for reinstatement, Wintroub shall have the burden of proving that he has not practiced law during the period of suspension and that he has met the requirements of Neb. Ct. R. of Discipline 16 (rev. 2001). In addition, reinstatement shall be conditioned upon (1) the payment of all costs of this action, which are hereby taxed to Wintroub; (2) a showing of full compliance by Wintroub with all terms and conditions of his monitoring contract with the Nebraska Lawyers Assistance Program (NLAP) dated January 15, 2004, and any subsequent amendments thereto during the period of suspension; (3) a showing, confirmed by the office of the Counsel for Discipline, that there are no pending or unresolved disciplinary charges against Wintroub; (4) a showing that Wintroub has completed a course in law office management which includes instruction in proper bookkeeping procedures; (5) the submission by Wintroub and approval by this court of a probation plan, to be in effect for a period of not less than 2 years following readmission, whereby Wintroub's recovery program and his compliance with the Code of Professional Responsibility

would be monitored by an attorney monitor selected or approved by the director of the Nebraska Lawyers Assistance Program. Such plan should provide that the attorney monitor shall not be compensated for his or her duties, but he or she shall be reimbursed by Wintroub for actual expenses incurred. The plan of probation must also require that the attorney monitor will review any trust account maintained by Wintroub on a monthly basis during the period of probation and report any trust account irregularity or other disciplinary violation to the office of the Counsel for Discipline. At the end of the 2-year probationary period, it will be Wintroub's burden to show cause why the period of probation should not be extended for another year.

CONCLUSION

It is the judgment of this court that Wintroub be suspended from the practice of law, beginning on the date of his temporary suspension on December 30, 2002, and continuing until at least December 30, 2004, when he will be eligible to apply for readmission. Upon readmission, Wintroub shall be subject to a term of probation for not less than 2 years, in compliance with the terms as outlined above. Wintroub shall comply with disciplinary rule 16, and upon failure to do so, Wintroub shall be subject to punishment for contempt of this court. Accordingly, Wintroub is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION AND PROBATION.

CAROL LUDWICK, APPELLANT, V. TRIWEST HEALTHCARE ALLIANCE AND PHYSICIANS CLINIC, INC., APPELLEES.

678 N.W.2d 517

Filed April 29, 2004. No. S-02-200.

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. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation: Words and Phrases.** Under the Nebraska Workers' Compensation Act, an "occupational disease" is a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed. "Injury" and "personal injuries" mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms "injury" and "personal injuries" include disablement resulting from occupational disease.
6. **Workers' Compensation: Time.** Under the Nebraska Workers' Compensation Act, an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of the body and a disability has resulted. In other words, an occupational disease has caused an "injury," within the meaning of the act, at the point it has resulted in disability.
7. ____: ____. A worker becomes disabled, and thus injured, from an occupational disease at the point in time when a permanent medical impairment or medically assessed work restrictions result in labor market access loss.
8. **Workers' Compensation.** An employee's disability caused by an occupational disease is determined by the employee's diminution of employability or impairment of earning power or earning capacity.
9. **Workers' Compensation: Expert Witnesses.** It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, INBODY, and CARLSON, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., for appellant.

Joseph W. Grant, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellee TriWest Healthcare Alliance.

Kirk S. Blecha and Theresa A. Schneider, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee Physicians Clinic, Inc.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

PER CURIAM.

We granted Carol Ludwick's petition for further review of the decision of the Nebraska Court of Appeals in *Ludwick v. TriWest Healthcare Alliance*, No. A-02-200, 2003 WL 282588 (Neb. App. Feb. 11, 2003) (not designated for permanent publication). Ludwick contends the Court of Appeals erred in affirming the trial court's dismissal of her petition based on the appellate court's finding that Ludwick's latex allergy manifested itself in disability in 1992 and that subsequent reactions during her employment with the defendants were merely recurrences.

FACTUAL BACKGROUND

On March 9, 2001, Ludwick filed an amended petition alleging that she was entitled to workers' compensation benefits because "[o]n or about February 12, 1999, [her] symptomology and latex sensitization deteriorated and worsened to the extent that she could no longer safely perform her work duties and was required to cease her employment and pursue work where the risk of latex exposure would be diminished." Ludwick alleged that she suffered injuries as a result of an occupational disease arising out of and in the course of her employment with Physicians Clinic, Inc. (Physicians), and TriWest Healthcare Alliance (TriWest). Physicians and TriWest denied the allegations, and proceedings were held in the Workers' Compensation Court on June 15, 2001.

Ludwick was employed as a surgical nurse at Bergan Mercy Hospital (Bergan Mercy) from 1981 to 1993. During her time at Bergan Mercy, Ludwick was exposed to latex gloves and latex powder. She experienced rashes, hives, and wheezing symptoms, for which she received medical attention. Ludwick testified that her symptoms seemed to progressively worsen to the point where she was experiencing rashes, hives, and difficulty breathing at least once a month. In 1992, Ludwick had an anaphylactic-reaction to latex that required an epinephrine shot. Ludwick testified that she left Bergan Mercy in 1993 in order to take care of her children and to obtain employment where she would not be exposed to latex gloves because it was her

belief at that time that the powder in the latex gloves was causing her reactions.

From December 1994 to June 1997, Ludwick worked at Physicians as an office nurse. Ludwick was again exposed to latex which caused her to experience latex-related reactions. Ludwick sought medical treatment at Physicians for these reactions and was diagnosed with latex allergies on February 6, 1995. At that time, she was generally advised to avoid latex and began using vinyl gloves. Ludwick testified that she left Physicians to find another position where she would have a decreased exposure to latex.

Ludwick began working at TriWest on June 10, 1997, as a referral nurse, which involved working at a computer and telephone to authorize surgical procedures and did not involve any direct patient contact. Initially, Ludwick did not experience any latex-related problems. However, she began experiencing itching, hives, and difficulty breathing after TriWest moved into a new office building. The move to TriWest's new office building coincided with Ludwick's move into her new home. Ludwick testified that at the time TriWest moved to its new office building, she believed that her reactions may have been the result of problems with her new house. Ludwick testified that she does not know how much latex she was exposed to at TriWest, but that she had reactions "all the time," including four to five emergency room visits. On cross-examination, Ludwick conceded that three of these visits were attributed at the time to allergic reactions to food, not latex.

Ludwick resigned her position at TriWest on February 10, 1999. Initially, Ludwick testified that as a result of her health problems, she was on probation, and that she resigned because she thought she would be fired. On cross-examination, however, Ludwick acknowledged that three of the four documented reasons for her probation were not related to her health problems. The fourth reason was failure to give proper notice when taking time off.

From approximately 1993 continuing to the date of trial, Ludwick worked on an intermittent basis for Nurse Providers. After resigning from TriWest, Ludwick began working full time for Nurse Providers. This work involved providing patient care.

Although Ludwick attempted to limit her exposure to latex in this position, she was unable to avoid it entirely. At the time of trial, Ludwick was still employed by Nurse Providers on an "on-call basis."

At the time of trial in June 2001, Ludwick was also employed by Pediatric Associates as an office nurse, a position she had held since April of that year. Ludwick testified that Pediatric Associates has been able to accommodate her allergy problems, that she has only minor symptoms, and that although she is still exposed to latex and still has reactions, she is doing "better."

Dr. Ted Segura treated Ludwick for her allergies beginning in 1998. In a letter dated June 12, 2001, which was received in evidence at trial, he made recommendations for creating a latex-safe work environment for Ludwick. These recommendations included: avoiding the personal use of latex gloves, avoiding any environment in which powdered latex gloves are used, and avoiding intimate contact with latex items such as dental dams, condoms, balloons, and tourniquets. Despite these restrictions, Segura concluded that "[f]rom the standpoint of her latex allergy alone, Ms. Ludwick should be able to find a full-time position in a latex-safe environment."

Dr. Mary Wampler reviewed Ludwick's medical records. In a letter dated March 6, 2001, which was received at trial, Wampler concluded that Ludwick had developed "Type I" hypersensitivity to latex, or anaphylactic response, during her employment at Bergan Mercy. She stated that once an individual has progressed to this reaction to latex, no more aggravated reaction can occur because it is "as severe a reaction to latex [as] one can develop, short of death." Wampler thus opined that any symptoms Ludwick experienced after leaving Bergan Mercy were simply recurrences of the latex hypersensitivity and did not represent a worsening of her condition.

Jack Greene, a vocational rehabilitation counselor, stated in a report received at trial that Ludwick is able to continue employment as a registered nurse as long as she limits her exposure to latex. Greene opined, however, that Ludwick has experienced a 25-percent loss of earning capacity as a direct result of her hypersensitivity to latex, primarily because of her inability to work in a hospital environment.

The trial court, in its order filed August 22, 2001, dismissed Ludwick's petition, finding that she did not sustain an occupational disease during her employment with either Physicians or TriWest. Relying on Wampler's report, the trial court found that Ludwick's "last injurious exposure" to latex was prior to her employment at either Physicians or TriWest. Ludwick appealed to the workers' compensation review panel, and on January 18, 2002, the review panel affirmed the trial court's dismissal. In addition, the review panel ruled in favor of TriWest on its cross-appeal in which it contended that Ludwick failed to prove exposure to latex in the course of her employment with TriWest.

Ludwick appealed, and in an unpublished opinion, the Court of Appeals affirmed the dismissal without reference to TriWest's cross-appeal. *Ludwick v. TriWest Healthcare Alliance*, No. A-02-200, 2003 WL 282588 (Neb. App. Feb. 11, 2003) (not designated for permanent publication). The Court of Appeals determined that Ludwick's disability occurred in 1992 during her employment at Bergan Mercy, when she was forced to cease work and seek immediate medical attention, and that any subsequent reactions that occurred while she was in the employ of Physicians and TriWest were not causally connected to her disability. We granted Ludwick's petition for further review.

ASSIGNMENTS OF ERROR

Ludwick assigns, restated, that the Court of Appeals erred in (1) finding that Ludwick's disability, as opposed to her disease, occurred in 1992; (2) finding that Ludwick's acute allergic reactions caused by exposure to latex antigens in the workplace were a recurrence, as opposed to an aggravation, of her latex allergy disease; and (3) failing to apply the last injurious exposure rule.

In a purported cross-appeal asserted in its supplemental brief filed pursuant to Neb. Ct. R. of Prac. 2H (rev. 2002), TriWest assigns that the Court of Appeals erred when it failed to acknowledge and affirm the review panel's action sustaining TriWest's cross-appeal in which the review panel found that Ludwick failed to prove any exposure to latex during the course of her employment with TriWest. We do not reach this issue on appeal because TriWest did not petition for further review. See rule 2.

STANDARD OF REVIEW

[1] 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. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003); *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Morris v. Nebraska Health System, supra*; *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

[3,4] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Morris v. Nebraska Health System, supra*; *Zavala v. ConAgra Beef Co., supra*; *Frauendorfer v. Lindsay Mfg. Co., supra*. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003); *Morris v. Nebraska Health System, supra*; *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002); *Vega v. Iowa Beef Processors, supra*.

ANALYSIS

BACKGROUND

Under the Nebraska Workers' Compensation Act, "[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," the employee is entitled to compensation unless willfully negligent at the time of receiving the injury. Neb. Rev. Stat. § 48-101 (Reissue 1998). The central issue in this case is whether Ludwick sustained a compensable injury caused by an

occupational disease arising out of and in the course of her employment with Physicians or TriWest.

[5] Under the Nebraska Workers' Compensation Act, an "occupational disease" is a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed. See Neb. Rev. Stat. § 48-151(3) (Cum. Supp. 2002). "Injury" and "personal injuries" mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. § 48-151(4). The terms "injury" and "personal injuries" "include disablement resulting from occupational disease." *Id.*

If an injury results in disability, the disabled employee is compensated under the schedule set forth in the act. See Neb. Rev. Stat. §§ 48-109 (Reissue 1998) and 48-121 (Cum. Supp. 2002). If the employee is totally disabled, he or she is compensated based on a fixed percentage of the wages received at the time of the injury. See § 48-121(1). If the employee is partially disabled, except for scheduled member injuries, he or she is compensated for his or her loss of earning power. See § 48-121(2) and (3).

[6] Thus, under the Nebraska Workers' Compensation Act, an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of the body and a disability has resulted. See § 48-151(4). In other words, an occupational disease has caused an "injury," within the meaning of the act, at the point it has resulted in disability. See *id.* The resulting disability—assuming that a timely claim has been made—is compensated pursuant to the schedule set forth in the act. See §§ 48-109 and 48-121.

Date of Disability

The above illustrates that it is crucial in occupational disease cases to determine the date of disability, because until that date, the employee has suffered no compensable injury. The term "disability," however, is not expressly defined in the act. In cases involving injuries resulting from accidents, we have generally stated that disability is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. See *Minshall v. Plains Mfg. Co.*, 215 Neb. 881, 341 N.W.2d 906

(1983). In occupational disease cases, however, we have referenced the concept of disability slightly differently, stating that disability results at the point when "the injured worker is no longer able to render further service." *Morris v. Nebraska Health System*, 266 Neb. 285, 291, 664 N.W.2d 436, 441 (2003). See, also, *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995); *Osteen v. A.C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981); *Hauff v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956). We take this opportunity to clarify that the concept of disability is the same in both accident and occupational disease cases. To do so, it is necessary to examine the historical development of our occupational disease law.

We held in *Hauff v. Kimball, supra*, that the date of injury in cases of occupational disease was the time that disability first occurred.

> "Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be 'injured' only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation; and the 'date of injury,' within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred . . . ."

Hauff v. Kimball, 163 Neb. at 61, 77 N.W.2d at 687. We reaffirmed that holding in *Osteen v. A.C. and S., Inc., supra*. We also held in *Osteen* that the amount of the plaintiff's award was limited to the statutory maximum in effect at the time the plaintiff stopped working, because "in the case of an occupational disease such as this one, the ' "date of injury," within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred . . . .' " 209 Neb. at 292, 307 N.W.2d at 521, quoting *Hauff v. Kimball, supra*.

We next addressed the date of injury for occupational diseases in *Hull v. Aetna Ins. Co., supra*. In *Hull*, a dentist became unable to work in his profession due to contact dermatitis, and in order to determine which of two successive workers' compensation insurers was liable for the dentist's disability, we were required to determine the date of injury. *Hull* utilized the "rendering further

service" language for the first time, stating that "the date that determines liability is the date that the employee becomes disabled from rendering further service." 247 Neb. at 719, 529 N.W.2d at 789, citing *Lowery v. McCormick Asbestos Co.*, 300 Md. 28, 475 A.2d 1168 (1984). An examination of *Lowery* provides some context for this formulation of the rule:

> "Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date. In the search for an identifiable instant in time which can perform such necessary functions as to start claim periods running, establish claimant's right to benefits, determine which year's statute applies, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory. Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know he has a compensable claim; and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are usually not susceptible to positive demonstration."

300 Md. at 39-40, 475 A.2d at 1174. See 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 153.02[6][a] (2003). Notably, in *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995), the employee dentist experienced problems with contact dermatitis from 1987 to 1991. His reaction at one point in 1988 was so significant that it affected his fingers and hands and caused him to miss almost 1 week of work. On March 13, 1989, he was treated by a physician who recommended that he cease practicing dentistry. Although he reduced his hours to 10 per week, he did not completely abandon his dental practice until 1991. On these facts and applying the above rule, we found that the occupational disease manifested itself to the level of disability on March 13, 1989, and thus that that was the date of injury.

Subsequently, the Court of Appeals discussed *Hull* in *Ross v. Baldwin Filters*, 5 Neb. App. 194, 557 N.W.2d 368 (1996). In *Ross*, the plaintiff suffered from a skin condition that doctors linked to her employment as early as 1989. It was not until 1994, however, that the condition began to interfere with her ability to

work and a doctor recommended that she quit her job. Referencing *Hull*, the Court of Appeals found:

> This analysis is consistent with the definition and general treatment of the concept of "disability" under Nebraska workers' compensation laws. For example, "disability" within the meaning of Neb. Rev. Stat. § 48-128 (Reissue 1993), which addresses preexisting disabilities for the purpose of the Second Injury Fund, is defined as "an employee's diminution of employability or impairment of earning power or capacity." *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 909, 464 N.W.2d 343, 349 (1991). For the purpose of Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1993) (schedule of compensation), "disability" is defined "in terms of employability and earning capacity." *Minshall v. Plains Mfg. Co.*, 215 Neb. 881, 885, 341 N.W.2d 906, 909 (1983). [The plaintiff's] employability at Baldwin Filters first diminished in April 1994, when her condition had progressed to the point where her employment there had to cease.
>
> Thus, we conclude that the statute of limitations did not begin to run until April 1994 . . . .

Ross v. Baldwin Filters, 5 Neb. App. at 203, 557 N.W.2d at 373.

In *Jordan v. Morrill County*, 258 Neb. 380, 389, 603 N.W.2d 411, 418 (1999), and *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 558, 635 N.W.2d 405, 410 (2001), we described occupational disease cases as requiring "cessation of employment," as do repetitive trauma accident cases. Based on this language, the Court of Appeals concluded that the date of injury in both occupational disease and accidental injury cases was the same. See *Watson v. Omaha Pub. Power Dist.*, 9 Neb. App. 909, 622 N.W.2d 163 (2001). However, we recently clarified this aspect of our occupational disease law in *Morris v. Nebraska Health System*, 266 Neb. 285, 293, 664 N.W.2d 436, 442 (2003):

> *Jordan* and *Vonderschmidt* are inapplicable, as they are both repetitive trauma cases. This court has consistently analyzed repetitive trauma injuries as accidents within the meaning of Neb. Rev. Stat. § 48-151(2) (Reissue 1998), rather than occupational diseases. . . . Accordingly, our discussion in *Vonderschmidt* of the "discontinuation of

> employment" standard was framed in the context of establishing an identifiable point in time when an accident occurs "suddenly and violently" within the meaning of § 48-151(2). However, such an inquiry is unnecessary in an occupational disease case and, as such, has no application to the issues presented by this case. Any suggestion in either *Jordan* or *Vonderschmidt* that the "discontinuation of employment" standard is the same for both repetitive trauma and occupational disease cases is dicta and contrary to this state's line of occupational disease case law.

We further held in *Morris*:

> When considered collectively, *Hauff* [*v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956)], *Osteen* [*v. A.C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981)], and *Hull* [*v. Aetna Ins Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995)] set forth the rule that in an occupational disease context, *the "date of injury" is that date upon which the accumulated effects of the disease manifest themselves to the point the injured worker is no longer able to render further service. It is on that date that the occupational disease is said to manifest itself to the level of disability* permitting recovery for an occupational disease pursuant to the Nebraska Workers' Compensation Act.

(Emphasis supplied.) 266 Neb. at 291, 664 N.W.2d at 441.

[7,8] Thus, as recently as *Morris*, we continued to use the "no longer able to render further service" language when referring to "disability" in the occupational disease context. Read literally, this language implies that an employee must be permanently and totally disabled in order to be compensated for an occupational disease. However, as the above discussion of our occupational disease case law reveals, the phraseology means no such thing. Rather, there is no requirement in either our case law or the act that an employee be *totally* disabled in order for the date of injury to be established in an occupational disease case. An employee is "injured," for purposes of the act, on the date when the right to compensation accrues, even if the disability is only partial in nature. We therefore now clarify that the "no longer able to render further service" phraseology in our occupational disease case law refers to nothing other than the date of disability, partial or

total, as that term is commonly understood in workers' compensation law. We hold, restated, that a worker becomes disabled, and thus injured, from an occupational disease at the point in time when a permanent medical impairment or medically assessed work restrictions result in labor market access loss. See, *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002); *Jorn v. Pigs Unlimited, Inc.*, 255 Neb. 876, 587 N.W.2d 558 (1998). An employee's disability caused by an occupational disease is determined by the employee's diminution of employability or impairment of earning power or earning capacity. See, *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

APPLICATION

In the instant case, the Court of Appeals cited *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), and *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001), for the proposition that cessation of employment is a requirement for recovery of workers' compensation benefits regardless of whether an injury arises from an accident or an occupational disease. *Ludwick v. TriWest Healthcare Alliance*, No. A-02-200, 2003 WL 282588 (Neb. App. Feb. 11, 2003) (not designated for permanent publication). The court reasoned that because Ludwick was required to cease work temporarily and seek medical attention for an anaphylactic reaction to latex during her employment with Bergan Mercy in 1992, her injury, and thus her disability, occurred on that date and not during her subsequent employment at Physicians or TriWest, when the symptoms recurred. In light of *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003), this was an incorrect application of *Jordan* and *Vonderschmidt* to Ludwick's claim that she sustained a disability caused by an occupational disease. However, we agree with the ultimate determination of the Court of Appeals that Ludwick's injury and disability occurred in 1992.

Although no formal work restrictions were imposed upon Ludwick until Segura's recommendations in 2001, Wampler's letter clearly reveals that Ludwick suffered permanent medical impairment as early as 1992, while she was employed at Bergan

Mercy. This medical opinion, combined with the opinion of the vocational rehabilitation expert that Ludwick sustained a 25-percent loss of earning capacity primarily because of her inability to work in a hospital setting because of her hypersensitivity to latex, establishes the onset of her disability in 1992. The remaining question, therefore, is whether her exposures at Physicians and TriWest were merely recurrences or were aggravations of her injury. See *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

In this case, the single judge found Wampler's opinion to be credible. Wampler opined that Ludwick's latex hypersensitivity developed during her employment at Bergan Mercy in 1992 and that any reaction after that was recurrent. Wampler specifically concluded that Ludwick's condition could not and did not worsen after her employment at Bergan Mercy. Based on this evidence, the single judge concluded that Ludwick was not entitled to compensation from Physicians or TriWest.

[9] It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe. *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000). Findings of fact may be reversed by this court only if they are clearly erroneous. *Id.* Based upon Wampler's testimony that Ludwick's latex hypersensitivity occupational disease was not causally related to any latex exposure at either Physicians or TriWest, it was not clearly erroneous for the single judge to find that Physicians and TriWest, the defendants in this case, are not liable for workers' compensation benefits.

CONCLUSION

Ludwick's claim for compensation has been brought against employers who are not liable for her compensation benefits. The judgment of the Court of Appeals affirming the judgment of the Workers' Compensation Court is therefore affirmed.

AFFIRMED.

McCORMACK, J., not participating.

KIMBERLEY FAYE GANGWISH, APPELLANT AND CROSS-APPELLEE, V. PAUL ALLAN GANGWISH, APPELLEE AND CROSS-APPELLANT.

678 N.W.2d 503

Filed April 29, 2004. No. S-02-274.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Divorce: Property Division: Alimony: Attorney Fees: 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; this standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
3. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
4. **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.
5. **Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
6. ____. Under Neb. Rev. Stat. § 42-365 (Reissue 1998), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
7. ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
8. **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.
9. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
10. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. Such exceptions include property accumulated and acquired through gift or inheritance.
11. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
12. **Child Support: Rules of the Supreme Court.** The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective incomes.

13. ____: ____. In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation.
14. **Child Support: Rules of the Supreme Court: Words and Phrases.** The Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, a 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 and payments received for children of prior marriages.
15. **Child Support: Taxation.** Income for the purpose of child support is not necessarily synonymous with taxable income.
16. **Corporations: Courts: Equity.** Ordinarily, a corporation is regarded as a separate entity, distinct from the members who compose it; however, equity allows a court to disregard the corporate veil when necessary to do justice.
17. **Parent and Child: Child Support.** Support of one's children is a fundamental obligation which takes precedence over almost everything else.

Appeal from the District Court for Buffalo County: TERESA K. LUTHER, Judge. Affirmed in part, and in part reversed and remanded with directions.

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

Heather Swanson-Murray, of Yeagley Law Offices, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

I. NATURE OF CASE

Kimberley Faye Gangwish appeals from the decree dissolving her marriage to Paul Allan Gangwish, and Paul cross-appeals. At issue in this appeal are the trial court's decisions with respect to the property division, the child support determination, and an attorney fees award.

II. FACTUAL AND PROCEDURAL BACKGROUND

On November 5, 1988, Kimberley and Paul were married in Hastings, Nebraska. In the following years, three children were born to the marriage, currently ages 8, 11, and 13. Prior to their marriage, Paul worked for Gangwish Seed Farms, Inc., a family corporation, which had been founded by his father. In 1994, Paul stopped working for Gangwish Seed Farms and began to pursue

his own farming operation. To do so, Paul and Kimberley formed P.G. Farms, Inc., of which they are the sole and equal shareholders. Essentially, P.G. Farms is the corporate body through which Paul conducts his farming operation. Paul is considered an employee of P.G. Farms.

Prior to, and throughout the marriage, Kimberley has worked as a physician's assistant. During the marriage, however, Kimberley's employment arrangement changed and she became an independent contractor. In an effort to reduce Kimberley's tax liability, Paul and Kimberley formed K.F.G., Inc. Thereafter, whenever Kimberley would receive a paycheck, she would deposit the check into K.F.G.'s corporate account. Currently, Kimberley works nearly full time, earning $40 per hour.

On May 30, 2000, Kimberley filed a petition to dissolve the marriage, seeking custody of the children, child support, exclusive use of the family residence, and equitable division of the property. Finding the parties' marriage to be irretrievably broken, the trial court ordered the marriage to be dissolved. In addition, the court granted custody of the children to Kimberley, subject to reasonable visitation by Paul, and ordered Paul to pay child support in the amount of $1,567 per month. Paul was also ordered to maintain health insurance on the children, pay 66 percent of daycare expenses, and pay 66 percent of any unreimbursed medical, dental, optical, and orthodontia expenses.

As to the distribution of the parties' property, Kimberley was awarded, inter alia, (1) household furnishings and equipment, (2) two accounts at First State Bank of Shelton, (3) her retirement plans, (4) 14 shares of Gangwish Seed Farms; and (5) all shares of stock in K.F.G. Paul, on the other hand, was awarded, inter alia, (1) household furnishings and equipment; (2) two accounts at First State Bank of Shelton; (3) all shares of stock in P.G. Farms; (4) all shares of stock in Gangwish Seed Farms, minus the 14 shares awarded to Kimberley; (5) all shares of stock in another corporation, Platteland, Inc.; and (6) 320 acres of real estate in Buffalo County. To equalize the property settlement, the court ordered Paul to (1) pay a number of debts owed by the parties and their corporations, and to hold Kimberley harmless on the same, and (2) pay Kimberley $471,871.50. Paul was also ordered to pay $10,000 of Kimberley's legal fees.

On January 16, 2000, Kimberley moved for a new trial. In her motion for new trial, Kimberley alleged, inter alia, that (1) the court erred in its division of assets and debts, (2) the decision to grant the family home to Paul was contrary to the best interests of the children, (3) the court erred in its asset evaluation, and (4) the award of child support was not in accord with the Nebraska Child Support Guidelines. After a hearing, Kimberley's motion was denied. Thereafter, Kimberley filed a timely notice of appeal, and Paul cross-appealed.

III. ASSIGNMENTS OF ERROR

Kimberley assigns, restated, that the trial court erred in (1) failing to award Kimberley the family home, (2) failing to add to Paul's income the depreciation expenses taken by P.G. Farms for purposes of determining child support, and (3) not deviating upward from the child support guidelines.

In his cross-appeal, Paul assigns, renumbered and restated, that the trial court erred in (1) failing to adequately account for the student loans Kimberley brought into the marriage; (2) failing to give Paul a credit for the personal, premarital funds he used to make a downpayment on the parties' first home; (3) awarding shares of Gangwish Seed Farms stock to Kimberley; (4) calculating Paul's child support obligation; and (5) awarding attorney fees to Kimberley.

IV. STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Olson v. Sherrerd,* 266 Neb. 207, 663 N.W.2d 617 (2003).

[2] 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; this standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003).

[3] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Claborn v. Claborn*, *ante* p. 201, 673 N.W.2d 533 (2004).

V. ANALYSIS

The parties' assignments of error fall into three categories: property division, child support, and award of attorney fees to Kimberley.

1. Property Division

(a) The Marital Residence

During oral argument, Kimberley withdrew her first assignment of error relating to the trial court's award of the family home to Paul. Therefore, we will not discuss this previously assigned error.

(b) Kimberley's Student Loans

At the time of the parties' marriage, Kimberley owed $12,399.43 in student loans. During the marriage, Kimberley's loans were paid off with marital funds. However, in its decree, the trial court accounted for only $7,000 of the $12,399.43 debt that Kimberley brought into the marriage. Paul argues the court erred by failing to deduct the remaining $5,399.43 from Kimberley's award.

[4] We agree that Kimberley's award should have been reduced by the total student loan debt that she brought into the marriage because that debt was paid off with marital assets. However, we do not believe this mistake constitutes an abuse of judicial discretion when it is placed in the context of the property division as a whole. 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; this standard of review applies to the trial court's determinations regarding the division of property. *Longo, supra.* 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. *Nelson v. Nelson, ante* p. 362, 674 N.W.2d 473 (2004).

Here, the marital estate totaled well over $1 million and the alleged mistake constitutes less than one-half of 1 percent of this

total. Under these circumstances, we cannot say the court's error deprived Paul of a substantial right or a just result.

(c) Paul's Premarital Funds

Shortly before their marriage, in 1988, the parties purchased a home in Grand Island, Nebraska. At trial, Paul testified that he paid $10,619.93 in personal, premarital funds for the downpayment on the home. He also presented evidence, in the form of check stubs from a check register, of his $10,619.93 contribution. The warranty deed for the house lists both Paul and Kimberley as grantees. After the parties were married, they purchased a new home and moved to Shelton, Nebraska. Thereafter, they found a buyer for their home in Grand Island and applied the proceeds from that sale to the payments on their new home.

In 1998, the parties decided to build their current residence at the site of P.G. Farms' farming operation in rural Buffalo County. To do so, they sold their residence in Shelton and loaned the proceeds from that sale to P.G. Farms, from which P.G. Farms paid for the construction of their new, and current, residence. On appeal, Paul argues that the court erred by not giving him a credit for the $10,619.93 in personal, premarital funds that he expended for the downpayment on the parties' first home in Grand Island.

[5-7] The purpose of a property division is to distribute the marital assets equitably between the parties. Neb. Rev. Stat. § 42-365 (Reissue 1998); *Claborn v. Claborn, ante* p. 201, 673 N.W.2d 533 (2004). Under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Mathews v. Mathews, ante* p. 604, 676 N.W.2d 42 (2004). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

On a number of occasions, we have examined similar factual circumstances. For example, in *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000), we modified a property settlement to

credit the husband for making the downpayment on the parties' first marital home. In doing so, we recognized that when the husband made the downpayment, he used separate funds and was not yet married. *Id.* Therefore, because property which a party brings into the marriage is generally excluded from the marital estate, we determined that the husband was entitled to a credit for the downpayment he made on what became the parties' marital home. *Id.* Similarly, in *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001), we determined that a husband who owned the parties' residence prior to the parties' marriage was entitled to receive a credit for the amount of equity in the house at the time of the parties' marriage. See, also, *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003) (husband entitled to credit for downpayment he made on his business, when downpayment was made with separate funds, prior to his marriage).

[8] We note that in neither case did the husband and wife have joint title to the subject property prior to their marriage. However, we conclude that this is a distinction without a difference. In *Schuman, supra*, the husband inherited a sizeable amount of money from his mother during his marriage. After receiving the money, the husband took part of it and applied it toward the downpayment on an acreage that he and his wife took in joint title. During the dissolution action, the husband, claiming the deposit was paid for with separate property, sought a credit for the amount of money he expended on the downpayment. *Id.* The district court determined that the inherited money he used for the downpayment became marital property when the acreage was placed in joint tenancy with his wife and refused to give him a credit. *Id.* We reversed, concluding that 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. *Id.* Because the husband proved that $19,000 of the $20,000 downpayment for the acreage came from his separate funds, i.e., his inheritance, we determined he was entitled to a credit in that amount. *Id.*

Similarly, in the instant case, the fact that the parties' home was jointly titled does not alter the fact that Paul provided documentary evidence to establish that he contributed $10,619.93 of personal funds toward its purchase prior to the parties' marriage.

Under these circumstances, Paul proved that he made a sizeable contribution to what became a joint asset from his personal funds, and normally, he would be entitled to a credit in that amount. See *Heald, supra* (property which party brings into marriage is generally excluded from marital estate). To rule otherwise would be to presume that Paul's expenditure of personal, premarital funds was, in essence, a gift of $10,619.93 to Kimberley. This we will not do. See *Schuman, supra* (disapproving *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996)).

[9] Nonetheless, Paul is not entitled to a credit for the personal, premarital funds he expended on the parties' first home. The burden of proof to show that property is nonmarital remains with the person making the claim. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). At trial, Paul testified that the proceeds from the sale of the parties' first home were used to make payments on their second home. Paul also testified that the parties loaned the proceeds from the sale of their second home, as well as some personal funds, to P.G. Farms and that P.G. Farms paid for the construction of their current residence. Essentially, Paul claims that when the parties sold their first home, his separate, premarital contribution was used, along with the remaining proceeds from the sale, to make the payments on the parties' second home. When the parties sold their second home, Paul claims his separate, premarital contribution was loaned, along with the remaining proceeds from the sale, to P.G. Farms.

Paul, however, did not present evidence that his premarital contribution retained its status as separate property after the parties sold their first home. More significantly, even if we were to assume Paul could trace his personal, premarital interest from the parties' first home to their second, Paul presented no evidence to document how his separate interest in the proceeds from the second home were in fact loaned to P.G. Farms. In fact, outside of Paul's testimony, the record is devoid of evidence which establishes that *any* of the proceeds from the sale of the parties' second home were in fact loaned to P.G. Farms. In the absence of such evidence, we cannot say that the trial court abused its discretion by not giving Paul a credit for his premarital contribution toward the downpayment on the parties' first home. See *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985) (noting problems

with tracing premarital property through disposition and reinvestment during marriage).

(d) Gift of Stock

During the parties' marriage, Leland Gangwish, Paul's father, gifted shares of Gangwish Seed Farms stock to both Paul and Kimberley. On December 29, 1994, Paul and Kimberley each received a certificate for eight shares of Gangwish Seed Farms stock. On August 23, 1996, Kimberley transferred her eight shares to Paul. On December 30, 1996, Paul and Kimberley each received a certificate for six shares of Gangwish Seed Farms stock. On April 22, 1997, Kimberley transferred her six shares to Paul. Leland testified that it was his desire to give all 28 shares to Paul, but out of concern for the tax consequences, he chose to gift half of the shares to Kimberley, with the intent that she would transfer them to Paul at a later time. Both Paul and Kimberley were aware of Leland's intent when he made the gifts.

In its decree, the trial court awarded Kimberley 14 shares of Gangwish Seed Farms and the remainder to Paul. The shares were not assigned a value in the decree. On appeal, Paul argues that the trial court abused its discretion by awarding Kimberley 14 shares of his family's corporate stock because it was Leland's intention that Paul gain ownership of all 28 shares.

[10] Our review of the trial court's decree suggests that the court determined that all 28 shares were marital property and simply allocated half to each party. As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). Such exceptions include property accumulated and acquired through gift or inheritance. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

We agree the evidence showed that Leland wanted Paul to obtain eventual possession of all 28 shares of stock in Gangwish Seed Farms. However, the fact remains that Leland gave only 14 shares to Paul. Therefore, Paul is entitled to receive, as separate property, only the 14 shares of stock that he received from Leland as a gift. As to the 14 shares given to Kimberley, upon transferring ownership of the shares to Paul, they lost their status as a gift

and became part of the marital estate. Because no value was assigned to the shares, we conclude that the parties should divide these 14 remaining shares equally. On remand, the trial court is ordered to amend its decree to award Kimberley seven shares of stock in Gangwish Seed Farms and the remainder to Paul.

2. Child Support

In its decree, the trial court ordered Paul to pay child support in the amount of $1,567 per month. On appeal, Kimberley contends that this amount is too low. Specifically, Kimberley argues that the court should have (1) added to Paul's income the depreciation expenses taken by P.G. Farms and (2) deviated upward from the child support guidelines. Paul, on the other hand, argues that P.G. Farms is a separate corporate entity and that the court erred by adding P.G. Farms' income and/or depreciation expenses onto his income for purposes of determining child support.

The record shows that the trial court relied on the parties' federal joint tax return for 2000 in establishing Kimberley's gross income for child support purposes. The tax return reported that K.F.G. had an income of $50,880 in 2000, or a monthly income of $4,240. Using worksheet 1, the trial court stated that Kimberley's monthly income was $4,240, or $50,880 annually. Neither Kimberley nor Paul questions the court's determination of Kimberley's income.

As for Paul, the court stated that his monthly income was $10,208, or $122,497 annually. Both parties agree that it is unclear how the court arrived at this amount. The court may have used the parties' 2000 federal income tax return which claimed $122,424 in total income from both parties. However, this number includes, among other sources of income, K.F.G.'s earnings, e.g., Kimberley's income. The record does show that P.G. Farms paid Paul $6,000 in salary and that Paul received $1,500 in director fees from Platteland, Inc. The parties' joint tax return also shows they received income from other sources, such as rental income and capital gains. However, as Paul notes, even if these additional sources of income were attributed to Paul, his total monthly income would be substantially less than $10,208. Therefore, it is reasonable to conclude that the trial court, in calculating Paul's income, included some amount of income from P.G. Farms.

(a) Paul's Income

On appeal, Kimberley contends that the court should have added the depreciation expenses taken by P.G. Farms to Paul's income. Paul, on the other hand, argues that P.G. Farms is a separate corporate entity and that, therefore, neither P.G. Farms' income nor its depreciation expenses are relevant to his income for child support purposes.

[11-13] The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child. *Claborn v. Claborn, ante* p. 201, 673 N.W.2d 533 (2004). The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective incomes. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation. *Claborn, supra.*

[14,15] The Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, a 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 and payments received for children of prior marriages. *Marcovitz v. Rogers, ante* p. 456, 675 N.W.2d 132 (2004); Nebraska Child Support Guidelines, paragraph D. In the past, we have not set forth a rigid definition of what constitutes "income," but have instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be present in child support cases. *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001). Thus, income for the purpose of child support is not necessarily synonymous with taxable income. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000); *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

[16] We take a flexible approach in determining a person's "income" for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature. Thus, a court is allowed, for example, to add "in-kind"

benefits derived from an employer or third party to a party's income. See, *Workman, supra*; *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994). Likewise, we believe that a party's income, for purposes of determining child support, does not necessarily stop at the corporate structure of a closely held corporation. Although, ordinarily, a corporation is regarded as a separate entity, distinct from the members who compose it, equity allows a court to disregard the corporate veil when necessary to do justice. See *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). As noted previously, "justice," in child support determinations, is the best interests of the child. *Claborn, supra.*

Thus, we determine that under the appropriate factual circumstances, equity may require a trial court to calculate a party's income by looking through the legal structure of a closely held corporation of which the party is a shareholder. Stated otherwise, equity may demand that a court consider as income the earnings of a closely held corporation of which a party is a shareholder. The real question, however, is deciding what type of factual scenario justifies casting aside the corporate identity to place corporate income on the shareholder's side of the ledger. While the following is by no means meant to be exclusive, the facts of the instant case provide such an example:

The record establishes that throughout its existence, P.G. Farms has been used to pay for many of the parties' living expenses. For example, not only does P.G. Farms own the home in which the parties lived, it also paid for many of the costs of home ownership, including utilities, real estate taxes, homeowners insurance, yard care, and pool maintenance. In addition, P.G. Farms purchased the family's groceries and a number of the household furnishings, including a theater system, a washer and dryer, and bar stools. As Paul testified, "my salary from PG Farms is $6,000 a year. But there's other benefits from the company that we have had since the company was established that I would call a benefit in lieu of salary."

As mentioned previously, Kimberley and Paul were the sole and equal owners of P.G. Farms. In its decree, the trial court awarded Kimberley half of the value of P.G. Farms' assets. However, the court awarded Paul all of the shares of P.G. Farms'

stock, thereby making him the sole owner of P.G. Farms. Thus, where P.G. Farms was once used to supplement the parties' income by paying for a number of the family's living expenses, P.G. Farms' considerable revenue stream will now inure solely to the benefit of Paul.

In addition, the evidence reveals that throughout the parties' marriage, Paul was in sole control of the parties', as well as P.G. Farms', financial decisions. Therefore, the decision to treat P.G. Farms as the family's corporate piggy bank was Paul's. Likewise, the decision to pay Paul a salary of $6,000, while building value in the corporation, was Paul's. We note these facts not to question Paul's business decisions, but to show that Paul had, and continues to have, the ability to earn considerably more income than the $6,000 he receives from P.G. Farms. Moreover, the amount of salary and/or benefits in lieu of salary that Paul receives from P.G. Farms is, and will remain, Paul's decision.

[17] In cases such as these, a trial court should not only add "in-kind" benefits derived from an employer to a party's income, see *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001), but should also take into consideration the party's actual earning capacity. Nebraska Child Support Guidelines, paragraph D. See, also, *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001) (noting importance of determining party's actual earning capacity in child support cases); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991) (same). The need to examine a party's earning capacity is "especially true when it appears that the parent is capable of earning more income than is presently being earned." *Rauch v. Rauch*, 256 Neb. 257, 264, 590 N.W.2d 170, 175 (1999). Moreover, while we do not doubt that building equity in a corporation in lieu of taking salary can be a wise business decision, the "support of one's children is a fundamental obligation which takes precedence over almost everything else." *Id.* at 263-64, 590 N.W.2d at 175. Here, it would simply be inequitable for Paul's children to suffer because of his decision to build value in P.G. Farms by depressing his salary. See *id.* See, also, *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Gammel v. Gammel*, 259 Neb. 738, 612 N.W.2d 207 (2000); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

We note that our resolution of this matter is not unique. A number of courts have determined that perquisites supplied by a business to an employee, or a closely held corporation to a shareholder, should be considered as income for purposes of determining child support. See, *Mascaro v. Mascaro*, 569 Pa. 255, 803 A.2d 1186 (2002); *Clark v. Clark*, 172 Vt. 351, 779 A.2d 42 (2001); *Heisey v. Heisey*, 430 Pa. Super. 16, 633 A.2d 211 (1993); *Com. ex rel. Gutzeit v. Gutzeit*, 200 Pa. Super. 401, 189 A.2d 324 (1963). In addition, when a sole or majority shareholder uses the closely held corporation to pay for numerous personal expenses, courts have been willing to pierce the corporate veil and treat the corporation's income as the shareholder's own. See, *Morgan v. Ackerman*, 964 S.W.2d 865 (Mo. App. 1998); *Palazzo v. Palazzo*, 9 Conn. App. 486, 519 A.2d 1230 (1987); *Hurd v. Hurd*, 397 So. 2d 133 (Ala. Civ. App. 1980). Similarly, when a party is the sole or majority shareholder of a closely held corporation and determines his or her own salary, courts have been willing to pierce the corporate veil for the purpose of determining the party's income for child support. See, *Bleth v. Bleth*, 607 N.W.2d 577 (N.D. 2000); *Ochs v. Nelson*, 538 N.W.2d 527 (S.D. 1995); *Mitts v. Mitts*, 39 S.W.3d 142 (Tenn. App. 2000); *Morgan, supra*; *Isanti County v. Formhals*, 358 N.W.2d 703 (Minn. App. 1984); *Com. ex rel. Maier v. Maier*, 274 Pa. Super. 580, 418 A.2d 558 (1980). Simply put, courts throughout the nation have been unwavering in their attempt to reach an equitable outcome when it comes to determining a party's income for child support.

In sum, the court was within its discretion to look to P.G. Farms to determine Paul's income for child support purposes. However, we remain unable to determine how the trial court arrived at $10,208 as Paul's net monthly income. In any event, such a determination is a factual matter best left to the discretion of the trial court, and because we remand for a new determination of Paul's income, we need not dwell on this issue any further.

During the hearing on Kimberley's motion for a new trial, the trial court made it clear that it did not include P.G. Farms' depreciation expenses when determining Paul's monthly income. The record shows that in 1999, P.G. Farms had a gross income of over $1.08 million and took a $189,700 writeoff for depreciation.

Among other deductions, P.G. Farms' depreciation writeoff left it with a taxable income of $48,589. As noted above, Kimberley contends that the court should have included P.G. Farms' depreciation expenses when determining Paul's income.

Paragraph D of the Nebraska Child Support Guidelines, which discusses the proper treatment of depreciation expenses, was amended effective September 1, 2002. However, we must turn to the provision in effect at the time the dissolution action was filed. That provision states, "If a party is self-employed, depreciation claimed on tax returns should be added back to income or loss from the business or farm to arrive at an annualized total monthly income." Nebraska Child Support Guidelines, paragraph D. Thus, under usual circumstances, before we could add claimed depreciation to Paul's income, we would need to determine if Paul should have been considered as self-employed. See, *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Gammel v. Gammel,* 259 Neb. 738, 612 N.W.2d 207 (2000).

These, however, are not the usual circumstances. In the instant case, equity compels us to disregard the corporate entity, of which Paul is the sole shareholder, to determine Paul's true income. Thus, the measure of Paul's income is driven, in large part, by the profitability of his closely held corporation, P.G. Farms. Therefore, it is imperative that the court determine P.G. Farms' true income. To that end, corporate income, much like individual income, at least for the purposes of child support, is not necessarily synonymous with taxable income.

Under these circumstances, we determine that depreciation expenses must be considered in determining P.G. Farms' income. Otherwise, Paul would be allowed to benefit from his choice to build equity in P.G. Farms by taking depreciation and lowering profits. See, *Gase, supra*; *Gammel, supra*. Obviously, such a situation would work against the best interests of Paul's children because Paul would have a tax incentive to keep P.G. Farms' income as low as possible. Thus, the depreciation reported on P.G. Farms' tax returns must be added back to its income. See *Gammel, supra* (noting that for child support purposes, Nebraska Child Support Guidelines treat depreciation as book figure which does not involve any cash outlay or reduce actual dollar income and, therefore, should not be allowed as deduction).

In sum, we determine that the court did not abuse its discretion by looking to P.G. Farms to determine Paul's income. However, we conclude that the court abused its discretion by failing to add P.G. Farms' depreciation expenses to P.G. Farms' income before looking to P.G. Farms' income to determine Paul's income. Therefore, we reverse, and remand for a new determination of Paul's income. On remand, when determining Paul's income, the trial court should consider, in addition to looking to Paul's reported income, (1) the in-kind benefits, e.g., perquisites, that Paul receives from P.G. Farms; (2) P.G. Farms' depreciation expenses; and (3) with due regard for business realities, the amount of P.G. Farms' income which should equitably be attributed to Paul.

(b) Upward Deviation

The trial court determined that after deductions, Paul and Kimberley had a monthly net income of $10,132.69, or $121,592.26 annually. Kimberley contends that the court should have deviated upward from the child support guidelines. Because we remand for a new determination of Paul's income, we need not decide if the trial court erred in failing to deviate upward from guidelines.

3. Attorney Fees

Paul argues the trial court erred in ordering him to pay Kimberley $10,000 in attorney fees. In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Mathews v. Mathews, ante* p. 604, 676 N.W.2d 42 (2004). As noted previously, Paul was awarded a sizeable amount of the marital assets, including all the shares of stock in P.G. Farms, household goods and furnishings, and 320 acres of land in Buffalo County. In addition, as the sole shareholder of P.G. Farms, Paul will continue to reap the benefit of its substantial income stream. Thus, under these circumstances, we cannot say the trial court abused its discretion by awarding Kimberley $10,000 in attorney fees.

VI. CONCLUSION

For the foregoing reasons, the trial court's property division is affirmed with respect to ownership of the marital residence, the

accounting of Kimberley's student loans, and the accounting of Paul's premarital funds. With respect to the division of shares in Gangwish Seed Farms, we conclude that the trial court abused its discretion and remand with directions to award Kimberley seven shares of stock in Gangwish Seed Farms and the remainder to Paul. As to child support, we conclude that the trial court erred in its determination of Paul's income, and remand for a new income determination in accordance with this opinion. Finally, we conclude that the trial court did not abuse its discretion by ordering Paul to pay Kimberley $10,000 in attorney fees.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL E. SMITH, APPELLANT.

678 N.W.2d 733

Filed April 29, 2004. No. S-02-1482.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When dispositive 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.
3. **Lesser-Included Offenses.** The test adopted by the Nebraska Supreme Court to determine whether one crime is a lesser-included offense of another is a statutory elements test in which a court looks to the statutory elements of each crime rather than the particular facts of a specific case.
4. ____. In order to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
5. **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.
6. **Criminal Law.** The crime proscribed by Neb. Rev. Stat. § 28-311.01 (Reissue 1995) does not require that the recipient of the threat be terrorized.
7. **Criminal Law: Intent.** The crime proscribed by Neb. Rev. Stat. § 28-311.01 (Reissue 1995) does not require an intent to execute the threats made.

8. **Assault: Intent.** Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1995) renders unlawful a promise to do another person bodily harm which is made in such a manner as to intentionally cause a reasonable person in the position of the one threatened to suffer apprehension of being so harmed.

Petition for further review from the Nebraska Court of Appeals, HANNON and INBODY, Judges, and BUCKLEY, District Judge, Retired, on appeal thereto from the District Court for Hall County, TERESA K. LUTHER, Judge. Judgment of Court of Appeals affirmed.

Jerry J. Fogarty and John C. Jorgensen, Deputy Hall County Public Defenders, for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Daniel E. Smith seeks further review of the Nebraska Court of Appeals' decision affirming his convictions for terroristic threats and use of a deadly weapon to commit a felony. The sole issue presented is whether the district court should have instructed the jury upon third degree assault under Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1995) as a lesser-included offense of terroristic threats under Neb. Rev. Stat. § 28-311.01(1)(a) (Reissue 1995).

BACKGROUND

On June 3, 2002, Smith and his wife, Tamera Smith (Tamera), were living in Grand Island, Nebraska, with their 15-year-old son. When Tamera came home from work that evening, Smith asked her what she would like for supper. Tamera told Smith that he should decide and, because he had been home all day, that he should be able to have supper ready when she arrived home from work. Smith was angered by her comments, and an argument ensued. During the argument, Smith went to the kitchen and got an 8-inch chef knife from a butcher block. With

the knife in hand, Smith then began to go toward Tamera, who retreated to the bathroom. At the same time, Tamera called out to her son, saying that he should call the police, which he did.

As Tamera was holding the bathroom door closed and attempting to lock it, Smith yelled that he was going to kill her. Smith then stabbed the knife into the door. The knife went through the door and emerged on the other side just above Tamera's head. Smith continued to bang on the door, eventually breaking through it and into the bathroom. Smith then began to push Tamera backward (he no longer held the knife) while Tamera pleaded with him to consider their children. Smith again threatened to kill Tamera, but she was eventually able to get past Smith and ran into her bedroom. Tamera then attempted to reason with Smith, telling him that they could discuss the situation like adults. However, Smith remained angry, went back into the kitchen and got another knife from the butcher block. Tamera was able to escape from the house and ran next door to the neighbor's house. Soon thereafter, two Grand Island Police Department officers arrived at the Smith home and took Smith into custody. At trial, Smith admitted to stabbing the knife through the bathroom door but was unable to remember exactly what he said during the incident. He further testified that he had no intention of terrorizing Tamera and that he "just wanted to make her stop."

Smith was charged with one count of terroristic threats in violation of § 28-311.01(1)(a), a Class IV felony, and one count of use of a deadly weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1995), a Class III felony. A jury trial was held. During the jury instruction conference, Smith objected to the district court's failure to instruct the jury that third degree assault under § 28-310(1)(b) was a lesser-included offense of terroristic threats. The objection was overruled. The jury returned guilty verdicts against Smith on both counts. He was sentenced to 36 months of intensive supervision probation.

Smith asserted several errors on appeal, including that the jury should have been instructed upon third degree assault as a lesser-included offense of terroristic threats. The Court of Appeals affirmed his conviction. *State v. Smith*, No. A-02-1482, 2003 WL 22769284 (Neb. App. Nov. 25, 2003) (not designated for permanent publication). We granted Smith's petition for further review.

ASSIGNMENT OF ERROR

Smith's sole assignment of error is that the district court failed to instruct the jury upon third degree assault as a lesser-included offense of terroristic threats.

STANDARD OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003). When dispositive 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. *Id.*

ANALYSIS

[3] The test adopted by this court to determine whether one crime is a lesser-included offense of another is a statutory elements test in which a court looks to the statutory elements of each crime rather than the particular facts of a specific case. *State v. Putz, supra*; *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993) (abandoning cognate evidence approach for determining what constitutes lesser-included offenses in favor of statutory elements approach). Smith invites us to utilize the old cognate evidence test in this and future cases. We have declined such invitations since *State v. Williams* was decided, see *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997), and do so again here.

[4,5] In order to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. *State v. Williams, supra*. Otherwise stated, a lesser-included offense is one which is fully embraced in the higher offense. *Id.* Once it is determined that an offense is a lesser-included one, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense. *State v. Williams, supra*. Consequently, 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. Williams, supra.*

Nebraska's terroristic threats statute, § 28-311.01, provides in relevant part: "(1) A person commits terroristic threats if he or she threatens to commit any crime of violence: (a) With the intent to terrorize another." A person commits third degree assault in relevant part if he or she "[t]hreatens another in a menacing manner." § 28-310(1)(b). Each crime shares one element: a threat. See *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993) (collecting cases describing meaning of words "threat" and "threaten" in § 28-311.01(1)).

In addition to a threat, § 28-311.01(1)(a) requires that the threat to commit a violent crime be made "[w]ith the intent to terrorize another." Section 28-310(1)(b) requires that the threat be made "in a menacing manner." Our prior cases have explained "intent to terrorize another" and "menacing" in greater detail.

[6,7] In *State v. Schmailzl, supra*, we stated that § 28-311.01(1)(a) prohibits a threat to commit a violent crime when the threat is made with the intention of causing "a state of intense fear in another." *State v. Schmailzl*, 243 Neb. at 741, 502 N.W.2d at 467. In the same opinion, we also equated the intent to terrorize another with the "production of anxiety in another." *Id.* at 742, 502 N.W.2d at 468. Thus, the intent to terrorize another is an intent to produce intense fear or anxiety in another. However, a critical feature of the statute for purposes of our analysis here is that it merely requires the *intent* to terrorize another. It does not require that the recipient of the threat be actually terrorized, and it does not require an intent to execute the threats made. See *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990).

[8] As used in § 28-310(1)(b), "menacing" includes a showing of an intention to do harm. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995). Comprehensively stated, "'§ 28-310(1)(b) renders unlawful a promise to do another person bodily harm which is made in such a manner as to intentionally cause a reasonable person in the position of the one threatened to suffer *apprehension* of being so harmed.'" (Emphasis supplied.) *State v. Kunath*, 248 Neb. at 1014, 540 N.W.2d at 591, quoting *In re Interest of Siebert*, 223 Neb. 454, 390 N.W.2d 522 (1986).

The distinction between the intent required by each statute leads us to conclude that § 28-310(1)(b) is not a lesser-included offense of § 28-311.01(1)(a). Section § 28-311.01(1)(a) requires an intent to terrorize another and is not concerned with the result produced by an individual's threat. *State v. Saltzman, supra.* On the other hand, § 28-310(1)(b) is violated when a person acts in a manner that intentionally causes a reasonable person in the position of the one threatened to feel apprehension of being bodily harmed. *State v. Kunath, supra.* Simply put, a violation of § 28-311.01(1)(a) need not produce a result in the victim, while a violation of § 28-310(1)(b) must cause a reasonable person to suffer apprehension of being bodily harmed. Thus, we conclude that a person can commit the greater offense of terroristic threats under § 28-311.01(1)(a) without simultaneously committing third degree assault under § 28-310(1)(b). To the extent that *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001), suggests otherwise, it is disapproved.

CONCLUSION

The Court of Appeals did not err in upholding the district court's refusal to instruct the jury upon third degree assault under § 28-310(1)(b) as a lesser-included offense of terroristic threats under § 28-311.01(1)(a). As a crime focused upon an individual's intent to terrorize another, it is possible to violate § 28-311.01(1)(a) without committing the crime of third degree assault under § 28-310(1)(b), which occurs when an individual causes a reasonable person to suffer apprehension of being bodily harmed. We affirm.

AFFIRMED.

RUBEN ROJAS AND FABIOLA ROJAS, APPELLANTS, V. SCOTTSDALE INSURANCE COMPANY, APPELLEE.

678 N.W.2d 527

Filed April 29, 2004. No. S-03-557.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Ralph E. Peppard for appellants.

Robert F. Bartle, of Bartle & Geier Law Firm, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Ruben Rojas and Fabiola Rojas filed a petition in the district court for Douglas County against Scottsdale Insurance Company (Scottsdale) seeking a judgment in the amount of their dwelling insurance policy limits. The insured real property had been damaged by fire, but Scottsdale refused payment on the basis of a policy endorsement which provided that Scottsdale would not be liable for loss occurring while the insured property was vacant or unoccupied. In its answer, Scottsdale alleged that coverage was denied because the property had been unoccupied for more than 60 days prior to the fire. Both parties moved for summary judgment. The district court determined that the denial of coverage was proper. The district court denied the Rojases' motion but sustained Scottsdale's motion and dismissed the Rojases' petition. The Rojases appeal. We affirm.

STATEMENT OF FACTS

The following facts are derived from the evidence admitted from the summary judgment proceedings: In early 2001, the Rojases purchased a piece of improved real property in Omaha, Nebraska, in a tax foreclosure sale. The Rojases intended to and

did use the property as rental property. The Rojases applied to Scottsdale for an insurance policy covering the property on February 12, 2002, and Scottsdale subsequently issued a policy titled "Dwelling Policy." The policy included "Occupancy Endorsement" No. UTS-32g, which provided as follows:

> It is a condition of this policy that the described building must be occupied at the inception date of the policy. It is a further condition of this policy that any vacancy or unoccupancy of the described building after the inception date of the policy must be reported to the Company within thirty (30) days.
>
> The Company shall not be liable for loss occurring while a described building, whether intended for occupancy by owner or tenant, is vacant, or unoccupied for more than sixty (60) consecutive days immediately before the loss.

The terms "vacancy," "vacant," "unoccupancy," and "unoccupied" are not defined in the policy.

Although not controlling to our determination, we note that the policy also contained a provision regarding coverage with respect to glass or safety glazing material. This provision stated that the policy covered loss caused by the breakage of glass or safety glazing material. The glass provision stated that such coverage did not include loss "if the dwelling has been vacant for more than 30 consecutive days immediately before the loss" and specified that "[a] dwelling being constructed in [sic] not considered vacant."

The Rojases evicted the tenants of the property on March 21, 2002. After the eviction, the Rojases began making repairs and improvements to the property. According to the evidence, from March 21 until July 8, the Rojases or their workers were present on the property approximately 3 days per week to make improvements.

On July 8, 2002, the property was extensively damaged by fire. The parties do not dispute that the damage to the property exceeded the insurance policy limits of $35,000. The Rojases filed a claim with Scottsdale under the policy. Scottsdale denied the claim on the basis of the occupancy endorsement. In correspondence to the Rojases' counsel, Scottsdale stated that "[a] dwelling under renovation does not constitute occupancy."

The Rojases filed a petition against Scottsdale on October 25, 2002, seeking judgment in the amount of the $35,000 policy limit plus damages for bad faith denial. Scottsdale answered, asserting that coverage was not provided because the premises had remained "unoccupied" for more than 60 days prior to the fire.

The Rojases subsequently filed a motion for summary judgment. The Rojases claimed the property was not vacant. In arguing in favor of summary judgment, the Rojases relied in part on the coverage provision regarding "Glass Or Safety Glazing Material" which stated that "[a] dwelling being constructed in [sic] not considered vacant." The district court rejected the Rojases' arguments and overruled their motion for summary judgment. Scottsdale also filed a motion for summary judgment. Following a hearing, the district court concluded that there was no genuine dispute between the parties regarding the material underlying facts and that "the plain meaning of the language of the policy and its endorsements excludes the premises from coverage when there is no one actually residing in the premises." We understand the district court's ruling to mean that it agreed with Scottsdale that the evidence showed no genuine issue as to the material fact that the property had been unoccupied for more than 60 days prior to the fire. The district court sustained Scottsdale's motion for summary judgment and dismissed the Rojases' petition on April 24, 2003. The Rojases appeal.

ASSIGNMENT OF ERROR

The Rojases assert that the district court erred in denying their motion for summary judgment and sustaining Scottsdale's motion for summary judgment because the court erred in its interpretation of the occupancy endorsement provision of the insurance contract.

STANDARDS OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004).

[2] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn., ante* p. 158, 673 N.W.2d 15 (2004).

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

ANALYSIS

Introduction.

In rejecting the Rojases' motion for summary judgment and sustaining Scottsdale's motion for summary judgment, the district court determined that the policy endorsement in this case "excludes the premises from coverage when there is no one actually residing in the premises." The court further determined that the sporadic presence of the Rojases and their workers to make renovations did not rise to the level of residency. We determine that the district court did not err as to either the law or the facts in determining that there was no coverage because the property was in effect "unoccupied" for more than 60 days prior to the fire. The court therefore did not err in denying the Rojases' motion for summary judgment and sustaining Scottsdale's motion for summary judgment.

The resolution of this appeal requires us to explain the terms "vacant" and "unoccupied" in the policy Scottsdale issued to the Rojases as a matter of law and then to determine on the record presented whether the property was either "vacant" or "unoccupied" under such definitions at the time of the fire as a matter of fact. It has been stated, and we agree, that "[t]he interpretation of the words 'vacant' and 'unoccupied' as used in an insurance policy is a question of law, but whether the subject dwelling was

vacant or unoccupied at the time of the loss is a question of fact." *Lundquist v. Allstate Ins. Co.*, 314 Ill. App. 3d 240, 245, 732 N.E.2d 627, 631, 247 Ill. Dec. 572, 576 (2000). In our analysis, after first noting that the terms "vacant" and "unoccupied" are phrased in the disjunctive in the policy, we consider as a question of law the meaning of the policy terms "vacated" and "unoccupied" and then consider with reference to the undisputed facts in the record whether the district court correctly determined that the property in this case was unoccupied at the time of the fire.

Policy Language is Disjunctive.

The occupancy endorsement provides that Scottsdale "shall not be liable for loss occurring while a described building, whether intended for occupancy by owner or tenant, is vacant, or unoccupied for more than sixty (60) consecutive days immediately before the loss." We note that the occupancy endorsement provides in the disjunctive that Scottsdale is not liable if the property is either "vacant, or unoccupied." Because of this, if the property was either vacant or unoccupied, there would be no coverage. See *Alcock v. Farmers Mut. Fire Ins. Co.*, 591 S.W.2d 126, 128 (Mo. App. 1979) ("'vacant' and 'unoccupied'" language in policy "is clearly in the disjunctive, indicating that either a condition of vacancy or unoccupancy extending for a period of sixty days constitutes a defense to a policyholder claim"). In the instant case, the district court found that the property was unoccupied.

Question of Law: Meaning of Policy Terms "Vacant" and "Unoccupied."

The terms "vacant" and "unoccupied" are not defined in the policy. The terms are not synonymous. 6 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 94:135 (1997). In defining "vacant," Black's Law Dictionary notes that "[c]ourts have sometimes distinguished *vacant* from *unoccupied*, holding that *vacant* means completely empty while *unoccupied* means not routinely characterized by the presence of human beings." Black's Law Dictionary 1546 (7th ed. 1999). In an earlier edition, Black's defined "vacant" as follows: "'In fire policy insuring dwelling, term "vacant" means empty, without inanimate objects, deprived

of contents; a thing is vacant when there is nothing in it; "vacant" means abandoned and not used for any purpose.' " Black's Law Dictionary 1548 (6th ed. 1990). The same edition defined "unoccupied," in part, as follows:

> Within fire policy exempting insurer from liability in case dwelling is "unoccupied," means when it is not used as a residence, when it is no longer used for the accustomed and ordinary purposes of a dwelling or place of abode, or when it is not the place of usual return . . . .

Id. at 1538. Courts have similarly defined the two terms. For example, the U.S. Court of Appeals for the Seventh Circuit, interpreting Illinois law, stated that the terms "vacant" and "unoccupied" are not synonymous and noted that "vacant" focuses on the lack of animate or inanimate objects, while "unoccupied" focuses on the lack of animate objects. *Myers v. Merrimack Mut. Fire Ins. Co.*, 788 F.2d 468, 471 (7th Cir. 1986). The Court of Appeals of Oregon recently noted that " ' "a house may be unoccupied, and yet not be vacant . . . a dwelling is 'unoccupied' when it has ceased to be a customary place of habitation or abode." ' " *Schmidt v. Underwriters at Lloyds of London*, 191 Or. App. 340, 345, 82 P.3d 649, 652 (2004) (quoting *Schoeneman v. Hartford Fire Ins. Co.*, 125 Or. 571, 267 P. 815 (1928)).

Although denial of coverage would be warranted if the property was either vacant or unoccupied for the requisite time, the Rojases nevertheless point to the policy provision relating to broken glass wherein a dwelling under construction is "not considered vacant." The Rojases argue that because the property was undergoing renovation, it was "under construction" and was not vacant under the broken glass provision and should similarly not be considered vacant under the occupancy endorsement. This argument is unavailing for several reasons, the most important being that coverage was properly controlled and denied under the occupancy endorsement, and, based on the evidence, the trial court properly found as a matter of fact that the property was unoccupied. Under the controlling disjunctive language of the occupancy endorsement, denial of coverage was proper where the property was unoccupied, regardless of whether or not it was vacant.

Question of Fact: Was Property Either "Vacant" or "Unoccupied"?

The uncontroverted evidence in this case establishes that the Rojases evicted the tenants of the property on March 21, 2002, and that the property was damaged by fire on July 8. The evidence regarding use of the property in the 60 consecutive days immediately before July 8 is that from March 21 until July 8, the Rojases or their workers were present on the property approximately 3 days per week to make improvements. The only reasonable factual inference from the evidence is that after the tenants were evicted on March 21, no one occupied the property. That is, from March 21 to July 8, there was a lack of habitation by human beings and a lack of use for the accustomed and ordinary purposes of a dwelling or place of abode and, therefore, the property was unoccupied.

For completeness, we note that the Rojases also argue in the alternative that the property was "occupied" during the requisite time because they or their workers were present approximately 3 days per week making improvements. In this regard, we note that other courts have rejected such an assertion under similar facts. See, generally, *Vennemann v. Badger Mut. Ins. Co.*, 334 F.3d 772 (8th Cir. 2003) (sporadic nighttime visits and remodeling projects did not convey appearance of residential living).

We make special note of the fact that the property was used and insured as a "dwelling," and we determine that this attribute of the policy is relevant to the factual determination of whether the property was vacant or unoccupied. In *Vennemann*, the U.S. Court of Appeals for the Eighth Circuit noted that coverage should be considered "[i]n light of the reasons for the inclusion of [an occupancy clause] in a homeowner's insurance policy," 334 F.3d at 774, and that the focus is on "the presence or absence of objects or activities customary for the property's intended use," *id.* at 773. In *Langill v. Vermont Mut. Ins. Co.*, 268 F.3d 46, 48 (1st Cir. 2001), the U.S. Court of Appeals for the First Circuit noted that the coverage determination is "helped by reflecting on the reasons underlying vacancy [or occupancy] exclusions." The court in *Langill* stated that those reasons include the concern that when a building is not in use, it is more likely that potential fire hazards will go undiscovered and that a fire in a vacant or unoccupied

building will burn for a longer period and cause greater damage before being detected. *Id.* The court in *Langill* stated, "When we consider the nature of the hazard sought to be guarded against, the sustained presence of a resident, particularly in the hours of darkness, appears logically as the critical factor where the premises are a dwelling." 268 F.3d at 49.

The policy in this case was titled "Dwelling Policy," and it is undisputed that the parties understood the policy was to provide insurance for a dwelling. The reasonable and ultimate inference from the evidence presented by the parties is that no one was using the property as a place of residence from the time the tenants were evicted on March 21, 2002, until the fire occurred on July 8. Therefore, the district court did not err when it determined that the property was "unoccupied" under the terms of the occupancy endorsement for more than 60 days immediately before the loss and, therefore, coverage was properly denied. Scottsdale was entitled to judgment as a matter of law.

CONCLUSION

This appeal is resolved by reference to the law, the evidence, and the ultimate inference from the evidence. The district court did not err as to the law or in its determination that the property was "unoccupied" within the meaning of the occupancy endorsement for more than 60 days immediately before the fire on July 8, 2002, and that therefore, Scottsdale was not liable for the loss. The district court did not err in denying the Rojases' motion for summary judgment and in sustaining Scottsdale's motion for summary judgment and dismissing the petition. We therefore affirm the district court's judgment.

AFFIRMED.

GERRARD, J., not participating.

JACQAUS L. MARTIN, APPELLANT, V. HONORABLE BERNARD J. McGINN, JUDGE, DISTRICT COURT FOR LANCASTER COUNTY, ET AL., APPELLEES.

678 N.W.2d 737

Filed April 29, 2004. No. S-03-689.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Appeal dismissed.

Jacqaus L. Martin, pro se.

No appearance for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Jacqaus L. Martin appeals from an order of the Lancaster County District Court dismissing his petition pursuant to Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2002) for failure to pay fees, costs, or security within the time allowed by the statute.

SCOPE OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

FACTS

This matter was previously before us in *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003) (*Martin I*). That appeal concerned an order of the district court which (1) denied Martin's application to proceed in forma pauperis on the grounds that the action was frivolous and (2) dismissed Martin's petition for declaratory, injunctive, and equitable relief.

With respect to the denial, we stated:

> A district court's denial of in forma pauperis status under § 25-2301.02 is reviewed de novo on the record based on

> the transcript of the hearing or the written statement of the court. . . . From our de novo review of the transcript, we conclude that Martin's application to proceed in forma pauperis was properly denied. The transcript does not support his motion.

(Citations omitted.) *Martin I*, 265 Neb. at 406, 657 N.W.2d at 219. Accordingly, we affirmed that portion of the district court's order which denied Martin's application to proceed in forma pauperis.

However, we found the district court's dismissal of Martin's petition to be in error. Citing § 25-2301.02(1), we noted in *Martin I* that if an objection to an application to proceed in forma pauperis is sustained, the party filing the application has 30 days to proceed with an action or appeal upon payment of fees, costs, or security. Because the district court had failed to allow Martin this 30-day period, we reversed that portion of the court's order which dismissed the petition and remanded the cause.

On April 8, 2003, we issued an alias mandate requesting the district court to enter judgment in accordance with *Martin I*. The mandate was file stamped by the clerk of the district court on April 9. The district court signed the order for entry of judgment pursuant to the mandate on April 11, and the order was file stamped on April 16.

The district court issued two orders that are relevant to this appeal. The first order, dated May 22, 2003, dismissed Martin's petition pursuant to § 25-2301.02(1) for failure to pay fees, costs, or security within the time allowed by the statute. Therein, the district court found (1) that the mandate from this court in *Martin I* was file stamped by the clerk of the district court on April 16, (2) that 30 days had passed since judgment was entered on the mandate, and (3) that Martin had not paid the fees, costs, or security within the required time.

The second order was issued by the district court on June 3, 2003. At that time, the matter was before the district court with regard to the notice of appeal filed by Martin from the May 22 order. The district court noted that on May 22, it had denied Martin's second application to proceed in forma pauperis, which was filed on May 3. The district court then concluded that Martin's application to proceed in forma pauperis on appeal should be denied for the reason that the action was frivolous.

Martin's notice of appeal was filed in the district court on June 4, 2003. Attached to the notice of appeal were the application to proceed in forma pauperis, the affidavit in support thereof, and the inmate accounting sheets that had previously been filed in the district court on May 3.

ASSIGNMENTS OF ERROR

Martin assigns the following restated errors to the May 22, 2003, order of the district court: (1) The court failed to consider the affidavit attached to his application to proceed in forma pauperis before dismissing the action, and (2) the court failed to allow the cause to progress after remand.

ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

Pursuant to Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002), an appellant must file his or her notice of appeal and deposit with the clerk of the district court the docket fee required by Neb. Rev. Stat. § 33-103 (Reissue 1998) within 30 days of the entry of the order from which the appeal is taken. Martin has filed a notice of appeal, an application to proceed in forma pauperis, an affidavit in support thereof, and inmate accounting sheets.

When the district court denied his application to proceed in forma pauperis on appeal on June 3, 2003, Martin had 30 days in which to file a docket fee with the clerk of the district court. See §§ 25-1912 and 25-2301.02(1). Since the record indicates that Martin did not file a docket fee, he did not perfect his appeal and we lack jurisdiction. Under the facts of this case, the notice of appeal and docket fee were mandatory and jurisdictional. See, § 25-1912(4); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996). Since we lack jurisdiction in this matter, the appeal must be dismissed.

CONCLUSION

For the reasons stated herein, Martin's appeal is dismissed.

APPEAL DISMISSED.

JUDY LOUISE HOSACK, APPELLEE, V. MAX GALEN HOSACK, APPELLANT.

678 N.W.2d 746

Filed May 7, 2004. No. S-02-1405.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
3. **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 refrain from action, but 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.
4. **Supreme Court: Courts: Appeal and Error.** Upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
5. **Divorce: Property Division: Pensions.** In dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties.
6. ____: ____: ____. Although Neb. Rev. Stat. § 42-366(8) (Reissue 1998) requires that any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party be included as part of the marital estate, the plain language of the statute does not require that such assets be valued at the time of dissolution.
7. **Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
8. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
9. **Alimony.** Disparity in income or potential income may partially justify an award of alimony.
10. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
11. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
12. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and HANNON and CARLSON, Judges,

on appeal thereto from the District Court for Saunders County, MARY C. GILBRIDE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Paul M. Conley for appellant.

James H. Hoppe and Timothy W. Curtis for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

In a petition for further review, Max Galen Hosack asserted that the Nebraska Court of Appeals erred in finding that it lacked jurisdiction to review a judgment of the Saunders County District Court. We granted Max's petition for further review.

SCOPE OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

[2] 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. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but 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. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

FACTS

On February 12, 2002, Judy Louise Hosack filed a petition for dissolution of her marriage to Max. On October 15, the district court signed and the clerk of the district court filed a journal entry which stated:

> Having considered all matters properly before it, the court now finds, concludes and rules as follows:

1. **Dissolution**. The marriage between the parties is irretrievably broken and the dissolution sought herein should be granted.

2. **Property Division**. The parties have reached a division of the marital estate and have divided their property in accordance with that division agreement. The court approves the property settlement . . . .

3. **Retirement Funds**. Each of the parties has a retirement account . . . . The court finds that each party is entitled to one half of the retirement of the other . . . . The court requires that counsel provide a QDRO [qualified domestic relations order] to be made a part of the decree to be drafted herein.

8. **Alimony**. . . .

. . . .

In this case, the parties have been married for 31 years. [Judy] is presently in her mid-fifties and worked at various times throughout the marriage, but mostly at minimum wage employment. . . . During the marriage, she raised the couple's three children. There is a significant disparity in the earning capacity of the parties.

. . . [Max] should pay alimony to [Judy] until she reaches age 62 in the monthly amount of $575.00.

9. **Miscellaneous Matters**. 1) [Judy] can retrieve her belongings from [Max's home] by giving him at least 48 hours telephone notice. 2) [Max] shall continue health insurance coverage for [Judy] for 6 months after the entry of the decree. 3) [Judy] is awarded $750.00 towards [sic] her attorney's fees, to be paid by [Max] no later than December 30, 2002.

10. **Motion**. Counsel shall advise the court, by written motion, if the court failed to rule on any material issue presented. If no motion is filed within 10 days from the date of this order, all matters not specifically ruled upon are deemed denied.

11. **Decree**. [Judy's counsel] shall prepare the decree and provide it to [Max's counsel] for review no later than October 31, 2002. The decree shall be presented to the Court for signature no later than November 15, 2002.

A decree was signed by the district court on November 14, 2002, and it was filed by the clerk of the district court. The decree provided that Max was awarded the residence in Exeter, Nebraska, subject to any liens and encumbrances thereon. It stated that the court approved the division of property, finding it fair, reasonable, and not unconscionable. Each party was awarded that property currently in his or her possession, including any vehicles subject to existing liens. Each party was directed to pay any debts in his or her individual name and to hold the other harmless for the payment thereof. Fifty percent of Judy's retirement benefits at Square D and 50 percent of Max's retirement benefits at Kawasaki were awarded to each party. The court retained jurisdiction to enter any necessary qualified domestic relations orders to effectuate the division of the retirement benefits of the parties. The decree awarded Judy attorney fees of $750 to be paid by Max no later than December 30. It directed that Max pay alimony to Judy in the amount of $575 per month commencing on November 1, 2002, and terminating when Judy reaches the age of 62. The decree also stated that alimony would terminate upon the death of either party or Judy's remarriage. Max was directed to maintain Judy on his health insurance program through Kawasaki for 6 months from and after the date of the court's decree. The decree also stated: "To the extent there is any conflict between this Decree and any attachment or other document incorporated herein by reference, the language of this Decree shall supersede and control." Max filed his notice of appeal on December 4.

COURT OF APPEALS' DECISION

Before the Court of Appeals, Max assigned the following restated errors: The district court erred (1) in considering retirement plan benefits as assets separate from the marital estate for purposes of equitable distribution; (2) in distributing retirement plan benefits without requiring a definitive accounting of their value and considering the relation of that value to the value of the entire marital estate; (3) in accepting as fair and reasonable the parties' division of marital property absent inclusion of the retirement plan benefits; (4) in failing to consider all statutory and judicially mandated factors in determining whether and how

much alimony should be awarded; (5) in failing to consider equitable factors other than disparity of income, which resulted in an alimony award that unfairly deprived Max of a substantial right or just result in a matter submitted for disposition through the judicial system; (6) in awarding alimony against the greater weight of the evidence that the statutory criteria did not support the court's decision; and (7) in awarding alimony where the general equities of the parties did not support the court's decision.

On May 30, 2003, the Court of Appeals dismissed the appeal for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001). The Court of Appeals found that the October 15, 2002, journal entry was a proper entry of judgment under Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002) and that the notice of appeal filed on December 4 was not timely. On June 9, Max filed a motion for rehearing, which was overruled by the Court of Appeals on September 3. Max filed a timely petition for further review in this court, and we granted his petition.

PETITION FOR FURTHER REVIEW

In Max's petition for further review, he assigned as error (1) the Court of Appeals' determination that the October 15, 2002, journal entry was intended to be a final determination; (2) the Court of Appeals' conclusion that Max's notice of appeal was untimely filed and that the court lacked jurisdiction to hear the appeal; and (3) the Court of Appeals' conclusion that the October 15 journal entry was not inconsistent with the decree dated November 14, which contained further findings and orders.

ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003). The Court of Appeals dismissed this appeal for lack of jurisdiction on the basis that the notice of appeal was not timely filed. Thus, the first question we must consider is whether this court has jurisdiction.

Section 25-1301 provides in part: "(1) A judgment is the final determination of the rights of the parties in an action." Therefore, we must determine in accordance with § 25-1301 which action by the district court finally determined the rights of the parties:

the journal entry filed on October 15, 2002, or the decree filed on November 14.

The Court of Appeals relied, in part, on *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986), in which the trial court announced its decision on December 4, 1984. At that time, the trial court found that the mortgagors were in default on a note and mortgage and that the bank had a first lien on the land described in the petition, except for one 80-acre parcel of land. The decision was typed in the court's trial docket on that date. On January 25, 1985, a more formal statement of the decision, entitled "Decree," was signed by the trial court. This second decision conformed to the earlier decision in all respects except that it did not exclude the parcel of land excluded in the first decision.

This court concluded that the December 1984 pronouncement and docket entry finally determined the rights of the parties and constituted the rendition of a decree and that the signing and filing of the more formal statement of the court's decision also constituted the rendition of a decree. However, the second decree contradicted the first decree in part. We held:

> Under such a circumstance the notice of appeal was timely with respect to that portion of the January decree which contradicted the December decree but untimely with respect to those portions of the January decree which confirmed the earlier decree. Thus, we have jurisdiction with respect to the [appellants'] first assignment of error, which deals with that portion of the second decree which contradicts the first decree, but not with respect to the second assignment of error, which deals with those portions of the first and second decrees which are consistent with each other.

Id. at 451, 384 N.W.2d at 298.

In the case at bar, the journal entry filed on October 15, 2002, left certain matters unresolved. Via the journal entry, counsel was directed to advise the district court by written motion if the court had failed to rule on any material issue presented. If no motion was filed within 10 days, then all matters not specifically ruled upon were to be deemed denied. The journal entry contemplated that the decree was to be prepared for opposing counsel's review by October 31 and for signature no later than November 15. We conclude that the journal entry was not the final determination of

the rights of the parties in this action. See § 25-1301. Thus, the Court of Appeals erred when it found that the journal entry was a proper entry of judgment and dismissed the appeal for lack of jurisdiction.

We take this opportunity to disapprove of the practice of a trial court's filing a journal entry which describes an order that is to be entered at a subsequent date. As we noted in *McElhose*, 222 Neb. at 452, 384 N.W.2d at 298, "the confusion presented by this case can be avoided if trial courts will, as they should, limit themselves to entering but one final determination of the rights of the parties in a case." The filing of both a journal entry and a subsequent order creates the potential for confusion. Instead, the trial court should notify the parties of its findings and intentions as to the matter before the court by an appropriate method of communication without filing a journal entry. The trial court may thereby direct the prevailing party to prepare an order subject to approval as to form by the opposing party. See commentary to Canon 3(B)(7) of the Nebraska Code of Judicial Conduct. Only the signed final order should be filed with the clerk of the court.

In this case, the journal entry of October 15, 2002, was not a final order which would start the time for filing a notice of appeal. Thus, the Court of Appeals erred in dismissing the appeal for lack of jurisdiction, and its decision is reversed.

[4] Upon granting further review which results in the reversal of a decision of the Court of Appeals, this court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *DeBose v. State, ante* p. 116, 672 N.W.2d 426 (2003). We therefore consider whether the district court abused its discretion in its division of retirement plan benefits and in its order requiring Max to pay alimony.

Retirement Plan Benefits

Max asserts on appeal that the district court should not have considered the parties' retirement plan benefits to be assets separate from the marital estate. He claims the court erred (1) by distributing the benefits without requiring a definitive accounting of their value and considering the relation of that value to the entire marital estate and (2) by accepting the division of property as fair and reasonable absent inclusion of the retirement plan benefits.

[5] 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. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but 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. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003). In dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

In this case, the journal entry noted that each party had a retirement account and that although the present value of the accounts was not adduced at trial, it appeared that Judy's monthly retirement payment would be minimal. In the decree, the district court awarded each party half of the other party's retirement plan benefits.

At trial, Max testified that he had been employed at Kawasaki for 27 years and that he earned approximately $20 per hour. He stated that he did not know the amount of retirement plan benefits he had accumulated, but that all of the benefits had been accumulated during the marriage. Max agreed that an equal division would occur if he received half of Judy's retirement plan benefits and she received half of his benefits.

[6] We have held that although Neb. Rev. Stat. § 42-366(8) (Reissue 1998) requires that any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party be included as part of the marital estate, the plain language of the statute does not require that such assets be valued at the time of dissolution. The expression "at the time of dissolution" in § 42-366(8) qualifies the date at which the marital estate is divided but does not provide that pension-type property must be valued on such date. *Tyma v. Tyma, supra.*

[7] The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Tyma v. Tyma, supra.* Max has not provided any support for his argument that the division of

the retirement plan benefits was unfair or unreasonable. The marriage was of long duration, as the parties were married more than 30 years. During the marriage, Judy was primarily responsible for raising the parties' three children. All of Max's retirement plan benefits were earned during the marriage. Thus, we find that the district court did not abuse its discretion in dividing the retirement plan benefits.

ALIMONY

[8,9] Max objects to the alimony award of $575 per month that he was ordered to pay to Judy. In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Claborn v. Claborn, ante* p. 201, 673 N.W.2d 533 (2004). Disparity in income or potential income may partially justify an award of alimony. *Id.*

The district court found a significant disparity in the earning capacity of the parties. The court noted that Judy was currently in her mid-50's and had worked at various times throughout the marriage, usually at minimum wage jobs. Although she was able to work at the time of the dissolution, it was likely to be at minimum wage. Our de novo review of the record shows that Judy, a high school graduate, was employed throughout most of the marriage and that the maximum amount she had earned was $7.50 per hour.

[10-12] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Id.* In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *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 make it appropriate. *Id.* As to the award of alimony, the district court did not abuse its discretion.

CONCLUSION

For the reasons set forth herein, we reverse the decision of the Court of Appeals and remand the cause with directions that the Court of Appeals affirm the judgment of the district court as to the division of the retirement plan benefits and the award of alimony.

REVERSED AND REMANDED WITH DIRECTIONS.

THE COUNTY OF SARPY, NEBRASKA, A BODY CORPORATE AND POLITIC, APPELLANT, V. THE CITY OF GRETNA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

678 N.W.2d 740

Filed May 7, 2004. No. S-02-1473.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
3. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
5. **Actions: Parties: Standing.** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
6. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
7. ____: ____: ____. The litigant must have some legal or equitable right, title, or interest in the subject of the controversy.
8. **Standing: Parties: Annexation.** Persons who are not residents, property owners, taxpayers, or electors of an annexed area generally do not have standing to challenge the annexation.
9. **Counties: Statutes.** A county is a creature of statute, and its power to act must originate from statute.
10. **Counties: Legislature.** Because a county's governmental function is the product of the Legislature's will, it is a legally protectable interest that a county is capable of defending from an allegedly improper infringement.

11. **Standing: Counties: Annexation.** If a county alleges that a city, through an unlawful annexation plan, has encroached upon its governmental function, it has alleged an injury sufficient to give it standing to challenge the annexation plan.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded for further proceedings.

Tamra L.W. Madsen, Deputy Sarpy County Attorney, for appellant.

John K. Green for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

The City of Gretna sits entirely within the borders of Sarpy County, Nebraska. Pursuant to two municipal ordinances, Gretna purported to annex sections of two state highways which extend from Gretna's borders. Sarpy County filed suit, claiming that Gretna was without authority to annex the land. The district court determined that Sarpy County lacked standing to bring the action and sustained Gretna's demurrer. The question on appeal is whether Sarpy County has standing to contest the allegedly unlawful annexations.

FACTUAL AND PROCEDURAL HISTORY

Sarpy County is a political subdivision located in eastern Nebraska. Gretna is a municipal corporation organized and operating under the laws of the State of Nebraska as a city of the second class. Gretna is located entirely within Sarpy County.

On July 31, 2001, Gretna's city council adopted ordinances Nos. 740 and 741. Generally speaking, the ordinances proposed to annex certain lands adjoining Gretna's borders. Specifically, ordinance No. 740 proposed to extend Gretna's corporate limits southward to include Nebraska State Highway 6/31 from its intersection with Capehart Road in south Gretna to a point one-half mile north of Fairview Road. Ordinance No. 741 proposed to extend Gretna's corporate limits eastward to include Nebraska State Highway 370 from its intersection with 204th Street to the midline of the intersection of 180th Street.

On June 20, 2002, Sarpy County filed a petition in the district court challenging the annexations. Sarpy County claimed that the annexations were illegal, null, and void because (1) none of the property sought to be annexed was urban or suburban as required under Neb. Rev. Stat. § 17-405.01 (Reissue 1997); (2) none of the property sought to be annexed was adjacent or contiguous to the existing boundaries of Gretna, except for the narrow strips of the highways which are the subjects of the ordinances; (3) the sole purpose of the annexations was to increase revenue; (4) Sarpy County already provided the annexed property with all necessary benefits and services; (5) Gretna usurped the authority of Sarpy County to govern its affairs in the areas of zoning and planning; and (6) Gretna's purpose was to extend its sphere of influence in the area, rather than to serve the public interest as required by law.

Gretna filed a demurrer, and then an amended demurrer, to Sarpy County's petition. The district court sustained Gretna's amended demurrer; however, the record does not reveal on what basis. Thereafter, Sarpy County filed an amended petition. In response, Gretna filed a motion to make more definite and certain, and to strike. This motion was partially granted by the district court. Sarpy County then filed a second amended petition. Again, Gretna filed a demurrer. In its demurrer, Gretna asserted that (1) Sarpy County does not have legal capacity to sue, (2) there is a defect of parties, (3) the petition does not state facts sufficient to constitute a cause of action, and (4) the district court does not have subject matter jurisdiction over the action. The district court determined that Sarpy County lacked standing to bring the action and sustained Gretna's demurrer. The court also determined that Sarpy County could not correct the defect and dismissed the action. Sarpy County filed a timely notice of appeal.

ASSIGNMENT OF ERROR

Sarpy County assigns two errors, more properly restated as one: The district court erred in determining Sarpy County lacks standing to contest the annexations by Gretna.

STANDARD OF REVIEW

[1] In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together

with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader. *Arthur v. Microsoft Corp., ante* p. 586, 676 N.W.2d 29 (2004).

[2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Adam v. City of Hastings, ante* p. 641, 676 N.W.2d 710 (2004).

ANALYSIS

As an initial matter, we note that we need not concern ourselves with the legality of the annexations. Nor do we need to determine, as Sarpy County suggests, whether its petition states a cause of action. Instead, the sole issue before us is whether Sarpy County has standing to contest the allegedly illegal annexations of property by Gretna. We conclude that it does.

[3,4] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy. *Id.* Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Id.* Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Id.*

[5-7] The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.* In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Id.* The litigant must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.*

Essentially, Sarpy County argues that it pled facts sufficient to establish standing. In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader. *Arthur v. Microsoft Corp., supra.*

We note that Sarpy County's second amended petition was redacted to comport with the district court's order granting, in part, Gretna's motion to strike. Because Sarpy County did not assign this ruling as error, we rely only on Sarpy County's operative, second amended petition to determine whether Sarpy County pled facts sufficient to establish standing. See *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997) (in absence of plain error, appellate court considers only claimed errors which are both assigned and discussed).

Over the last 50 years, our jurisprudence with respect to a party's standing to challenge an annexation of territory has developed considerably. In *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952), resident property owners sued the City of Omaha in an attempt to enjoin the annexation of their land. The issue of the property owners' standing arose, and we determined that an action to enjoin an annexation could be maintained by (1) a municipality that was scheduled to be annexed to another municipality or (2) a person who owned or was a voter in the territory scheduled to be annexed. *Id.*

This enumeration of real parties soon proved to be too rigid, however, and in *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968), we determined that the list of real parties with standing to sue, announced in *Wagner*, was not exclusive. Instead, we determined that the focus of the standing inquiry should be on whether the "person has a personal, pecuniary, and legal interest which is adversely affected by an annexation ordinance." 183 Neb. at 513, 162 N.W.2d at 229. See, also, *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992). If so, that individual has a sufficient interest upon which to contest the validity of the ordinance. *Sullivan v. City of Omaha, supra.*

[8] In *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved in part, Adam v. City of Hastings, ante* p. 641, 676 N.W.2d 710 (2004), we restricted the class of persons who could have a personal, pecuniary, and legal interest which is adversely affected by an annexation ordinance. We determined that persons who are not residents, property owners, taxpayers, or electors of an annexed area generally do not have standing to challenge the annexation. *Id.* Moreover, we noted that in order to have standing, a party must also allege a special injury that is

personal in nature: "a party seeking to restrain an act of a municipal body [relative to annexation] must show some *special injury peculiar to himself* aside from a general injury to the public." (Emphasis supplied.) *SID No. 57*, 248 Neb. at 495, 536 N.W.2d at 64. See, also, *Sullivan v. City of Omaha, supra.*

Thus, with regard to a party's standing to challenge an annexation, the current state of our law can be described in the following manner: At the broadest level, every party must show (1) a personal, pecuniary, and legal interest that has been affected by the annexation and (2) the existence of an injury to that interest that is personal in nature. Persons who have the requisite personal, pecuniary, and legal interest include residents, property owners, taxpayers, and electors of the annexed area. Conversely, as a general rule, persons who are not residents, property owners, taxpayers, or electors of the annexed area do not have the requisite personal, pecuniary, and legal interest.

Again, we note, as we did in *Sullivan v. City of Omaha, supra*, that the aforementioned list of enumerated parties is not exclusive. The touchstone of the inquiry remains whether a party has a personal, pecuniary, and legal interest in the controversy. In this regard, we have determined on a number of occasions that parties outside of the enumerated list have a sufficient interest upon which to base standing. For example, we have determined that plaintiffs whose land is outside the annexed area but whose land would fall within the annexing city's zoning authority if the challenged annexation of nonplaintiff land was permitted have (despite not being residents, property owners, taxpayers, or electors of the annexed area) the requisite personal, pecuniary, and legal interest upon which to base standing. See, *Johnson v. City of Hastings, supra*; *Piester v. City of North Platte*, 198 Neb. 220, 252 N.W.2d 159 (1977); *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968).

In the instant case, it is obvious that Sarpy County is not a resident, property owner, taxpayer, or elector of the annexed highways, and Sarpy County did not plead, nor does it contend, otherwise. Nonetheless, Sarpy County argues that it pled facts sufficient to show that it has a personal, pecuniary, and legal interest that has been adversely affected by the annexations. Specifically, Sarpy County contends it has standing because (1)

it has lost approximately $38,000 in revenue from rezoning applications, building permit fees, platting fees, and other zoning fees that it once collected but are now being collected by Gretna; (2) it provides law enforcement services on the annexed roadways; (3) of the numerous dedicated roads and streets that it maintains within the areas to be included in the newly created extraterritorial zoning jurisdiction of Gretna; and (4) the annexations have allowed Gretna to usurp Sarpy County's right to zone what was formerly in Sarpy County's zoning jurisdiction.

Of the few courts that have examined whether a county has standing to challenge a city's annexation plan, the majority have determined that a county has standing. See 1 Sandra M. Stevenson, Antieau on Local Government Law § 3.10[3] (2d ed. 1999). However, they have done so under varying rationales. For example, courts have determined that a county which owns property within the annexed area has standing to challenge the annexation. See, *Bd. of Co. Com'rs of Laramie v. Cheyenne*, 85 P.3d 999 (Wyo. 2004); *City of Tampa v. Hillsborough County*, 504 So. 2d 10 (Fla. App. 1986). Courts have also determined that an alleged loss of revenue from taxes or fees serves as a sufficient injury upon which a county can base standing. See, *Harrison County v. City of Gulfport*, 557 So. 2d 780 (Miss. 1990); *Bd. of Cty. Com'rs v. City & Cty. of Denver*, 714 P.2d 1352 (Colo. App. 1986); *City of Sunrise v. Broward County*, 473 So. 2d 1387 (Fla. App. 1985). Still other courts have determined that the loss of territorial integrity and/or the ability to zone serves as a sufficient injury upon which a county can base standing. See, *Denver v. Miller*, 151 Colo. 444, 379 P.2d 169 (1963); *New Castle County v. City of Wilmington*, No. 7788, 1984 WL 19831 (Del. Ch. Dec. 28, 1984) (unpublished opinion).

While the stated rationales may vary, the underlying logic of these cases is that an annexation alters the normal relationship, i.e., power structure, between the two governmental entities. Stated otherwise, these courts have recognized that when a city annexes land within a county's borders, the city infringes upon, in a variety of ways, a county's governmental function. Obviously, this is an intended consequence of annexation. After all, the purpose behind annexations is for the city to replace, at least in some respects, the governmental function of the county in the annexed

area. However, this does not mean a county is without a legally protectable interest.

[9-11] A county is a creature of statute, and its power to act must originate from statute. See, *Guenzel-Handlos v. County of Lancaster*, 265 Neb. 125, 655 N.W.2d 384 (2003); *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002). Because a county's governmental function is the product of the Legislature's will, it is a legally protectable interest that a county is capable of defending from an allegedly improper infringement. Therefore, we hold that if a county alleges that a city, through an unlawful annexation plan, has encroached upon its governmental function, it has alleged an injury sufficient to give it standing to challenge the annexation plan.

As listed above, Sarpy County has alleged that the unlawful annexations have altered and/or deprived it of its statutory authority to act in and around the annexed area. Relevant to Sarpy County's allegations, we note that under Nebraska law, county boards have been given zoning authority. See Neb. Rev. Stat. §§ 23-114 et seq. and 23-164 et seq. (Reissue 1997, Cum. Supp. 2002 & Supp. 2003). In conjunction with this power, county boards have also been given the authority to set a reasonable schedule of fees for the issuance of zoning permits. See § 23-114.04. Additionally, county boards have been given the authority to supervise and control the public roads within the county's borders. See, Neb. Rev. Stat. § 39-1402 (Reissue 1998); *Art-Kraft Signs, Inc. v. County of Hall*, 203 Neb. 523, 279 N.W.2d 159 (1979); *Brym v. Butler County*, 86 Neb. 841, 126 N.W. 521 (1910).

Thus, Sarpy County has alleged that Gretna, through an unlawful annexation, has encroached upon certain aspects of its governmental function. Stated otherwise, Sarpy County has properly alleged that the annexations have adversely affected a personal, pecuniary, and legal interest. Moreover, the alleged injury is undoubtedly unique to Sarpy County. Therefore, Sarpy County is not resigned to sit idly by if it has a good faith belief that Gretna, through an allegedly unlawful annexation plan, would deprive it of the power granted to it by statute.

CONCLUSION

For the foregoing reasons, we conclude that Sarpy County has standing to challenge Gretna's allegedly unlawful annexations.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WASHINGTON MUTUAL BANK, FA, APPELLANT, V. ADVANCED CLEARING, INC., APPELLEE.

679 N.W.2d 207

Filed May 7, 2004. No. S-03-054.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Actions: Breach of Warranty.** One of the elements of a cause of action for breach of warranty is reasonable reliance.
4. **Negligence: Fraud: Liability.** Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information.
5. **Actions: Negligence.** One of the elements of a cause of action for negligent misrepresentation is justifiable reliance on the part of the plaintiff.
6. **Summary Judgment: Appeal and Error.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

T. Randall Wright, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellant.

Patrick B. Griffin, Suzanne M. Shehan, and Stephen J. Pedersen, of Kutak Rock, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Washington Mutual Bank, FA (Washington Mutual), filed suit against Advanced Clearing, Inc., alleging breach of warranty and negligent misrepresentation. The Douglas County District Court sustained a motion for summary judgment filed by Advanced Clearing, and Washington Mutual appeals.

SCOPE OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

FACTS

Washington Mutual is a bank that has its principal place of business in Seattle, Washington. Advanced Clearing is a clearing broker for Ameritrade Holding Corporation and its affiliates, subsidiaries, and other correspondent brokers. Advanced Clearing does business and has offices in Omaha, Nebraska. At all times relevant to this case, Yu Kiu Yu and Helen Suk Ching Lam held three accounts with Washington Mutual as joint tenants. Two of the accounts were certificates of deposit, and the other was a money market account.

On June 11, 1998, a "sight draft" was sent from Advanced Clearing to Washington Mutual. A sight draft is a request sent from one financial institution to another seeking the transfer of funds. The sight draft at issue requested that one of Yu and Lam's certificate of deposit accounts be liquidated and that the funds be transferred to Advanced Clearing. The sight draft contained signatures in the spaces provided for the account holders. Beside each of these signatures was a "Medallion Signature Guarantee Stamp" (Medallion Stamp) bearing the signature of Kurt Halvorson, who was president of Advanced Clearing at that time.

Katherine Munoz, a Washington Mutual employee, reviewed, approved, and processed the sight draft. On June 24, 1998, a check in the amount of $44,351.37 was drawn on Yu and Lam's account. The check was made payable to Advanced Clearing for the benefit of Yu and Lam. Shortly after the funds were received by Advanced Clearing, they were forwarded to another financial institution.

On December 4, 1998, Yu filed a forgery affidavit with Washington Mutual. Therein, he claimed that he did not sign or authorize the sight draft, nor did he receive any benefit from the proceeds of the resulting check. Yu asserted that he had discovered the unauthorized activity on November 28 and that his delay in ascertaining the situation was caused by his bank statements being sent to the wrong address. Lam made the same claims in a nearly identical forgery affidavit filed with Washington Mutual on January 12, 1999.

After an investigation into the disposition of the funds, Washington Mutual chose to honor these forgery affidavits. Washington Mutual reimbursed Yu and Lam in the amount of $46,449.97, which included the amount of the check, reimbursement of a penalty, and interest.

Washington Mutual subsequently sued Advanced Clearing, alleging breach of warranty and negligent misrepresentation. Advanced Clearing moved for summary judgment. After a hearing on the motion, the district court granted summary judgment in favor of Advanced Clearing. Washington Mutual filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

Washington Mutual assigns the following restated errors to the order of the district court: (1) its finding that Washington Mutual could not have relied on the Medallion Stamp, (2) its finding that Washington Mutual did not in fact rely on the Medallion Stamp, and (3) its ruling that Advanced Clearing was entitled to summary judgment.

ANALYSIS

[3-5] Washington Mutual's cause of action is based upon breach of warranty and negligent misrepresentation. One of the elements of a cause of action for breach of warranty is reasonable

reliance. See *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986). Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information. *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994). The Restatement (Second) of Torts § 552 at 126 (1977) provides: "One who . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information . . . ." Accordingly, one of the elements of a cause of action for negligent misrepresentation is justifiable reliance on the part of the plaintiff.

[6] This case comes to us following the entry of summary judgment in favor of Advanced Clearing. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002).

Munoz, the Washington Mutual employee who processed the sight draft, testified that she had no independent recollection of reviewing the document. She agreed that she would have reviewed the signature card of Yu and Lam before she approved any transfer of funds. Prior to approval, she would have determined that the signatures on the sight draft appeared similar to those on Yu and Lam's signature card.

Washington Mutual also offered the affidavit of David Volkman, which stated that Volkman was a tenured professor at the University of Nebraska at Omaha, where he served as the chair of the Department of Finance, Banking, and Law. His experience prior to appointment to his present position included serving as an assistant national bank examiner for the Office of the Comptroller of the Currency and as an account executive for a financial brokerage house. Volkman averred that he had reviewed the depositions of various parties involved in this case and that based upon his education and experience, it was his opinion that "Advanced Clearing inappropriately used [its Medallion Stamp] by not validating signatures on account transfer forms."

Volkman opined that, in general, the financial community believes that the intent of the Medallion signature guarantee program is to thwart fraudulent activities through forgery and to aid

transfer agents for all assets. According to Volkman, the financial community highly regards the Medallion signature guarantee program and is aggressive in maintaining the program's reputation by diligently verifying signatures before the stamp is affixed for all transferred accounts and all assets, not just equity and debt investments. He stated that this view was held by local financial institutions as well as government organizations, such as the Office of the Comptroller of the Currency and the Federal Reserve. In conclusion, Volkman stated that because of the use of signature verification for all assets and the high regard for and reliance on the Medallion signature guarantee program by the financial community, it was his opinion that Washington Mutual reasonably relied on the validity of the signatures on the sight draft.

Halvorson, the president of Advanced Clearing in June 1998, testified that Advanced Clearing placed the Medallion Stamp on documents other than those dealing with securities. The Medallion Stamp was placed on sight drafts directed toward financial institutions that did not participate in the automated customer account transfer system (ACATS). He stated that in such circumstances, the Medallion Stamp merely authenticated that the document came from the institution that affixed the Medallion Stamp. According to Halvorson, in this situation, the Medallion Stamp did not guarantee the validity of the signature.

Angel Peterson, an Advanced Clearing employee in the new account department, testified that Advanced Clearing used the Medallion Stamp on non-ACATS transfers. She characterized the sight draft at issue in this case as a non-ACATS form. It was her understanding that industry standards dictated that affixing a Medallion Stamp on non-ACATS transfer forms guaranteed that the form was complete and signed, but had nothing to do with the validity of the signature.

The district court concluded that Washington Mutual could not have reasonably relied upon the Medallion Stamp affixed by Advanced Clearing when processing the sight draft in question. It found that pursuant to Washington Mutual's written policies, a Medallion Stamp affixed to a sight draft could not be relied upon to guarantee signatures on bank transfers. Washington Mutual's Medallion Stamp policy provided: "The Medallion STAMP is not to be used as a signature for a Notary Acknowledgement,

Notary Jurat or an Endorsement Guarantee of a negotiable item (i.e., check, draft or collection item). . . . The Medallion Signature Guarantee Stamp should ONLY be used for securities transactions."

The district court also concluded that Washington Mutual did not, in fact, rely upon the presence of the Medallion Stamp on the sight draft it received from Advanced Clearing. The court found that since Munoz reviewed the signature card of Yu and Lam and independently determined that the signatures on the card were similar to those on the sight draft, Washington Mutual did not rely upon the presence of the Medallion Stamp on the document. The court therefore granted Advanced Clearing's motion for summary judgment.

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

The question for our consideration is whether Washington Mutual could have reasonably or justifiably relied upon the Medallion Stamp affixed to the sight draft it received from Advanced Clearing. In determining the answer to this question, we examine the policies of Washington Mutual with regard to the *use* of a Medallion Stamp and the *acceptance* of a Medallion Stamp.

In its analysis, the district court focused primarily on Washington Mutual's policy regarding the *use* of a Medallion Stamp. According to Washington Mutual's online employee policy manual, its employees could affix a Medallion Stamp only on documents related to securities transactions. Thus, it is clear that Washington Mutual employees could not *use* the Medallion Stamp on a sight draft because it is not a securities transaction. Washington Mutual's policy manual also provided that the Medallion Stamp was not to be *used* to guarantee signatures in bank account transfers.

We are more persuaded by Washington Mutual's policy with regard to the *acceptance* of a Medallion Stamp. It was the policy of Washington Mutual for the processor of a sight draft to require a signature guarantee as a prerequisite to processing such a transaction. With respect to the *acceptance* of a Medallion Stamp as a signature guarantee when a Medallion Stamp was used by another institution, Washington Mutual's policy manual stated:

> **Presentation of a Medallion Signature Guarantee in Connection with Deposit Transaction**
>
> If an endorsement guarantee is required, a standard financial institution endorsement guarantee stamp must be presented. A Medallion Signature Guarantee S[t]amp is NOT ACCEPTABLE. Use of the Medallion Stamp in connection with deposit transactions is outside the scope of the STAMP program.
>
> — If an individual presents a Medallion Guarantee from another institution in this context, request an appropriate endorsement guarantee (not the Medallion Signature Guarantee STAMP).
>
> — DO NOT USE your financial center's Medallion Signature Guarantee Stamp as an endorsement guarantee for deposit transactions. Your financial center should have a standard endorsement guarantee stamp to accom[m]odate these types of requests.

Thus, the policy manual contemplated a situation wherein Washington Mutual would be presented with a Medallion Stamp from another financial institution in the context of a deposit transaction. In such a circumstance, Washington Mutual's policy did not permit the *acceptance* of the Medallion Stamp as an endorsement guarantee for deposit transactions.

Washington Mutual's policy with regard to sight drafts required that upon receipt of a sight draft, the processor was responsible for examining the document to determine whether it bore a signature guarantee stamp. The policy manual dictated that Washington Mutual would not accept a Medallion Stamp as a signature guarantee, and if such a stamp was presented, the correct procedure was to request an appropriate, standard financial institution endorsement guarantee stamp.

Even when viewing the evidence in the light most favorable to Washington Mutual and giving it the benefit of all reasonable inferences deducible from the evidence, we conclude that Washington Mutual's policy did not allow its employees to reasonably or justifiably rely on a Medallion Stamp as a signature guarantee in the transaction presented in this case. Thus, there is no genuine issue as to any material fact that prevents summary judgment in favor of Advanced Clearing.

Because we have concluded that Washington Mutual could not have reasonably or justifiably relied upon the Medallion Stamp, it is not necessary to address Washington Mutual's other assignments of error.

CONCLUSION

The order of the district court granting summary judgment in favor of Advanced Clearing is affirmed.

AFFIRMED.

BRENT CERNY, APPELLANT, V.
CEDAR BLUFFS JUNIOR/SENIOR PUBLIC SCHOOL,
SAUNDERS COUNTY DISTRICT NO. 107, APPELLEE.

679 N.W.2d 198

Filed May 7, 2004. No. S-03-085.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
2. ____: ____. In actions brought pursuant to the Political Subdivisions Tort Claims Act, when determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
3. **Trial: Expert Witnesses.** Determining the weight that should be given expert testimony is uniquely the province of the fact finder.
4. **Political Subdivisions Tort Claims Act: Appeal and Error.** In reviewing a judgment awarded in a bench trial under the Political Subdivisions Tort Claims Act, it is not the purview of an appellate court to reweigh the evidence.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Larry C. Johnson, of Johnson & Welch, P.C., for appellant.

Stephen S. Gealy and Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

HENDRY, C.J., AND WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

I. NATURE OF CASE

This is the second appearance of this case before this court. Brent Cerny, appellant, filed a personal injury action against Cedar Bluffs Junior and Senior High School (the School), appellee, under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1991 & Cum. Supp. 1994). In his lawsuit, Cerny alleged that while participating in athletics as a student at the School, he sustained personal injuries as a result of the negligence of the School and its coaching staff. Following the initial bench trial, the district court for Saunders County found that the School's coaches were not negligent and dismissed the petition. Cerny appealed.

On appeal, we concluded that the district court had erred in determining the applicable standard of care and in discounting certain expert witness testimony when applying that standard of care. We reversed the district court's decision and remanded the cause for a new trial. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001) (*Cerny I*).

Following remand, a second bench trial was held. After the second trial, the district court found that certain conduct was required to meet the standard of care and that the conduct of the School's football coaching staff comported with the standard of care required of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement. As a result, in its journal entry filed January 6, 2003, the district court found no negligence on the part of the School and dismissed the petition. Cerny appeals. We affirm the district court's decision on remand.

II. STATEMENT OF FACTS

Initially, we note that pursuant to the parties' stipulation, much of the trial record from the first trial of this case was received into

evidence during the second trial. The following facts are established by that portion of the record which is before us now and which was before us in *Cerny I*, 262 Neb. at 67-69, 628 N.W.2d at 700-01, and are therefore reiterated from that opinion:

> In the fall of 1995, Cerny was a student at the School and a member of its football team. On the evening of Friday, September 15, 1995, he participated in a football game between Cedar Bluffs and Beemer high schools. Mitchell R. Egger was the head coach of the Cedar Bluffs team, and Robert M. Bowman was the assistant coach. Both held Nebraska teaching certificates with coaching endorsements.
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> Cerny fell while attempting to make a tackle during the second quarter of the Beemer game, striking his head on the ground. Although he felt dizzy and disoriented after the fall, Cerny initially remained in the game but took himself out after a few plays. He returned to the game during the third quarter. Subsequently, during football practice on Tuesday, September 19, Cerny was allegedly injured again when his helmet struck that of another player during a contact tackling drill.
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> There was conflicting evidence at trial regarding the symptoms experienced and communicated by Cerny during and after the Beemer game. Cerny testified that when he came out of the game, he told Egger and Bowman that he felt dizzy, disoriented, and extremely weak. Egger stated that Cerny complained of dizziness when he came off the field during the Beemer game. He also noted that Cerny was short of breath and had a tingling sensation in his neck. Egger stated that Bowman continued to monitor Cerny.
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> Bowman testified that Cerny did not complain of a headache when he left the game, but did state that he felt fuzzy or dizzy, that he had some burning in his shoulder, and that he could not catch his breath. Bowman attributed Cerny's dizziness to hyperventilation, not a head injury. Bowman stated that when Cerny came out of the game, Cerny made normal eye contact with Bowman and Cerny's speech and movement appeared normal. After catching his breath, Cerny appeared to Bowman to be in a normal emotional state. However, Bowman did recommend to Egger

that Cerny should get medical attention, but to his knowledge, no medical personnel examined Cerny that evening.

When Cerny asked to re-enter the game during the third quarter, Bowman observed that he seemed completely normal, exhibiting neither confusion, disorientation, nor abnormal speech. Bowman also noted that Cerny did not complain of a headache. Egger allowed Cerny to re-enter the game after observing that his color looked good, his eyes looked clear, and his speech was normal.

Cerny testified that he had a headache continuously from Friday night until the practice on Tuesday. However, there is conflicting evidence as to whether he reported this to his coaches. Cerny testified he told Bowman he had a headache during the bus ride home after the Beemer game. However, Bowman testified that during the bus ride, he asked Cerny how he felt, and Cerny replied "I feel good, Coach" and did not complain of a headache. . . . Cerny testified that he told his coaches before the Tuesday practice that he had a nagging headache all weekend, but on cross-examination, he admitted that he did not remember if he had told the coaches that he was feeling bad before practice. Egger testified that he did not talk to Cerny before the Tuesday practice and permitted him to participate because "I thought he was okay, just—he was okay Friday. At least in our eyes he was okay."

Dr. Thomas A. McKnight, a family practice physician who has treated Cerny since September 1995, and Dr. Richard Andrews, a neurologist to whom Cerny was referred by McKnight, both expressed opinions that Cerny suffered a concussion during the Friday night game; that he was still symptomatic at the practice on the following Tuesday; and that during the practice, he suffered a closed-head injury with second concussion syndrome. Andrews testified that the second blow to the head sustained during the practice was "the principal cause of [Cerny's] traumatic brain injury, and the sequelae as [they exist] now."

Cerny filed a personal injury action against the School under the Political Subdivisions Tort Claims Act, and in his amended petition (petition) alleged that the School, acting through its

coaches, was negligent in a number of particulars, including "failing to adequately examine [Cerny] following his initial concussion . . . to determine the need for immediate qualified medical attention" and "allowing [Cerny] to return to play . . . without authorization from qualified medical personnel and without verifying it was safe to do so." The case was tried to the bench from June 28 to 30, 1999. On October 6, the district court entered judgment in favor of the School and dismissed Cerny's petition.

Cerny appealed the district court's decision. In *Cerny I*, we noted that determining the standard of care to be applied in a particular case is a question of law, and we concluded as a matter of law that in the instant case, "[t]he applicable standard of care by which the conduct of the School's coaching staff should be judged is that of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement." 262 Neb. at 77, 628 N.W.2d at 706. We further concluded that the district court erred in determining the applicable standard of care and in discounting certain expert witnesses' testimony when determining whether the coaches met the standard of care. Because the district court's errors were prejudicial to Cerny, we reversed the district court's decision and remanded the cause for a new trial. On remand, we instructed the district court that "in order to determine the existence of negligence, [it should] determine, as the finder of fact, what conduct was required by [the standard of care] under the circumstances of this case and whether Egger and Bowman acted in conformity therewith." *Id.*

Cerny's case came on for a second bench trial on April 11 and 12, 2002. As stated above, pursuant to the parties' stipulation, much of the record from the first trial was offered and received into evidence by the district court during the second trial. Certain documentary evidence was received into evidence at the second trial. Certain witnesses testified live. Cerny called several expert witnesses, including Christina Froiland, a certified athletic trainer and assistant professor of physical education, and Michael McCuistion, a certified athletic trainer. The School called John Stineman as its sole expert witness. Stineman, a Nebraska endorsed high school football coach, had recently retired after 30 years of coaching.

At the close of the trial, the district court took the matter under advisement. The district court filed its journal entry on January 6, 2003, in which it made findings and conclusions. In its journal entry, the district court summarized the expert witnesses' testimony. That summary, which is supported by the record, is repeated as follows:

> Christina Froiland . . . teaches a class entitled "Prevention and Care of Athletic Injuries." This class is required by the State of Nebraska for teachers seeking a coaching endorsement. Froiland testified the typical symptoms of a concussion include dizziness, headache, and disorientation, and are generally known in the coaching profession. She further testified that when an athlete exhibits such symptoms following an injury, the coach should not permit the athlete to return to competition until receiving clearance from a physician.
>
> . . . Michael McCuistion . . . testified regarding the recognition of symptoms of head injuries. . . . He testified that coaches must be aware of [the symptoms] and, when an athlete exhibits such symptoms, must take the athlete out of competition until a medical evaluation has been performed.
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> . . . .
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> . . . John Stineman . . . testified that he has 30 years [sic] experience as a coach of Nebraska high school football and that he has coached in many games, met and discussed football issues with other coaches and is aware of the practices and procedures utilized by coaches in the state with regard to player injury. . . . He stated that since the time of [Cerny's injury in 1995] and another head injury which occurred in a Nebraska high school football game at about the same time, high school football coaches have been more cognizant of the issues involving head injuries. He testified that there was little training or literature made available to Nebraska coaches on the issues of head injury prior to 1995, but since that time training and literature has [sic] been made more widely available to Nebraska's high school coaches. . . . He testified that in his opinion, the evaluation[s] made by coaches Egger and Bowman of [Cerny] on September 15, 199[5], were reasonable actions

> which would have been taken by a Nebraska endorsed coach . . . . He testified that a reasonable coach would have permitted [Cerny] to reenter the game.

Elsewhere in its journal entry, the district court set forth its findings regarding the conduct required of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement under the circumstances of this case. The district court found that based upon the evidence in the record, which included the testimony of Froiland, McCuistion, and Stineman, the conduct required of a person holding a Nebraska teaching certificate with a coaching endorsement in 1995, when a player has sustained a possible head injury, is as follows: (1) The coach must be familiar with the features of a concussion, (2) the coach must evaluate the player who appears to have suffered a head injury for the symptoms of a concussion, (3) the evaluation must be repeated at intervals before the player can be permitted to reenter a game, and (4) the coach must make a determination based upon the evaluation as to the seriousness of the injury and determine whether it is appropriate to let the player reenter the game or to remove the player from all contact pending a medical examination.

In its journal entry, the district court next considered whether the School's coaches had acted in conformity with the conduct required under the foregoing standard of care. In this regard, the district court found that the record demonstrated the following:

> Coach Bowman was familiar with the signs of a concussion. . . . Coach Bowman evaluated [Cerny] with respect to the signs of a concussion at intervals throughout the evening [and such evaluation] occurred while [Cerny] was resting and while he was up and about and while he was active in the game and after the game was over. The evaluation conducted by Coach Bowman revealed that the fuzziness complained of by [Cerny] had resolved within 15 minutes of his removing himself from the game. The record reveals that [Cerny] did not complain of any of the symptoms of a concussion.

Based upon these and other findings of fact, the district court determined that the coaches' decision allowing Cerny to reenter the game did not violate the applicable standard of care. The court stated that "the conduct of the coaches in this matter comported

with the standard of care required of reasonable [sic] prudent persons holding a Nebraska teaching certificate with a coach's endorsement. The court finds no negligence on the part of [the School]." The district court ordered the petition dismissed. Following dismissal of his petition, Cerny appealed.

III. ARGUMENTS ON APPEAL

Cerny makes various arguments on appeal. These arguments can be restated as follows: The district court erred (1) in its consideration of Stineman's testimony regarding the conduct required by the School's coaches to meet the standard of care, (2) in its finding of fact as to what conduct was required to meet the applicable standard of care, (3) in its finding of fact that the coaches' decision to permit Cerny to reenter the game did not violate the applicable standard of care, and (4) in its resolution of the question of fact that the School was not negligent.

IV. STANDARDS OF REVIEW

[1,2] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003). In actions brought pursuant to the Political Subdivisions Tort Claims Act, when determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

V. ANALYSIS

Cerny makes four arguments on appeal. We treat the first argument individually. Because the remaining three arguments challenge the district court's findings and resolutions of questions of fact, we treat the remaining arguments together below.

1. District Court's Consideration of Stineman's Testimony

Cerny first asserts that the district court erred in considering Stineman's testimony regarding the conduct required by the

School's coaches under the standard of care. Although Cerny concedes that Stineman is qualified as an expert witness, Cerny nonetheless objects to the weight accorded Stineman's testimony by the district court and claims that the district court erred in considering Stineman's testimony to the effect that the School's coaches' conduct was within the applicable standard of care. We reject this argument.

[3,4] We have recognized that determining the weight that should be given expert testimony is uniquely the province of the fact finder. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). We have further stated that in reviewing a judgment awarded in a bench trial under the Political Subdivisions Tort Claims Act, it is not the purview of an appellate court to reweigh the evidence. See *City of LaVista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185 (1992).

As the finder of fact, the district court had the authority to determine what weight, if any, it would give to Stineman's testimony. See *Hawkins v. City of Omaha, supra*. It is apparent from the district court's journal entry that it evaluated all of the expert witnesses' testimony, as it was directed to do on remand. See *Cerny I*. It is also apparent from the district court's journal entry that the district court accorded weight to certain of Stineman's testimony, as it was permitted to do. Contrary to Cerny's argument, Stineman's testimony was not limited to anecdotal subject matter. To the contrary, Stineman's testimony was helpful to the finder of fact because aspects of his testimony related to the year 1995 in particular. It is not the function of this court to second guess the district court's decision with regard to the weight given to an expert's testimony or to reweigh that evidence in this appeal. See, *Hawkins v. City of Omaha, supra*; *City of LaVista v. Andersen, supra*. Accordingly, we conclude that Cerny's first argument is without merit.

2. District Court's Findings of Fact

For his remaining three arguments, Cerny asserts that the district court erred (1) in its finding of fact as to what conduct was required to meet the applicable standard of care, (2) in its finding of fact that the coaches' decision to permit Cerny to reenter the

game did not violate the applicable standard of care, and (3) in its resolution of the question of fact that the School was not negligent. Cerny is asserting on appeal that the evidence shows that Cerny's coaches, Mitchell Egger and Robert Bowman, acted negligently in failing to keep Cerny out of competition until after he had received clearance from a physician to play. Cerny thus claims that the district court erred in finding under the facts of this case that the conduct of Egger and Bowman, in allowing Cerny to return to play in the Beemer game, satisfied the standard of care. Because the record contains evidence supporting the district court's various findings of fact, we determine there is no merit to Cerny's arguments.

As noted above, in *Cerny I*, we set forth the standard of care to be applied in this case. We stated that determining the standard of care to be applied in a particular case is a question of law, and we concluded that in the instant case, "[t]he applicable standard of care by which the conduct of the School's coaching staff should be judged is that of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement." *Id.* at 77, 628 N.W.2d at 706. Under the law-of-the-case doctrine, the applicable standard of care that the School's coaches were required to meet in this case has been conclusively established. See *Houston v. Metrovision, Inc., ante* p. 730, 677 N.W.2d 139 (2004).

On remand, we directed the district court to determine what conduct was required by the standard of care under the circumstances of this case, and to determine whether the conduct of Egger and Bowman in this case comported therewith. These determinations are findings of fact. See *Cerny I*, 262 Neb. at 75, 628 N.W.2d at 705 (stating "a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with the standard").

In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong, *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003), and it is not the purview of the appellate court to reweigh the evidence. *City of LaVista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185

(1992). In actions brought pursuant to the Political Subdivisions Tort Claims Act, when determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

(a) Conduct Required to Meet Standard of Care

As noted above, on remand, after reviewing the evidence, the district court found that the conduct required of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement in 1995, when a player has sustained a possible head injury, was (1) to be familiar with the features of a concussion; (2) to evaluate the player who appeared to have suffered a head injury for the symptoms of a concussion; (3) to repeat the evaluation at intervals before the player would be permitted to reenter the game; and (4) to determine, based upon the evaluation, the seriousness of the injury and whether it was appropriate to let the player reenter the game or to remove the player from all contact pending a medical examination.

With regard to the conduct required under the standard of care, we note that Froiland testified that an evaluation procedure similar to that found appropriate by the district court was "good advice for coaches to follow." Elsewhere in the record, there is ample evidence to support the district court's finding that the conduct outlined above was required to meet the standard of care, and such finding is not clearly wrong.

(b) Conformance With Standard of Care

In its evaluation of whether the coaches' conduct conformed to the standard of care, we note that the district court found that the evidence in the case showed that Bowman was familiar with the signs of a concussion. The district court found additional facts that showed that the coaches met the standard of care regarding evaluating Cerny at intervals and making their determination whether to permit Cerny to reenter the game.

The facts found by the district court include the following: The district court found that when Cerny removed himself from

the game, he told Bowman that he was fuzzy and had tingling in his neck. The district court found that Bowman talked to Cerny continuously for 5 to 6 minutes and observed that Cerny did not have a vacant stare, responded normally to conversation, did not appear to be disoriented or confused, and did not complain of nausea, headache, or blurred vision. The district court also found that the record demonstrated that Bowman observed and talked to Cerny approximately 15 minutes after his initial evaluation and that during this second observation, Bowman noted that Cerny was oriented, breathing normally, speaking coherently, and not complaining of headache, dizziness, vision problems, or nausea. The district court also found that Bowman observed Cerny on the sidelines during the third quarter and that Bowman noted that Cerny appeared to be "100% normal"; that his responses were appropriate; that he did not seem confused or disoriented; that his speech was not incoherent or slurred; that his emotions were appropriate; that he did not complain of dizziness, unsteadiness, nausea, or headache; and that he told the coach he felt "fine." Based upon the foregoing, the district court found that Bowman evaluated Cerny for symptoms of a concussion and that Cerny was evaluated at intervals. Further, the district court found that Cerny was properly allowed to reenter the game.

With regard to whether the conduct of the coaches met the standard of care, we note that the record contains Stineman's testimony, in which he stated that the evaluations and actions taken by Egger and Bowman regarding Cerny were reasonable for Nebraska endorsed coaches on September 15, 1995. According to Stineman, Bowman's evaluation of Cerny during the Beemer football game and Egger's decision to permit Cerny to reenter the game were the actions that would have been taken by a reasonable Nebraska endorsed football coach under similar circumstances in 1995.

Given its findings of fact summarized above, the district court determined, inter alia, that "the conduct of the coaches in this matter comported with the standard of care required of reasonable [sic] prudent persons holding a Nebraska teaching certificate with a coach's endorsement. The court finds no negligence on the part of [the School]."

Although we recognize that the record contains evidence that could controvert the district court's findings of fact, we are required to consider the evidence in a light most favorable to the School. See *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001). The district court's findings that the coaches' conduct met the standard of care and that the School was not negligent are supported by evidence and are not clearly wrong. Pursuant to our standard of review, we determine that there is sufficient evidence to sustain the district court's judgment.

Cerny's second, third, and fourth arguments are without merit. Further, we have considered all of Cerny's remaining arguments on appeal and determine that they are without merit.

VI. CONCLUSION

For the reasons stated above, the decision of the district court finding in favor of the School and dismissing Cerny's petition is affirmed.

AFFIRMED.

SODORO, DALY & SODORO, P.C., A NEBRASKA PROFESSIONAL CORPORATION, APPELLEE, V. KATHLEEN J. KRAMER, APPELLANT.

679 N.W.2d 213

Filed May 7, 2004. No. S-03-154.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Limitations of Actions: Contracts: Termination of Employment.** Where services are rendered under a contract of employment which does not fix the term of service or the time for payment, the contract is continuous and the statute of limitations does not commence to run until the employee's services are terminated.
4. **Limitations of Actions.** A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
5. **Pleadings.** The issues in a case are framed by the pleadings.

6. **Actions: Pleadings.** The essential character of an action and relief sought, whether legal or equitable, is determinable from its main object, as disclosed by the pleadings.
7. **Open Accounts: Actions.** An action on account or open account is appropriate where the parties have conducted a series of transactions for which a balance remains.
8. **Actions: Contracts: Words and Phrases.** An action on account is an action of assumpsit or debt for the recovery of money only for services performed, property sold and delivered, money loaned, or damages for the nonperformance of simple contracts, expressed or implied, when the rights of the parties will be adequately conserved by the payment and receipt of money.
9. **Actions.** An account stated is a new and independent cause of action founded on the agreed balance due upon the account rendered.
10. **Open Accounts: Contracts.** Openness of an account is indicated when further dealings between the parties are contemplated and when some term or terms of the contract are left open and undetermined.
11. **Open Accounts.** The critical factor in deciding whether an account is open is whether the terms of payment are specified by the agreement or are left open and undetermined.
12. **Open Accounts: Limitations of Actions.** In an action on an open account, where the dealing between the parties was continuous, each succeeding item is applied to the true balance, and the latest item of the account removes prior items from the operation of the statute of limitations.
13. **Debtors and Creditors: Limitations of Actions.** The mere entry of a credit by a creditor without the consent of the debtor is generally conceded to be without effect upon the statute of limitations.
14. ____: ____. For a part payment to remove the bar to recovery imposed by the statute of limitations, the payment must be made under circumstances which warrant a clear inference that the debtor recognizes and acknowledges the entire debt as the debtor's existing liability, and must demonstrate the debtor's willingness or obligation to pay the balance of the debt.
15. ____: ____. When a part payment amounts to a voluntary acknowledgment of the existence of the debt, the law implies a new promise to pay the balance.
16. **Open Accounts: Limitations of Actions.** The last item in an open account, for statute of limitations purposes, is the final underlying transaction which represents a legal indebtedness.
17. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded with direction to dismiss.

Jeffrey T. Palzer, of Kellogg & Palzer, P.C., for appellant.

Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

This is an action for attorney fees incurred during lengthy and complicated divorce proceedings. See, *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997); *Kramer v. Kramer*, 1 Neb. App. 641, 510 N.W.2d 351 (1993) (appeals of underlying case). The question presented in this appeal is whether the statute of limitations on the law firm's action for attorney fees ran from the time that the law firm's employment by the client ended, or from the date on which the law firm received the client's appeal bond and credited that money to her account.

BACKGROUND

Kathleen J. Kramer, the defendant below and appellant in this court, employed the law firm of Sodoro, Daly & Sodoro (Sodoro) in February 1989 to represent her in her divorce proceedings. Specifically, Kramer hired Peter C. Bataillon, a Sodoro attorney. Kramer's final appeal was argued before this court on April 2, 1997, our decision was filed on May 23, and our mandate issued on June 5. The mandate was spread on the record by the Sarpy County District Court on June 10. In April, prior to our decision, Bataillon left Sodoro. Kramer continued to employ Bataillon with respect to her divorce and no longer employed Sodoro.

Sodoro records indicate that at the time Bataillon left the firm, Kramer owed Sodoro a balance of $16,995.02. The last charge in Kramer's account was a fee transaction dated April 4, 1997, for "preparation of correspondence to client regarding oral argument." The notation "PCB" next to the charge presumably referred to Bataillon. The final transactions in the account, however, were dated June 19 and were designated as "payment transactions." There were three separate transactions on that date. The first and second each were for the "return of unused portion of filing fee from court return of Supreme Court cost bond - clerk of Sarpy County District Court." The third was a "Reimbursement from St. Paul for expert witness return of Supreme Court cost bond - clerk of Sarpy County District Court." The three amounts,

totaling $188.50, were credited to Kramer's account balance. For convenience, we will refer to these transactions collectively as the "appeal bond." After these credits, Kramer's balance stood at $16,806.52. Sodoro records reveal no activity on the account after the June 19, 1997, credits.

Sodoro filed the petition in the instant case on June 7, 2001. The petition alleged, as pertinent, that Sodoro had rendered professional legal services to Kramer in her divorce action, that "various charges were made for these services and that the grand total for these legal services and expenses incurred was in the sum of $16,510.82," and that Kramer had failed to pay. Kramer's answer affirmatively alleged the defense of the statute of limitations. Kramer subsequently filed a motion for summary judgment based on her statute of limitations defense. Although the transcript does not contain an order disposing of that motion, it is apparent from later proceedings that the motion was denied. Sodoro then filed a motion for summary judgment. The district court determined, inter alia, that the statute of limitations on Sodoro's claim for fees began to run on June 19, 1997, when Sodoro received and accounted for the appeal bond. Finding no other issue of material fact, the district court entered summary judgment for Sodoro. Kramer appeals.

ASSIGNMENTS OF ERROR

Kramer assigns, consolidated and restated, that the district court erred in overruling her motion for summary judgment and sustaining Sodoro's because (1) Sodoro's action was barred by the statute of limitations and (2) there was a genuine issue of material fact as to the amount owed.

STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004). Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those

facts and that the moving party is entitled to judgment as a matter of law. *Id.*

Sodoro argues that " '[t]he point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.' " Brief for appellee at 5, quoting *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999), and citing *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). However, this level of deference does not apply to an appellate court's review of a grant of summary judgment; the governing standard of review for an order of summary judgment should be, and continues to be, one favorable to the nonmoving party. See *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003).

ANALYSIS

[3] The parties agree that the statute of limitations at issue in this case is Neb. Rev. Stat. § 25-206 (Reissue 1995), which provides that "[a]n action upon a contract, not in writing, expressed or implied . . . can only be brought within four years." Kramer relies on the rule that "where services are rendered under a contract of employment which does not fix the term of service or the time for payment, the contract is continuous and the statute of limitations does not commence to run until the employee's services are terminated." *In re Estate of Baker*, 144 Neb. 797, 803, 14 N.W.2d 585, 589 (1944). Accord, *Weiss v. Weiss*, 179 Neb. 714, 140 N.W.2d 15 (1966); *Phifer v. Estate of Phifer*, 112 Neb. 327, 199 N.W. 511 (1924). See, e.g., *Maksym v. Loesch*, 937 F.2d 1237 (7th Cir. 1991); *Jenney v. Airtek Corp.*, 402 Mass. 152, 521 N.E.2d 388 (1988). Kramer argues that Sodoro's service to her was terminated when Bataillon left the firm in April 1997 and that Sodoro's June 2001 filing against her was untimely.

Sodoro does not dispute that Bataillon left the firm more than 4 years before it filed suit against Kramer. However, Sodoro argues that receipt of the appeal bond and crediting that amount to Kramer's account was a "service" to Kramer sufficient to restart the statute of limitations.

[4-6] Sodoro contends that its receipt of the appeal bond and credit to Kramer's account was part of its employment relationship

with Kramer, such that the statute of limitations began to run at that time. Before disposing of this argument, however, it is necessary to consider more basic principles of law. A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). Applying that proposition in the instant case requires us to determine the nature of Sodoro's cause of action. For that, we turn to the pleadings. The issues in a case are framed by the pleadings. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). The essential character of an action and relief sought, whether legal or equitable, is determinable from its main object, as disclosed by the pleadings. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994).

For the reasons set forth below, we conclude that Sodoro's cause of action is best characterized as an action on an open account. An action on an open account is the appropriate cause of action under the circumstances presented, given that the action is based in contract, there have been a number of transactions between the parties, the terms of payment are not specified by the contract, and the central issue is the discrete legal effect of one of those transactions.

[7,8] " '[A]n action on account or open account is appropriate where the parties have conducted a series of transactions for which a balance remains.' " *Pipe & Piling Supplies v. Betterman & Katelman*, 8 Neb. App. 475, 482, 596 N.W.2d 24, 30-31 (1999), quoting 1 C.J.S. *Account, Action On* § 3 (1985).

> An "action on account" has been defined as an action of assumpsit or debt for the recovery of money only for services performed, property sold and delivered, money loaned, or damages for the nonperformance of simple contracts, expressed or implied, when the rights of the parties will be adequately conserved by the payment and receipt of money.

1 C.J.S., *supra*, § 2 at 605. See, also, *Moore v. Schank*, 148 Neb. 228, 27 N.W.2d 165 (1947); *Pipe & Piling Supplies, supra*.

Sodoro's petition, and the evidence submitted in support of its motion for summary judgment, establish a prima facie case for an action on an account. See, *Florist Supply of Omaha v. Prochaska*,

244 Neb. 776, 509 N.W.2d 209 (1993); *Moore, supra*; *Pipe & Piling Supplies, supra*. More important, however, is that Sodoro's argument presents a question which can be answered only by analyzing this case as an action on an account. Sodoro's argument on the statute of limitations issue is based solely on the June 19, 1997, account entry, and the account entry is the sole basis to be found in the record for concluding that Sodoro's action was timely filed. Sodoro's argument requires us to determine the legal effect of the June 19 account entry, and this determination can be made only within the context of an action on the account.

[9] At common law, the rules governing actions on accounts differed depending on whether the account was mutual, simple, open, or stated. See, generally, *State, Etc. v. Hintz*, 281 N.W.2d 564 (N.D. 1979) (explaining different types of accounts). However, Nebraska law has never distinguished among most of the various types of accounts. *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979). The primary distinction recognized by Nebraska law is between an open account and an account stated. The instant case does not involve an action on an account stated, which is a new and independent cause of action founded on the agreed balance due upon the account rendered. *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000). In such an action, the plaintiff must allege that the account was, in fact, stated and agreed to, although the failure to expressly allege the account stated may be waived by joining issue on the matter. *Id.* This case involves no such allegation.

[10,11] Instead, the instant case is an action on an open account. Openness is indicated when further dealings between the parties are contemplated and when some term or terms of the contract are left open and undetermined. See *T. S. McShane Co., Inc., supra*. The critical factor in deciding whether an account is open is whether the terms of payment are specified by the agreement or are left open and undetermined. See *id.* Here, the terms of payment are clearly open and undetermined.

[12-14] It is well established that in an action on an open account, where the dealing between the parties was continuous, each succeeding item is applied to the true balance, and the latest item of the account removes prior items from the operation

of the statute of limitations. See, *Wellnitz v. Muck*, 182 Neb. 22, 152 N.W.2d 1 (1967); *Lewis v. Hiskey*, 166 Neb. 402, 89 N.W.2d 132 (1958). However, not every entry in an account is an "item" that restarts the statute of limitations. In particular, the mere entry of a credit by a creditor without the consent of the debtor is generally conceded to be without effect upon the statute of limitations. See *id.* In this regard, Kramer calls our attention to Neb. Rev. Stat. § 25-216 (Reissue 1995), which provides that

> [i]n any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise . . . .

Based in part on § 25-216, we have consistently held that for a part payment to remove the bar to recovery imposed by the statute of limitations, the payment must be made under circumstances which warrant a clear inference that the debtor recognizes and acknowledges the entire debt as the debtor's existing liability, and must demonstrate the debtor's willingness or obligation to pay the balance of the debt. See, *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984); *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979); *Hejco, Inc. v. Arnold*, 1 Neb. App. 44, 487 N.W.2d 573 (1992).

[15] The theory underlying this rule is that when a part payment amounts to a voluntary acknowledgment of the existence of the debt, the law implies a new promise to pay the balance. See, *T. S. McShane Co., Inc. v. Dominion Constr. Co., supra*; *Hejco, Inc., supra*. But merely crediting Kramer's account for property returned by a third party does not support such an implication. See *T. S. McShane Co., Inc., supra* (credit for returned parts raised no inference that defendant assented to or acknowledged greater debt). Such a rule would, under many circumstances, permit parties to manipulate the statute of limitations by transferring funds or otherwise manipulating credit to the account.

Sodoro evidently recognizes that the circumstances here would not support a finding that the credit to Kramer's account was a

ratification of the debt. Instead, Sodoro states that it has never argued that crediting Kramer's account was a part payment that would have restarted the statute of limitations. While this may be the case, Sodoro may be missing the point: If the credit was not a part payment, then there is no other persuasive characterization under which the credit will serve to bring Sodoro's petition within the statute of limitations.

[16] It is the latest item of the account which removes prior items from the operation of the statute of limitations. See, *Wellnitz v. Muck*, 182 Neb. 22, 152 N.W.2d 1 (1967); *Lewis v. Hiskey*, 166 Neb. 402, 89 N.W.2d 132 (1958). Not every entry in an account is an "item," however. The last item in an open account, for statute of limitations purposes, is the final underlying transaction which represents a legal indebtedness. See *T. S. McShane Co., Inc., supra.* See, also, *Jordan v. United States*, 180 F. Supp. 950 (E.D. Wis. 1960); *Eagle Water Co. v. Roundy Pole Fence Co.*, 134 Idaho 626, 7 P.3d 1103 (2000); *Am. Homes v. Broadmoor Corp.*, 153 Mont. 184, 455 P.2d 334 (1969). This definition is consistent with the theory underlying the rule, i.e., that the statute restarts because each succeeding item is applied to the true balance of the open account. See, *Wellnitz, supra*; *Lewis, supra.* An item that incurs legal indebtedness implies a new promise to pay the entire balance, just as part payment does when the circumstances demonstrate the intent of the debtor to ratify the entire debt. See *T. S. McShane Co., Inc., supra.*

In this case, Kramer's account was credited due to the return of the appeal bond. Sodoro argues that since advancing the appeal bond was a service to the client, receiving and accounting for the bond is also a service to the client. There is little question that disbursing an attorney's private funds for the client's benefit (to the extent permitted by Canon 5, DR 5-103(B), of the Code of Professional Responsibility) is a proper charge on an account, and is an item that can serve to remove prior items from the statute of limitations. See *Sibley v. Rice*, 58 Neb. 785, 79 N.W. 711 (1899). But receiving an appeal bond, and crediting that amount to a client's account, does not incur legal indebtedness on the part of the client. In the instant case, although Sodoro claims to have performed a "service" to Kramer by receiving the bond, Sodoro did not *charge* Kramer for the performance of a service.

Instead, Sodoro simply credited Kramer's account for returned property—which, standing alone, would not restart the statute of limitations if Kramer had returned the property herself, much less when the property was returned by a third party. See *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979).

Simply stated, Sodoro's purported "service" to Kramer did not involve providing legal services, as it was only incidentally related to furthering the client's interest; accounting for the appeal bond primarily advanced Sodoro's interest in collecting compensation for services that had already been provided. See *Gamm, Greenberg & Kaplan v. Butts*, 508 So. 2d 633 (La. App. 1987). See, e.g., *Jordan, supra* (credit for overpayment on mutual account did not fix new liability of parties); *Eagle Water Co., supra* (credit for return of tractor was not "item" that commenced running of statute of limitations); *Am. Homes, supra* (credit for payment or for goods returned is not "item" in account for purposes of determining deadline for filing mechanic's lien); *T. S. McShane Co., Inc., supra.*

In short, we conclude that Kramer's employment of Sodoro ended in April 1997 and that Sodoro's receipt of the appeal bond and credit of that amount to her account did not restart the running of the statute of limitations on Sodoro's cause of action against Kramer. Kramer's first assignment of error has merit and is dispositive of this appeal. Kramer's statute of limitations defense was meritorious, and she was entitled to judgment in her favor as a matter of law.

CONCLUSION

Sodoro's petition states a cause of action on an open account and must be characterized as such. The last entry in that account, and the only entry that could bring Sodoro's petition within the 4-year statute of limitations on oral contracts, represents neither legal indebtedness nor a part payment from which the law can infer a new promise to pay the entire indebtedness. Thus, Sodoro's action is barred by the statute of limitations.

[17] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court

has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn., ante* p. 158, 673 N.W.2d 15 (2004). Given our reasoning above, it is apparent that Kramer is entitled to judgment as a matter of law based on the statute of limitations. Therefore, we reverse the judgment of the district court and remand the cause to the district court with direction to dismiss Sodoro's petition.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. KIRK R. MONJAREZ, RESPONDENT.

679 N.W.2d 226

Filed May 14, 2004. No. S-01-1424.

Original action. Judgment of suspension.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

On January 18, 2001, in case No. S-01-086, this court entered an order temporarily suspending respondent, Kirk R. Monjarez, from the practice of law in the State of Nebraska. A trustee was appointed whose duties generally encompassed the notification requirements outlined in Neb. Ct. R. of Discipline 16 (rev. 2001).

On January 29, 2002, amended formal charges containing five counts were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent. These amended formal charges form the basis of the instant case, case No. S-01-1424. Respondent's answer disputed the allegations. A referee was appointed. On March 26, 2003, this

court granted relator's motion to dismiss count III of the amended formal charges.

On January 15, 2004, the referee's hearing was held on the four remaining charges. Respondent, who was represented by counsel, testified. Documentary evidence offered by respondent was received in evidence.

The referee filed a report on February 12, 2004. With respect to the charges, the referee concluded that respondent's conduct had breached the following disciplinary rules of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); Canon 6, DR 6-101(A)(2) (inadequately preparing to handle legal matter); DR 6-101(A)(3) (neglecting legal matter); Canon 9, DR 9-102(A)(2) (failing to deposit client funds in trust account); and DR 9-102(B)(3) (failing to maintain client account records). Although respondent was charged with violating his oath of office as an attorney, see Neb. Rev. Stat. § 7-104 (Reissue 1997), the referee made no finding as to this allegation.

With respect to the discipline to be imposed, the referee recommended that respondent be suspended from the practice of law for a period of 3 years, retroactive to the date of his temporary suspension, followed by 1 year's probation on certain conditions. Neither relator nor respondent filed exceptions to the referee's report. Relator filed a motion for judgment on the pleadings under Neb. Ct. R. of Discipline 10(L) (rev. 2003). We grant the motion for judgment on the pleadings and impose discipline as indicated below.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 23, 1998. At all times relevant hereto, he has practiced in Douglas County, Nebraska.

At the outset of the referee hearing, respondent admitted to many of the allegations contained in the amended formal charges, and the referee based her report in part upon respondent's admissions.

The substance of the referee's findings may be summarized as follows: As to count I of the amended formal charges, the referee found that respondent had been hired by John Morse, Rory

Heaton, and Barry Ridout to represent them in a civil claim against the Mall of America. Respondent failed to record the amount of fees each of these clients had paid him to pursue the claim and did little work on the claim, ultimately withdrawing from his representation of these clients. Respondent refunded $800 to Heaton, an amount equal to the fees respondent believed he had been paid in total by these clients, and asked Heaton to distribute the funds to his coclaimants.

As to count II of the amended formal charges, the referee found that respondent had neglected an appeal to the Nebraska Court of Appeals on behalf of Duane and Vi Koenig. As a result, the Koenigs' appeal in case No. A-99-1170 was dismissed. The record reflects that a dispute exists between the Koenigs and respondent as to the amount of fees to which respondent is entitled in connection with this engagement. Additionally, the Koenigs had paid respondent in advance for their legal fees and expenses, and respondent failed to deposit these funds in his attorney trust account.

As indicated *supra* in this opinion, count III of the amended formal charges was dismissed on March 26, 2003.

As to count IV of the amended formal charges, the referee found that respondent had represented Napolean Garcia Villa in federal court in a criminal prosecution for conspiracy to distribute methamphetamine, including sentencing and filing of a notice of appeal to the U.S. Court of Appeals for the Eighth Circuit. After filing the appeal, however, respondent failed to prosecute the appeal, resulting in respondent's suspension of his right to practice before the Eighth Circuit.

Finally, as to count V of the amended formal charges, the referee found that respondent had been hired by Gerald and Linda Helm to represent them with regard to a motorcycle accident. Although the Helms paid respondent $1,206.50, respondent had little contact with the Helms and failed to file a lawsuit on their behalf. Respondent admitted he did not "finish" the case for the Helms.

In the referee's report filed February 12, 2004, she specifically found by clear and convincing evidence that respondent had violated the disciplinary rules as indicated above. The referee also found certain facts which she characterized as mitigating factors,

including respondent's having reported to relator another attorney's acts of misconduct and respondent's having demonstrated his willingness to admit his neglect with regard to his representation of the clients named in the amended formal charges.

With respect to the sanction which ought to be imposed for the foregoing violations, and considering the mitigating factors the referee found present in the case, the referee recommended that respondent's license to practice law should be suspended for a period of 3 years and that the suspension should be retroactive to January 18, 2001, the date on which respondent was temporarily suspended from the practice of law. The referee also recommended that following this suspension, the grant of respondent's application for reinstatement, if any, be conditioned on the terms which follow: respondent be placed on probation for a period of 1 year following reinstatement, during which period of time, respondent would be supervised by another attorney who would file quarterly reports with relator regarding respondent's progress; respondent submit the Koenigs' fee dispute to the Nebraska State Bar Association's Nebraska Legal Fee Arbitration Plan and agree to be bound by the result reached by the program; and respondent repay $1,206.50 to the Helms.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings under rule 10(L). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Janousek, ante* p. 328, 674 N.W.2d 464 (2004). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the amended formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *Id.* To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. Counsel for Dis. v. Villarreal, ante* p. 353, 673 N.W.2d 889 (2004).

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1); DR 6-101(A)(2) and (3); and DR 9-102(A)(2) and (B)(3). The record also supports a finding by clear and convincing evidence that respondent violated his oath of office as an attorney, and we find that respondent has violated said oath.

We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. Counsel for Dis. v. Swanson, ante* p. 540, 551, 675 N.W.2d 674, 682 (2004). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by this court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. See, also, rule 10(N).

With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach attorney discipline case must be evaluated individually in light of its particular facts and circumstances." *Swanson, ante* at 549, 675 N.W.2d at 681. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Rokahr, ante* p. 436, 675 N.W.2d 117 (2004).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Id.*

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Janousek, supra.*

The evidence in the present case establishes among other facts that respondent has neglected several clients' legal matters,

failed to properly account for funds deposited in his attorney trust account, and failed to deposit certain client funds in his attorney trust account. As a mitigating factor, we note respondent's cooperation during the disciplinary hearing.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, this court finds that respondent should be suspended from the practice of law for a period of 40 months and that the suspension should be retroactive to the date of respondent's temporary suspension from the practice of law on January 18, 2001. Should respondent apply for reinstatement, his reinstatement shall be conditioned as follows: respondent shall be on probation for a period of 1 year following reinstatement during which period respondent shall be supervised by an attorney approved by relator, which attorney shall file quarterly reports with relator, summarizing respondent's progress and his adherence to the Code of Professional Responsibility; respondent shall make a showing that he has submitted the Koenigs' fee dispute to the Nebraska State Bar Association's Nebraska Legal Fee Arbitration Plan and has agreed to be bound by the result reached by the program; and respondent shall make a showing that he has refunded $1,206.50 to the Helms.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be and is hereby suspended from the practice of law for a period of 40 months with such suspension to be retroactive to January 18, 2001, after which period, respondent may apply for reinstatement, subject to the terms outlined above. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001) and 10(P).

JUDGMENT OF SUSPENSION.

SHAWN STUKENHOLTZ, APPELLANT, V. EDWARD L. BROWN, APPELLEE.

679 N.W.2d 222

Filed May 14, 2004. No. S-03-136.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.
3. **Trial: Expert Witnesses: Hearsay.** A testifying expert may not merely act as a conduit for hearsay, and if the trial court in its discretion determines that the introduction of the expert's testimony will merely act as a conduit for hearsay, the trial court has discretion to refuse to admit the evidence.
4. **Evidence.** Opinion evidence which is unsupported by appropriate foundation is not admissible.

Appeal from the District Court for Otoe County: GEORGE A. THOMPSON, Judge. Affirmed.

Jeffrey J. Funke, of Hoch, Funke & Kelch, for appellant.

Michael G. Mullin, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Shawn Stukenholtz appeals the denial of her motion for a new trial after a jury awarded her $2,000 for damages she sustained in a motor vehicle collision. On appeal, she argues that the district court erred by refusing to allow a physician's assistant to testify about the cause of her injuries and the necessity of her medical bills. We affirm because Stukenholtz failed to provide foundation that the physician's assistant was familiar with the practice and treatments of medical doctors and a chiropractor so that he could reasonably rely on their reports to form an opinion.

BACKGROUND

Stukenholtz brought this action against the appellee, Edward L. Brown, alleging damages incurred from a motor vehicle

collision. At trial, Stukenholtz testified about the June 22, 1996, collision and her activities after the collision. She did not receive medical treatment at the scene, but later went to the hospital after she had tingling in her eyebrow and pain in her arm. She was treated by a physician's assistant, Douglas J. Langemeier, and returned home, but felt "achy" and "stiff" the next day.

Stukenholtz visited her doctor on June 28, 1996. She had pain in her neck and shoulder blades, and her whole body was sore. She saw the doctor again on July 25 because the tightening in her neck and back was getting worse. On August 30, she was referred to an orthopedic specialist.

On September 14, 1996, while leaning over a bathtub, Stukenholtz experienced a muscle spasm in her middle back to the top of her shoulder. She could not stand up because of the pain and was treated at the hospital.

From October 29, 1996, through March 1997, Stukenholtz saw Dion Higgins, a chiropractor, and received treatment from him for a cervical-thoracic strain. However, she continued to have some pain and headaches.

At trial, all of Stukenholtz' medical bills, including her chiropractic bills, were introduced into evidence. Brown stipulated that the expenses were fair and reasonable for like charges in the area, but disagreed that bills incurred after June 22, 1996, were from the collision.

At trial, Langemeier testified about Stukenholtz' injury complaints on the day of the collision. He also reviewed Stukenholtz' medical records from other doctors and specialists, including an orthopedist and Higgins, who treated Stukenholtz after she was seen by Langemeier. When Langemeier was asked for a diagnosis of Stukenholtz' injuries to a reasonable degree of medical certainty, Brown objected on foundation. He argued that a physician's assistant was not competent to testify to a reasonable degree of medical certainty and asked that the testimony be limited to personal opinion based solely on Langemeier's examination of Stukenholtz. The objection was sustained. Without objection, Langemeier then testified, based on reasonable medical certainty, that when he examined Stukenholtz on the day of the collision, she had sustained a rhomboid strain.

After Langemeier gave his opinion, in an offer of proof, Stukenholtz stated that had Langemeier been allowed to further testify, he would have testified to a reasonable degree of medical certainty, based on other medical specialists' reports, that Stukenholtz had received a cervical-thoracic strain. In addition, he would have testified the medical bills incurred from June 22, 1996, through March 1997 were reasonable, fair, and necessary and caused by the collision. Brown objected to the offer of proof, arguing that Langemeier was not competent to give an opinion based on reports of medical specialists and a chiropractor and that there was a lack of foundation.

Higgins testified about Stukenholtz' complaints when he saw her and about muscle spasms she had in her back. He later diagnosed her as suffering from a cervical-thoracic strain and noted an abnormal spine position. He testified that there were different causes for an abnormal spine position, such as muscle tension, repetitive motion, a car accident, or a slip and fall. He also stated that the problem was not always caused by traumatic injury. Higgins, however, testified that based on his experience and training, it was his opinion to a reasonable degree of medical certainty that Stukenholtz had a cervical-thoracic strain because of the June 22, 1996, motor vehicle collision.

The jury awarded Stukenholtz $2,000, and she moved for a new trial, arguing that the court erred by not allowing Langemeier to testify about the cause of her injuries, the necessity of treatment for the injuries, and the reasonableness of the medical expenses. The motion was overruled, and Stukenholtz appeals.

ASSIGNMENTS OF ERROR

Stukenholtz assigns that the court erred by not allowing Langemeier to testify about the cause of her injuries, the necessity of treatment for the injuries, and the reasonableness of the medical expenses.

STANDARD OF REVIEW

[1] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Carlson v. Okerstrom, ante* p. 397, 675 N.W.2d 89 (2004).

[2] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

ANALYSIS

Stukenholtz contends that Langemeier should have been allowed to review the reports of physicians and a chiropractor and testify to a reasonable degree of medical certainty that Stukenholtz received a cervical-thoracic strain in her back from the collision. She also argues that Langemeier should have been allowed to testify that the medical bills incurred from June 22, 1996, through March 1997 were reasonable, fair, and necessary as a result of the collision. Brown argues there was insufficient foundation for Langemeier to give an opinion based on the records of medical doctors and a chiropractor who saw Stukenholtz after she was treated by Langemeier.

Neb. Rev. Stat. § 27-703 (Reissue 1995) provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[3,4] We have emphasized however, that a testifying expert may not merely act as a conduit for hearsay, and if the trial court in its discretion determines that the introduction of the expert's testimony will merely act as a conduit for hearsay, the trial court has discretion to refuse to admit the evidence. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997). In addition, opinion evidence which is unsupported by appropriate foundation is not admissible. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999).

Here, Stukenholtz failed to provide sufficient foundation to show that Langemeier was competent to use the reports of medical doctors and a chiropractor to form an opinion about the cause of the cervical-thoracic strain and the necessity of treatment.

Langemeier failed to show that he was familiar with the types of treatment of specialists such as an orthopedist and chiropractor.

There was no evidence that Langemeier was familiar with orthopedic or chiropractic practice, treatment, or diagnosis. Instead, the record contains evidence of Langemeier's general education and emergency room practice and a general statement in the offer of proof that he would testify to a reasonable degree of medical certainty based on the reports from other medical professionals. However, without further information about Langemeier's knowledge of the practice and treatments of the specialists, the court could not determine whether Langemeier could reasonably rely on reports from the professionals to form an opinion. Also, in the absence of foundation, Stukenholtz failed to show that Langemeier was competent to give an expert opinion on the issue whether her medical bills after June 22, 1996, were necessary and caused by the accident. See *State v. Mack*, 134 Ariz. 89, 654 P.2d 23 (Ariz. App. 1982).

Stukenholtz relies on two cases to argue that the court abused its discretion by denying Langemeier's testimony: *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), and *Gittins v. Scholl*, 258 Neb. 18, 601 N.W.2d 765 (1999). However, in those cases, the testifying experts were familiar with and could reasonably rely on the reports of other experts. For example, in *Pruett*, the expert based his opinion on data collected from his colleagues in the same medical field. In *Gittins*, a physician relied in part on reports from other medical doctors or less educated medical professionals and we stated that he was familiar with the treatment received from those providers. Here, however, Stukenholtz sought to offer opinion testimony based on reports from professionals outside of Langemeier's field without providing foundation that he was familiar with those specialties and the treatments provided.

Stukenholtz failed to provide foundation that Langemeier was competent to testify about what caused the cervical-thoracic strain and the necessity of the medical bills. She also failed to show that Langemeier would reasonably rely on the reports of medical professionals such as an orthopedist and chiropractor. Thus the court did not abuse its discretion when it excluded the testimony.

AFFIRMED.

ARTHUR AND KATHY INSERRA, HUSBAND AND WIFE, APPELLANTS, V. LOUIS AND BARBARA VIOLI, HUSBAND AND WIFE, APPELLEES.

679 N.W.2d 230

Filed May 14, 2004. No. S-03-469.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity 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, where credible evidence is in conflict on a material issue of fact, 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.
3. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.
4. **Adverse Possession: Boundaries.** Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
5. **Adverse Possession.** A claimant of title by adverse possession must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and vacated, and cause remanded with directions.

Daniel L. Rock and George T. Blazek, of Ellick, Jones, Buelt, Blazek & Longo, for appellants.

Charles Jan Headley for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This is an action brought by Arthur and Kathy Inserra to quiet title to a platted tract of residential real estate located in Omaha, Nebraska. Abutting landowners Louis and Barbara Violi claimed title to a portion of the tract by adverse possession. The district court found in favor of the Violis, and the Inserras appeal.

FACTS

In March 1973, the Violis moved into a newly constructed home located on Lot 55, Block O, Deer Ridge, an addition to the City of Omaha, Douglas County, Nebraska. Lot 55 is bordered on the east by Lot 56. When the Violis moved in, the residence on Lot 56 was occupied by Dave Hunt and his family.

Hunt had installed sod in his yard that ran "pole to pole from the telephone cable box in the back to the white pole in the front." He had also planted trees right along this line. Due to these actions, Barbara Violi perceived the lot line between Lots 55 and 56 to run along this "pole to pole" line. In June 1973, the Violis installed sod on Lot 55 which extended to where Hunt had laid his sod on Lot 56. After that time, the Hunts took care of the property to the east of the pole-to-pole line and the Violis took care of the property to the west of that line.

In approximately 1975, the Hunts sold Lot 56 to John and Karen Tilley. At approximately the same time, the Violis installed L-shaped sections of split-rail fence at various points on what they understood to be the boundaries of their property. These fence sections were decorative in nature and did not provide enclosure. Sections of fence along the east border of the yard were placed on the perceived pole-to-pole lot line. The Violis planted flowers in the area surrounding the fences in the ensuing years. The Tilleys built a fence that extended from the front of their home and attached to one of the fence sections erected by the Violis.

In 1978, James and Judith Palzer purchased Lot 56 from the Tilleys. In approximately 1989, the Palzers installed a sprinkler system on Lot 56 that ran along the perceived pole-to-pole border between the two lots. Several years later, the Violis installed a sprinkler system in their yard that watered up to the pole-to-pole property line. The Palzers and the Violis generally mowed to the same pole-to-pole line established by the sod installation, although at times they would mow into the other's yard.

Soon after the Inserras purchased Lot 56 from the Palzers in 2001, they became involved in a dispute with the Violis over the correct boundary between their properties. The Inserras obtained a survey that established that a section of split-rail fence segment erected by the Violis was actually on Lot 56, and not on Lot 55. They subsequently filed this action to quiet title to Lot 56 in

accordance with the survey. The Violis answered and counterclaimed, asserting that they had been in actual, continuous, exclusive, notorious, and adverse possession of a portion of Lot 56 for over 10 years. They prayed for an order declaring them to be the owners in fee "of the premises now occupied by them up to the line denoted by the fence now located between the properties of the parties."

At trial, Barbara Violi identified various photographs depicting the split-rail fence and the poles referred to in her testimony. She testified that the line created by the split-rail fence "runs roughly back to that telephone box in the back" and "runs roughly up, points towards the utility pole" in the front. She testified that this was the area the Violis were claiming by adverse possession. On redirect examination, Barbara clarified that the area being claimed by adverse possession was "on the west side . . . the area of the true lot line between Lot 55 and 56" and on "the east side it would be the area . . . created by the pole-to-pole line." Louis Violi testified that the land being claimed was from pole to pole, but admitted that he had "not put a line down or anything else." Referring to a survey the Violis had obtained, Louis Violi indicated that the eastern boundary of the disputed property could be determined by extending the split-rail fence line toward the back of the lot. He further testified that the portion of Lot 56 which he was claiming by adverse possession was "from the telephone to the light pole."

In an order filed on April 2, 2003, the district court found that the Violis

> had actual and exclusive possession of the property located on Lot 56 from the center of each of the poles adjacent to Lot 55 and said possession exceeded a period of ten years. Their possession was notorious in that their physical actions in installing the sprinkler system, split rail fence and plantings were visible and conspicuous and, furthermore, their possession was hostile in that it was against all other claimants of the land.

The court thus dismissed the Inserras' petition and granted the Violis ownership "of the real property running from 'pole to pole' on center on Lot 56 immediately adjacent to Lot 55." The Inserras filed this timely appeal.

ASSIGNMENTS OF ERROR

The Inserras assign, restated, that the district court erred in (1) granting ownership of the disputed property to the Violis without an exact and definite legal metes and bounds description of the land and (2) finding that the Violis had met their burden of proving the extent of the property and actual, exclusive, open, notorious, and hostile possession thereof.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003); *Burk v. Demaray*, 264 Neb. 257, 646 N.W.2d 635 (2002). In an appeal of an equity 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, where credible evidence is in conflict on a material issue of fact, 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. *K N Energy v. Cities of Alliance & Oshkosh*, 266 Neb. 882, 670 N.W.2d 319 (2003).

ANALYSIS

[3-5] The Inserras' principal argument on appeal is that the record does not include a description of the property claimed by the Violis sufficient to establish their claim to title by adverse possession. A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998). We have noted, however, that proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987). Thus,

> " '[a] claimant of title by adverse possession must further show the extent of his possession, the exact property which was the subject of the claim of ownership, that his

> entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description.' "

Id. at 539, 399 N.W.2d at 790, quoting *Pokorski v. McAdams*, 204 Neb. 725, 285 N.W.2d 824 (1979). Accord 2 C.J.S. *Adverse Possession* § 261 (2003). See *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981). This burden is not met where the metes and bounds of the area claimed would rest on speculation and conjecture. *Steinfeldt v. Klusmire*, 218 Neb. 736, 359 N.W.2d 81 (1984).

The western boundary of the portion of Lot 56 claimed by the Violis is the platted lot line between Lots 55 and 56. The location of the eastern boundary of the claimed tract, however, is problematic. This claimed boundary is repeatedly described in the record as extending from "pole to pole." The pole which the Violis claim as the northern terminus of this boundary is, according to their testimony, a "telephone box" located near the rear of the platted lots. The other pole located at the southern edge of the property is variously described in the testimony as a "light pole," a "white pole," and a "utility pole." Although these structures are separately shown in photographs included in the record, neither is depicted on any of the surveys which are included in the evidence. One of the surveys does depict a section of split-rail fence, approximately 8 feet in length, located "APPROX. 5' EAST" of the platted lot line. As shown on the survey, the section of fence is located at approximately one-third of the 137-foot distance between the front and rear of the property. The Violis testified that this section of fence is situated on the eastern boundary of the parcel they claim by adverse possession and that the full boundary can be determined by extending a line through the fence section to the front and rear of the property. Louis Violi described the parcel thus formed as a "pie-shaped piece" which is 6 to 8 feet wide at the front of the property.

The record does not include an exact legal description of the disputed tract or a survey depicting its boundaries. The Violis argue that no such description was required because they sufficiently described the parcel which they claim by reference to landmarks. This court rejected a similar argument in *Petsch v. Widger*, 214 Neb. 390, 397, 335 N.W.2d 254, 259 (1983), reasoning that the description of property claimed by adverse possession

"must not only be sufficient to found a verdict on but must also be 'exact' and 'definite.' " Citing *Layher v. Dove, supra*. The Violis argue that in *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998), we affirmed a judgment awarding title by adverse possession to platted residential property which, in our opinion, we described by reference to various landmarks. While that is true, the sufficiency of the description of the disputed property was not an assigned error in that case. Thus, our use of landmarks to describe the area in dispute cannot be deemed to imply either that such a description is legally sufficient or that the record before us in *Wahna* lacked a legally sufficient description.

Based upon our de novo review, we conclude that the Violis did not meet their burden of proving an exact and definite description of that portion of Lot 56 to which they claim title by adverse possession. Their testimony relating the eastern boundary of the disputed tract to existing structural landmarks provides at best an approximate location of the claimed boundary in relation to the known lot line. No specific boundary was proved because, as in *Steinfeldt v. Klusmire*, 218 Neb. 736, 739, 359 N.W.2d 81, 83 (1984), "[a]ny attempt to describe the area claimed in terms of metes and bounds would rest on speculation and conjecture." The issue is not, as the Violis argue, whether a surveyor could at some future date establish a boundary and legal description using the landmarks identified in their testimony. Rather, their adverse possession claim must fail because they did not produce such evidence at trial, as our case law requires. Thus, the record conclusively establishes that the Inserras hold title to Lot 56 in its entirety and are entitled to the relief sought in their petition.

CONCLUSION

Based upon the foregoing, we reverse and vacate the judgment of the district court and remand the cause with directions to enter judgment in favor of the Inserras for the relief sought in their petition.

REVERSED AND VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. JEFFREY LAKE DEVELOPMENT, INC., A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES.

679 N.W.2d 235

Filed May 14, 2004. No. S-03-701.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Demurrer: Pleadings.** In an appellate court's review of a ruling on a demurrer, the court is required to accept 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 conclusions of the pleader.
3. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion.
4. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), and must seek substantive alteration of the judgment.
5. **Declaratory Judgments.** The remedy of declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination.
6. **Declaratory Judgments: Pleadings: Justiciable Issues.** A court should refuse a declaratory judgment action unless the pleadings present a justiciable controversy which is ripe for judicial determination.
7. **Declaratory Judgments.** An action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain.
8. ____. A declaratory judgment action is not intended to adjudicate hypothetical or speculative situations which may never come to pass.
9. ____. A court should enter a declaratory judgment only where such judgment would terminate or resolve the controversy between the parties.
10. ____. A court should not grant declaratory relief for a party who simply is in a position of one expecting to be sued and who desires an anticipatory adjudication at the time and place of its choice of the validity of defenses it expects to raise.

Appeal from the District Court for Phelps County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Michael C. Klein, of Anderson, Klein, Peterson & Swan, for appellant.

Todd B. Vetter, of Fitzgerald, Vetter & Temple, and Steve Windrum for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The Central Nebraska Public Power and Irrigation District (Central) filed this declaratory judgment action against Jeffrey Lake Development, Inc. (Jeffrey Lake), and other sublessees, seeking interpretation of the parties' rights under a lease agreement, including the notice required to terminate the agreement. The district court sustained the defendants' demurrers, finding that no justiciable controversy existed, and dismissed the petition.

SCOPE OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

[2] In an appellate court's review of a ruling on a demurrer, the court is required to accept 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 conclusions of the pleader. *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003).

JURISDICTIONAL QUESTION

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley, supra*. Jeffrey Lake and other defendants assert that we are without jurisdiction to consider this appeal because Central failed to timely perfect the appeal. Therefore, we address this jurisdictional question before considering the assignments of error set forth by Central.

Central filed its declaratory judgment action on December 31, 2002, asking the district court to construe the agreement between the parties. Jeffrey Lake and certain sublessees filed demurrers, alleging that the petition failed to state facts sufficient to constitute a cause of action. In an order filed on April

24, 2003, the district court sustained the demurrers and dismissed the petition, finding that the petition failed to state facts sufficient to constitute a cause of action because no justiciable controversy existed.

Central filed a motion for new trial on May 2, 2003, and the motion was overruled on June 9. Central filed its notice of appeal on June 18. The notice stated that Central was appealing from the judgment entered on April 23 (filed on April 24) and the order overruling Central's motion for new trial entered on May 29 (filed on June 9). The appeal was docketed in the Nebraska Court of Appeals.

Jeffrey Lake subsequently filed a motion for summary dismissal of the appeal, asserting that the Court of Appeals lacked jurisdiction because Central's notice of appeal was filed more than 30 days after the order dismissing the petition. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002). The Court of Appeals overruled the motion for summary dismissal and directed the parties to file briefs addressing whether a motion for new trial filed after a demurrer has been sustained tolls the time for filing a notice of appeal.

In overruling the motion for summary dismissal, the Court of Appeals relied on *Forrest v. Eilenstine*, 5 Neb. App. 77, 554 N.W.2d 802 (1996), where the court stated that a motion for new trial following the sustaining of a demurrer was not a proper motion for new trial. The Court of Appeals did not have the opportunity to address this issue because Central's appeal was moved to the docket of this court on December 2, 2003.

Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002) provides in relevant part:

> A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court. The former verdict, report, or decision shall be vacated and a new trial granted on the application of the party aggrieved for any of the following causes affecting materially the substantial rights of such party: . . . (6) that the verdict, report, or decision is not sustained by sufficient evidence or is contrary to law . . . .

In the case at bar, the district court sustained the defendants' demurrers and dismissed the petition. Since there was no verdict

by a jury or trial and decision by the district court, Central's May 2, 2003, motion was not a proper motion for new trial under § 25-1142, which tolls the time for filing a notice of appeal. This determination, however, does not end our jurisdictional review.

[3] We have stated that a postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion. See *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). Thus, we must determine whether Central's May 2, 2003, motion should be treated as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), which tolls the time for filing a notice of appeal.

[4] In *Bellamy*, we held that "in order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and *must seek substantive alteration of the judgment*." (Emphasis supplied.) 264 Neb. at 789, 652 N.W.2d at 90. Central's motion filed May 2, 2003, stated: "COMES NOW the Plaintiff, The Central Nebraska Public Power & Irrigation District, and moves the Court to vacate the Order rendered hereon April 23, 2003, and to grant Plaintiff a new trial for the reason that the decision is contrary to law." Central argues that its motion was in fact a motion to alter or amend the judgment because it sought a substantive alteration of the judgment. The legal question before us is whether Central's motion should be treated as a motion to alter or amend the judgment, which tolls the time for filing an appeal. See *State v. Bellamy, supra.*

In federal courts, when the statutory basis for a motion challenging a judgment on the merits is unclear, the motion may be treated as a motion pursuant to Fed. R. Civ. P. 59(e). See, e.g., *U.S. v. Deutsch*, 981 F.2d 299 (7th Cir. 1992). A rule 59(e) motion seeks to alter or amend the judgment. In *Bellamy*, we noted that federal courts have held that a motion for reconsideration, if filed within 10 days of the entry of the judgment, is the functional equivalent of a motion to alter or amend a judgment brought pursuant to rule 59(e). See, also, *U.S. v. Deutsch, supra.* The *Deutsch* court noted a distinction between procedural motions (such as requests for an extension of time) or motions that begin collateral proceedings (such as a proceeding to obtain an award of costs or attorney fees), which do not fall under rule 59(e), and motions

which if granted would result in a substantive alteration in the judgment. See, also, *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982). In *Norman v. Arkansas Dept. of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996), the court stated: " '[A]ny motion that draws into question the correctness of the judgment is functionally a motion under [rule 59(e)], whatever its label.' " The court also pointed out that rule 59(e) was adopted to make clear that the district court possessed the power to rectify its own mistakes in the period immediately following the entry of the judgment.

Central's motion asked the district court to vacate its order dismissing Central's petition on the basis that the decision was contrary to law. Therefore, Central sought a substantive alteration of the order which can be treated as a motion to alter or amend the judgment pursuant to § 25-1329 in that the motion questioned the correctness of the judgment. See *Norman v. Arkansas Dept. of Educ., supra.* A timely motion under § 25-1329 tolls the time for filing a notice of appeal. See § 25-1912(3).

In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion described in § 25-1912(3). Central filed its notice of appeal on June 18, 2003, which was within 30 days after Central's motion was overruled on June 9. Therefore, we conclude that Central's notice of appeal was timely and that we have jurisdiction over this matter.

FACTS

We now consider the facts that are relevant to the merits of Central's appeal. In its petition for declaratory judgment, Central asked the district court to construe the agreement between the parties. Central stated that it "wishe[d] to terminate each of the leases, because the leases are of substantial rental value, and provide for no payment of rent to Central." Central contended that the agreement established a tenancy at will which could be terminated at any time by either party.

Central's petition asserted two alternative theories: It first argued that the tenancy was from year to year and, as such, could be terminated by agreement, either express or implied, or by notice given for 6 calendar months ending with the day of the

year on which the tenancy commenced. Central's second argument asserted that the tenancy was for a term of 31 years beginning May 1, 1980, and expiring on April 30, 2011, at which time the tenancy converts to a yearly tenancy which can be terminated with 6 months' notice.

The defendants demurred to the petition, asserting that it did not state facts sufficient to constitute a cause of action. The district court sustained the demurrers, finding that no justiciable controversy existed. The court noted that Central had pled that it "wishe[d]" to terminate the lease agreement, but that Central had not pled that it had taken any action to terminate the agreement. The court concluded that Central could not amend the petition to state facts sufficient to constitute a cause of action and dismissed the petition.

The district court also granted a motion for a change of venue should the cause be remanded for further proceedings. It noted that only 1 of the 185 defendants in the case resided in Phelps County.

ASSIGNMENTS OF ERROR

Central has assigned as error and argued that the district court erred in sustaining the defendants' demurrers, in finding that Central's petition did not present a justiciable controversy, and in finding that venue should be changed to Lincoln County.

ANALYSIS

DEMURRER

[5] This matter was previously before us in *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 262 Neb. 515, 633 N.W.2d 102 (2001). Central argues that our decision therein did not resolve the issue of what notice is necessary in order for Central to terminate the lease agreement and that, therefore, a justiciable controversy exists. Central relies on *Mullendore v. Nuernberger*, 230 Neb. 921, 925, 434 N.W.2d 511, 514-15 (1989), in which we stated:

> "The remedy of declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally

protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination."

Central claims that its petition for declaratory judgment met the criteria set forth in *Mullendore* because (1) the petition states that the parties disagree as to the term of the lease, (2) the parties have adverse interests, (3) Central has a legally protectable interest in the subject matter, and (4) the required notice is a controversy capable of present judicial determination. Central argues that it should not be required to issue a notice of termination of the lease in order for the dispute to be subject to resolution by an action for declaratory judgment. Central suggests that it would risk violating an injunction previously entered by a district court if it were to give notice of its intention to terminate the lease.

[6-8] A court should refuse a declaratory judgment action unless the pleadings present a justiciable controversy which is ripe for judicial determination. *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994). An action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. *Id.* In *Ryder Truck Rental*, we stated it is not enough that there exists "[m]ere apprehension or the mere threat of an action or a suit . . . ." 246 Neb. at 253, 518 N.W.2d at 127. A declaratory judgment action is not intended "to adjudicate hypothetical or speculative situations which may never come to pass." *Id.* at 254, 518 N.W.2d at 127.

In *Ryder Truck Rental*, the truck rental company asked the trial court to determine liability before any action had been filed following a vehicular accident involving one of Ryder's trucks. The trial court did not know if the injured party would file an action against Ryder or in which state the suit might be filed. We noted that the type of claim the injured party might raise was unknown, and we held that the required element of controversy did not exist and might never so exist. In the case at bar, the district court did not know on what basis the parties might bring a future action. Central has not attempted to terminate the lease agreement, but merely stated in its petition that it "wishes" to do so.

[9,10] A court should enter a declaratory judgment "only where such judgment would terminate or resolve the controversy

between the parties." *Id.* at 254, 518 N.W.2d at 127. A court should not grant declaratory relief for a party "who simply is in a position of one expecting to be sued and who desires an anticipatory adjudication at the time and place of its choice of the validity of defenses it expects to raise." *Id.* at 256, 518 N.W.2d at 128. Similarly, a court should not grant such relief to one who expects to file a suit or may file a suit and who seeks advice from the court on how to initiate such action.

In an appellate court's review of a ruling on a demurrer, the court is required to accept 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 conclusions of the pleader. *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003). Accepting as true the facts pled by Central, we conclude that the district court did not err in sustaining the demurrers and dismissing the petition because there is no justiciable controversy between the parties at this time. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001). We decline to render such an opinion.

VENUE

Central also asserts that the district court erred in finding that if the cause is remanded for further proceedings, venue is proper in Lincoln County rather than in Phelps County. Since we have determined that the district court did not err in dismissing the petition, no remand is necessary. We therefore decline to address any issues regarding the proper venue for commencement of an action.

MOTION FOR NEW TRIAL

Central has assigned as error that the district court erred in overruling its motion for new trial, but Central failed to argue this error in its brief. Therefore, it will not be considered on appeal. See *In re Estate of Matteson, ante* p. 497, 675 N.W.2d 366 (2004) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party asserting error).

CONCLUSION

For the reasons set forth herein, the district court was correct in its determination that a justiciable controversy did not exist between the parties. We therefore affirm the judgment of the district court, which sustained the defendants' demurrers and dismissed the action.

AFFIRMED.

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