THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

MAY 21, 2004 and DECEMBER 22, 2004

IN THE

Supreme Court of Nebraska

VOLUME CCLXVIII

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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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[1]
EVERETT O. INBODY, Chief Judge[2]
JOHN F. IRWIN, Associate Judge[3]
RICHARD D. SIEVERS, Associate Judge
EVERETT O. INBODY, Associate Judge[4]
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
FRANK E. GOODROE . . . . . State Court Administrator

[1]Until September 12, 2004
[2]As of September 13, 2004
[3]As of September 13, 2004
[4]Until September 12, 2004

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

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CARRIE ANNE WORTMAN
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STEPHANIE ANNE ZEEB
STEPHANIE ERIN ZULKOSKI

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No. S-02-896: **Atlantic Mortgage & Invest. Corp. v. Patterson**. Reversed and remanded with directions. McCormack, J.

No. S-02-1265: **Hahn v. Alegent Health**. Affirmed. Connolly, J.

No. S-02-1359: **Bland & Associates v. Melotz**. Affirmed. Stephan, J.

No. S-02-1483: **Frederick v. Frederick**. Appeal dismissed. Connolly J. Wright, J., participating on briefs.

No. S-03-643: **Soukop v. ConAgra, Inc**. Affirmed. Gerrard, J. Stephan, J., not participating.

No. S-03-1108: **Bowley v. Bowley**. Affirmed. Wright, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-01-086: **State ex rel. NSBA v. Monjarez**. Appeal dismissed. See *State ex rel. Counsel for Dis. v. Monjarez*, 267 Neb. 980, 679 N.W.2d 226 (2004).

No. S-03-153: **Grasso v. Cambridge Capacitors**. Appeal dismissed.

No. S-03-160: **Mireles v. Department of Corr. Servs**. Appeal dismissed.

No. S-03-587: **Irwin v. LaMar's Donuts Internat**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-03-793: **Medlock v. Kuhn**. Stipulation allowed; appeal dismissed; each party to pay own costs.

Nos. S-03-1073, S-03-1074: **Peterson v. Big Red Roofing Cos**. Stipulation allowed; appeal dismissed.

No. S-03-1397: **State v. Dean**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-03-1411: **State v. Neal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004); *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

No. S-03-1454: **State v. Contreras**. Motion for summary reversal sustained; reversed and remanded for new trial. See rule 7C.

No. S-04-051: **State v. Patz**. Motion for summary affirmance overruled; appeal dismissed. See rule 7A(2).

No. S-04-075: **State v. McNeill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-177: **In re Guardianship & Conservatorship of Trobough**. Motion of appellee for summary dismissal granted pursuant to rule 7B(1). Order dated January 14, 2004, dealing with disposition of personal property at issue in *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004), is vacated as null and void. See *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

No. S-04-178: **In re Guardianship & Conservatorship of Trobough**. Motion of appellee for summary dismissal granted pursuant to rule 7B(1). Order dated February 5, 2004, dealing with personal property at issue in *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004), is vacated as null and void. See *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004). Order dated January 26, 2004, approving special conservator fees is interlocutory and, thus, not appealable. See *In re Estate of Lehman*, 135 Neb. 592, 283 N.W. 199 (1939).

No. S-04-190: **State v. Blueitt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-213: **State v. Barnett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-462: **State ex rel. Tyler v. Britten**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-468: **State v. Cook**. Motion of appellee for summary dismissal sustained.

No. S-04-481: **Cerny v. Longley**. By order of the court, appeal dismissed for failure to file briefs.

No. S-04-497: **State v. Hessler**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-04-498: **In re Estate of Trobough**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-531: **Hall v. Clarke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-625: **State v. Davlin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-04-640: **State ex rel. Doyle v. Korslund**. Stipulation to remand allowed.

No. S-04-818: **In re Guardianship & Conservatorship of Trobough**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-04-952: **Central Neb. Pub. Power v. Irrigation Well Owners**. Motion of appellee to dismiss for lack of jurisdiction sustained.

No. S-04-1067: **State ex rel. Counsel for Dis. v. Meissner**. Respondent suspended from the practice of law in the State of Nebraska until further order of the court.

No. S-04-1304: **State v. Jeffrey Hessler**. Appeal dismissed for lack of jurisdiction.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-02-052: **Drew v. Davidson**, 12 Neb. App. 69 (2003). Petition of appellant for further review overruled on May 19, 2004.

No. A-02-095: **Allied Prop. & Cas. Co. v. Kreifels**. Petition of appellee for further review overruled on July 8, 2004.

No. A-02-207: **First Nat. Bank of Omaha v. Acceptance Ins. Cos.**, 12 Neb. App. 353 (2004). Petition of appellee for further review overruled on May 19, 2004.

No. A-02-308: **White v. White**. Petition of appellant for further review overruled on June 9, 2004.

No. A-02-621: **State v. Malcom**, 12 Neb. App. 432 (2004). Petition of appellant for further review overruled on July 8, 2004.

No. S-02-688: **Detter v. Miracle Hills Animal Hosp.**, 12 Neb. App. 480 (2004). Petition of appellant for further review sustained on June 30, 2004.

No. A-02-713: **SapaNajin v. Clarke**. Petition of appellant for further review overruled on September 1, 2004.

No. A-02-762: **Vanderpool v. Oakland Memorial Hosp. Dist**. Petition of appellant for further review overruled on June 9, 2004.

No. A-02-778: **Sorber v. Brumbaugh**. Petition of appellee for further review overruled on September 1, 2004.

No. A-02-789: **St. Elizabeth Comm. Health Ctr. v. Penrod**. Petition of appellant for further review overruled on September 1, 2004.

No. A-02-793: **Mendlik v. Board of Adj. for City of West Point**. Petition of appellee for further review overruled on June 23, 2004.

No. A-02-817: **Hedrick v. City of Waverly**. Petition of appellant for further review overruled on June 9, 2004.

No. A-02-933: **State v. Miner**. Petition of appellant for further review overruled on July 14, 2004.

No. A-02-936: **Cole v. State**. Petition of appellees for further review overruled on September 22, 2004.

No. A-02-970: **Freeman v. Griffin**. Petition of appellant for further review overruled on May 26, 2004.

No. A-02-995: **Worthon v. Southeast Community College**. Petition of appellant for further review overruled on June 9, 2004.

No. A-02-1012: **Reeg v. Leal**. Petition of appellant for further review overruled on September 15, 2004.

No. A-02-1020: **Santo v. Neth**. Petition of appellant for further review overruled on June 9, 2004.

No. A-02-1096: **Jacob v. State**, 12 Neb. App. 696 (2004). Petition of appellant for further review overruled on September 22, 2004.

No. A-02-1117: **State v. Lee**. Petition of appellant for further review overruled on May 13, 2004.

No. A-02-1138: **Smith v. Smith**, 12 Neb. App. 597 (2004). Petition of appellant for further review overruled on September 15, 2004.

No. A-02-1175: **Hoberman Realty v. Lamar Advertising Co**. Petition of appellee for further review overruled on September 1, 2004.

No. A-02-1237: **State v. Patterson**. Petition of appellant for further review overruled on July 14, 2004.

No. A-02-1237: **State v. Patterson**. Petition of appellant pro se for further review overruled on July 14, 2004, as untimely filed.

No. A-02-1276: **Kotinek v. Willard**. Petition of appellant for further review overruled on November 12, 2004, as untimely filed.

No. S-02-1307: **State v. Wiese**. Petition of appellant for further review sustained on October 14, 2004.

No. A-02-1312: **Armagost v. McFarland**. Petition of appellant for further review overruled on November 17, 2004.

No. A-02-1384: **Boyle v. Boyle**, 12 Neb. App. 681 (2004). Petition of appellant for further review overruled on September 22, 2004.

No. A-02-1419: **Madson v. TBT Ltd. Liability Co.**, 12 Neb. App. 773 (2004). Petition of appellee for further review overruled on October 27, 2004.

No. A-02-1429: **State v. Smith**. Petition of appellant for further review overruled on October 22, 2004, as untimely filed.

No. A-02-1490: **State v. Bearshield**. Petition of appellant for further review overruled on May 13, 2004.

No. A-03-001: **Muhlbach v. Muhlbach**. Petition of appellant for further review overruled on October 8, 2004, as filed out of time.

No. A-03-015: **Grahovac v. Grahovac**, 12 Neb. App. 585 (2004). Petition of appellee for further review overruled on September 22, 2004.

No. A-03-019: **Searcey v. Nebraska Dept. of Motor Vehicles**, 12 Neb. App. 517 (2004). Petition of appellant for further review overruled on September 1, 2004.

No. A-03-033: **State v. Jim**. Petition of appellant for further review overruled on September 15, 2004.

No. S-03-160: **Mireles v. Nebraska Dept. of Corr. Servs**. Petition of appellee for further review sustained on May 13, 2004.

No. A-03-216: **Kelley v. Hearthstone Homes**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-247: **State v. Koncaba**, 12 Neb. App. 378 (2004). Petition of appellant for further review overruled on May 19, 2004.

No. A-03-251: **State v. Muhs**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-268: **State v. Petersen**, 12 Neb. App. 445 (2004). Petition of appellant for further review overruled on May 13, 2004.

No. A-03-288: **State v. Fair**. Petition of appellant for further review overruled on July 14, 2004.

No. S-03-297: **State v. Banes**. Petition of appellee for further review sustained on May 13, 2004.

No. A-03-301: **State v. Bradley**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-335: **Fraternal Order of Police v. County of Douglas**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-363: **State v. Delano**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-382: **Hemmer v. Hemmer**. Petition of appellee for further review overruled on November 10, 2004.

No. A-03-393: **Medical Enters. v. City of Lincoln**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-404: **Haag v. Haag**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-424: **In re Guardianship & Conservatorship of Taya S**. Petition of appellee for further review overruled on September 29, 2004.

No. A-03-437: **Gaston v. Gaston**. Petition of appellee for further review overruled on October 27, 2004.

No. A-03-438: **State v. Conn**, 12 Neb. App. 635 (2004). Petition of appellant for further review overruled on September 1, 2004.

No. A-03-451: **City of Bellevue v. Engler**. Petition of appellant for further review overruled on November 17, 2004.

No. A-03-455: **Ryan v. Galbraith**. Petition of appellant for further review overruled on November 24, 2004.

No. A-03-465: **State v. Luebbert**. Petition of appellee for further review overruled on September 1, 2004.

No. S-03-467: **State v. Wisinski**, 12 Neb. App. 549 (2004). Petition of appellant for further review sustained on June 23, 2004.

No. S-03-481: **Kam v. IBP, inc.**, 12 Neb. App. 855 (2004). Petition of appellee for further review sustained on November 17, 2004.

No. A-03-496: **Bazer v. G & G Mfg**. Petition of appellant for further review overruled on June 16, 2004.

No. A-03-499: **State v. Thompson**. Petition of appellant for further review overruled on May 13, 2004.

No. A-03-502: **Widtfeldt v. Eaton Corp**. Petition of appellant for further review overruled on May 13, 2004.

No. A-03-508: **State v. Brown**. Petition of appellant for further review overruled on June 16, 2004.

No. A-03-523: **State v. Badger**. Petition of appellant for further review overruled on September 22, 2004.

No. S-03-525: **Sweeney v. Kerstens & Lee, Inc.**, 12 Neb. App. 314 (2003). Petition of appellees for further review sustained on May 13, 2004.

No. A-03-549: **Baumbach v. Hauxwell**. Petition of appellee for further review overruled on November 17, 2004.

No. A-03-552: **Martinez-Najarro v. IBP, inc.**, 12 Neb. App. 504 (2004). Petition of appellee for further review overruled on September 1, 2004.

No. S-03-603: **Kellogg v. Department of Corr. Servs.** Petition of appellant for further review sustained on June 9, 2004.

No. A-03-609: **State v. Goettsche**. Petition of appellant for further review overruled on May 13, 2004.

No. S-03-618: **Dyer v. Neth**. Petition of appellant for further review sustained on September 1, 2004.

No. A-03-637: **State v. Huffman**. Petition of appellant for further review overruled on September 1, 2004.

Nos. A-03-650, A-03-652, A-03-653: **In re Interest of Tesia S. et al**. Petitions of appellant for further review overruled on May 19, 2004.

No. A-03-651: **In re Interest of Crystal C.**, 12 Neb. App. 458 (2004). Petition of appellant for further review overruled on May 19, 2004.

No. A-03-656: **State v. Cutshall**. Petition of appellant for further review overruled on November 17, 2004.

No. A-03-657: **State v. Houpt**. Petition of appellant for further review overruled on July 14, 2004.

No. A-03-659: **Farris on behalf of Farris v. Wurtele**. Petition of appellant for further review overruled on June 23, 2004.

No. A-03-672: **State v. Moses**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-682: **Kortum v. Kortum**. Petition of appellant for further review overruled on September 1, 2004.

Nos. A-03-690, A-03-691: **State v. Weiler**. Petitions of appellant for further review overruled on May 19, 2004.

No. A-03-707: **State v. Valasek**. Petition of appellant for further review overruled on October 14, 2004.

No. A-03-711: **Benson v. Casey Industrial**, 12 Neb. App. 396 (2004). Petition of appellee for further review overruled on May 13, 2004.

No. A-03-728: **State v. Velazquez**. Petition of appellant for further review overruled on May 19, 2004.

No. A-03-763: **Delano v. Delano**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-787: **State v. Nichols**. Petition of appellant for further review overruled on June 23, 2004.

No. A-03-788: **State v. Huff**. Petition of appellant for further review overruled on July 14, 2004.

No. A-03-857: **State v. Trusler**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-871: **State v. Davlin**. Petitions of appellant for further review overruled on May 13, 2004.

No. A-03-879: **State v. Peterson**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-899: **Wagner v. Wagner**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-912: **In re Interest of Caleb H. & Savannah H**. Petition of appellant and appellee State for further review overruled on June 9, 2004.

No. A-03-912: **In re Interest of Caleb H. & Savannah H**. Petition of appellee Charles H. for further review overruled on June 9, 2004.

No. A-03-925: **State v. Romo**, 12 Neb. App. 472 (2004). Petition of appellant for further review overruled on July 14, 2004.

No. A-03-966: **State v. Hernandez**. Petition of appellant for further review overruled on September 15, 2004.

No. S-03-971: **Zoucha v. Touch of Class Lounge**. Petition of appellant for further review sustained on September 15, 2004.

No. A-03-979: **State v. Dalton**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-983: **Gressett v. Becton-Dickinson Co**. Petition of appellant for further review overruled on May 13, 2004.

No. A-03-987: **Williamson v. Werner Enters.**, 12 Neb. App. 642 (2004). Petition of appellant for further review overruled on September 1, 2004.

No. A-03-997: **Pserros v. Department of Corr. Servs.** Petition of appellant for further review overruled on November 19, 2004, as untimely filed.

No. A-03-1017: **State v. Hittle**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1019: **State v. Spiehs**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1024: **Kaltsounis v. Chappelear**. Petition of appellant for further review overruled on November 17, 2004.

No. A-03-1041: **Martin v. Department of Corr. Servs.** Petition of appellant for further review overruled on May 13, 2004.

No. S-03-1046: **State v. Petty**. Petition of appellant for further review overruled on September 22, 2004.

No. S-03-1046: **State v. Petty**. Petition of appellee for further review sustained on September 22, 2004.

No. A-03-1119: **State v. Garcia**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-1122: **Cole v. State**. Petition of appellant for further review overruled on September 1, 2004.

Nos. A-03-1127, A-03-1128: **State v. Bartlett**. Petitions of appellant for further review overruled on September 15, 2004.

No. A-03-1139: **In re Interest of Caleb N**. Petition of appellant for further review overruled on August 20, 2004, as untimely filed.

No. A-03-1141: **Stanfill v. Hansen Transfer**. Petition of appellant for further review overruled on October 14, 2004.

No. A-03-1144: **In re Interest of Cody S**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-1152: **State v. Murray**. Petition of appellant for further review overruled on May 19, 2004.

No. A-03-1159: **State v. Harper**. Petition of appellant for further review overruled on May 13, 2004.

No. A-03-1165: **Watson v. Watson**. Petition of appellant for further review overruled on September 13, 2004, as untimely filed.

No. A-03-1178: **McAuliffe v. McAuliffe**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1207: **In re Guardianship & Conservatorship of Bowman**, 12 Neb. App. 891 (2004). Petition of appellee for further review overruled on November 24, 2004.

No. A-03-1210: **State v. Johnston**. Petition of appellant for further review overruled on June 23, 2004.

No. A-03-1235: **State v. Schulte**, 12 Neb. App. 924 (2004). Petition of appellant for further review overruled on November 17, 2004.

No. A-03-1246: **State v. Moore**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1247: **Nelsen v. Arrow Distributing**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-1258: **State on behalf of Hagens v. Moore**. Petition of appellant for further review overruled on September 15, 2004.

No. A-03-1264: **State v. Jefferson**. Petition of appellant pro se for further review overruled on May 26, 2004.

No. A-03-1271: **State v. Chrisman**. Petition of appellee for further review overruled on November 10, 2004.

No. A-03-1293: **State v. Ramirez-Flores**. Petition of appellant for further review overruled on June 9, 2004.

No. A-03-1309: **State v. Pestka**. Petition of appellant for further review overruled on July 14, 2004.

No. A-03-1353: **State v. Johnson**. Petition of appellant for further review overruled on September 29, 2004.

No. A-03-1355: **Reifenrath v. Omaha Pub. Schools**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1357: **State v. Gonzales**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1364: **State v. Woods**. Petition of appellant for further review overruled on July 14, 2004.

No. A-03-1373: **State v. Shouse**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1390: **State v. Rush**. Petition of appellant for further review overruled on October 14, 2004.

No. S-03-1399: **State v. Muro**, 13 Neb. App. 38 (2004). Petition of appellant for further review sustained on December 1, 2004.

No. A-03-1422: **State v. Lopez**. Petition of appellant for further review overruled on July 15, 2004, as untimely filed.

No. A-03-1429: **State v. Coleman**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-1440: **Collier v. Joslyn Art Museum**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1469: **Duff v. State**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-001: **State v. Demauro**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-014: **State v. Moore**. Petition of appellant for further review overruled on May 13, 2004.

No. A-04-024: **State v. Witmer**. Petition of appellant for further review overruled on July 14, 2004.

No. A-04-050: **State v. Martin**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-068: **Widtfeldt v. Holt Cty. Bd. of Equal.**, 12 Neb. App. 499 (2004). Petition of appellant for further review overruled on May 24, 2004, as untimely filed.

Nos. A-04-084 through A-04-086: **State v. Eissler**. Petitions of appellant for further review overruled on September 1, 2004.

No. A-04-088: **State v. Hively**. Petition of appellant for further review overruled on November 10, 2004.

No. S-04-105: **Pope v. Department of Corr. Servs**. Petition of appellant for further review sustained on May 26, 2004.

No. S-04-105: **Pope v. Department of Corr. Servs**. Petition of appellant for further review dismissed on November 10, 2004, as having been improvidently granted.

No. A-04-115: **State v. Goings**. Petition of appellant for further review overruled on May 24, 2004, as premature.

No. A-04-115: **State v. Goings**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-120: **State v. Allen**. Petition of appellant for further review overruled on August 16, 2004, as untimely filed.

No. A-04-125: **Mumin v. Hart**. Petition of appellant for further review overruled on November 10, 2004.

No. A-04-132: **State v. Lang**. Petition of appellant for further review overruled on May 26, 2004.

No. A-04-139: **Tast v. Clark**. Petition of appellant for further review overruled on June 23, 2004.

No. A-04-141: **State v. Uglow**. Petition of appellant for further review overruled on May 13, 2004.

No. A-04-145: **Moore v. Hansen**. Petition of appellant for further review overruled on September 1, 2004.

Nos. A-04-156, A-04-157: **State v. Haynes**. Petitions of appellant for further review overruled on November 24, 2004.

No. A-04-163: **State v. McCall**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-193: **State v. Ware**. Petition of appellant for further review overruled on October 14, 2004.

No. A-04-193: **State v. Ware**. Petition of appellant for further review overruled on October 14, 2004, as untimely filed.

No. A-04-214: **State v. Ziemelis**. Petition of appellant for further review overruled on September 29, 2004.

No. A-04-218: **Mumin v. Clarke**. Petition of appellant for further review overruled on July 14, 2004.

No. A-04-318: **State v. Jones**. Petition of appellant for further review overruled on October 14, 2004.

No. A-04-354: **State v. Ybarra**. Petition of appellant for further review overruled on September 29, 2004.

No. A-04-355: **State v. Dill**. Petition of appellant for further review overruled on September 22, 2004.

No. A-04-360: **State v. Silcock**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-366: **State v. Ivory**. Petition of appellant for further review overruled on October 27, 2004.

No. A-04-375: **Mumin v. Kenney**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-421: **City of Lincoln v. Remmen**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-425: **State v. Lara**. Petition of appellant for further review overruled on November 17, 2004.

No. A-04-463: **State v. Perez**. Petition of appellant for further review overruled on September 22, 2004.

No. A-04-467: **State v. Felder**. Petition of appellant for further review overruled on October 27, 2004.

No. A-04-475: **State v. Henry**. Petition of appellant for further review overruled on October 27, 2004.

No. A-04-496: **State v. Swift**. Petition of appellant for further review overruled on November 24, 2004.

No. A-04-511: **Malchow v. Freeborn**. Petition of appellant for further review overruled on July 26, 2004, as untimely filed.

No. A-04-522: **State v. Flower**. Petition of appellant for further review overruled on November 17, 2004.

No. A-04-545: **State v. Wessling**. Petition of appellant for further review overruled on November 17, 2004.

No. A-04-567: **State v. Warner**. Petition of appellant for further review overruled on September 22, 2004.

No. A-04-568: **State v. Drees**. Petition of appellant for further review overruled on November 24, 2004.

No. A-04-572: **State v. Anderson**. Petition of appellant for further review overruled on October 27, 2004.

No. A-04-577: **State v. Thies**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-583: **State ex rel. Hansen v. Department of Corr. Servs**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-606: **State v. Garcia**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-612: **Hansen v. Department of Corr. Servs**. Petition of appellant for further review overruled on August 24, 2004, as untimely filed.

No. A-04-690: **State v. Braimah**. Petition of appellant for further review overruled on November 10, 2004.

No. A-04-698: **Caton v. Goracke**. Petition of appellant for further review overruled on September 1, 2004.

No. S-04-706: **In re Interest of Rachel B. et al**. Petition of appellant for further review sustained on September 22, 2004.

No. A-04-763: **State v. Velazquez**. Petition of appellant for further review overruled on November 10, 2004.

No. A-04-772: **Dean v. Department of Corr. Servs**. Petition of appellant for further review overruled on October 14, 2004, as untimely filed.

No. A-04-784: **Schade v. Board of Parole**. Petition of appellant for further review overruled on November 17, 2004.

No. A-04-927: **State v. Garcia**. Petition of appellant for further review overruled on November 24, 2004.

No. A-04-974: **Frain v. Portsche**. Petition of appellant for further review overruled on November 10, 2004.

No. A-04-1054: **Blair v. Clarke**. Petition of appellant for further review overruled on December 13, 2004, as untimely filed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA ON BEHALF OF TAYLAR CHAE PATHAMMAVONG, A MINOR CHILD, APPELLEE, V. SEANGSOURIYAN PATHAMMAVONG, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND MANDY J. STRUEBING, THIRD-PARTY DEFENDANT, APPELLANT.

679 N.W.2d 749

Filed May 21, 2004. No. S-02-1370.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Taxation: Appeal and Error.** An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion.
3. **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.
4. **Modification of Decree: Child Support.** When a party owes past-due child support, the failure to pay must be found to be a willful failure to pay, in spite of an ability to pay, before an application to modify child support may be dismissed on the basis of unclean hands.
5. **Child Custody.** While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child.
6. ____. 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.

7. **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.
8. **Paternity: Taxation: Child Custody: Waiver.** A court having jurisdiction in a filiation proceeding shall have the power to allocate tax dependency exemptions as part of a custody order and may order the custodial parent to execute a waiver of his or her right to declare the tax exemptions if the situation of the parties so requires.
9. **Visitation: Appeal and Error.** The matter of travel expenses associated with visitation is 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.
10. **Visitation.** There is no immutable standard for the allocation of travel expenses associated with visitation, and instead the determination of reasonableness is made on a case-by-case basis.
11. **Parent and Child: Visitation.** A reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent, and the determination of reasonableness is to be made on a case-by-case basis.
12. **Paternity: Visitation: Jurisdiction: Appeal and Error.** Where, in a filiation proceeding, a noncustodial parent of a child who resides with a custodial parent in another state requests a Nebraska court having jurisdiction to specify his or her visitation rights and parenting time, it is an abuse of discretion not to do so.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed in part, and in part vacated and remanded for further proceedings.

Darik J. Von Loh, of Hernandez, Frantz & Von Loh, for appellant.

Bradley T. Kalkwarf, and, on brief, Vicky L. Johnson for appellee Seangsouriyan Pathammavong.

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

STEPHAN, J.

The appellant, Mandy Struebing (Mandy), and the appellee, Seangsouriyan Pathammavong (Sean), are the natural parents of Taylar Chae Pathammavong (Taylar), a minor child, who was born out of wedlock. Mandy appeals from an order of the district court for Saline County awarding permanent custody of Taylar to Sean.

I. BACKGROUND

Mandy gave birth to Taylar on August 25, 1995. In paternity proceedings instituted by the State of Nebraska on behalf of Taylar, the district court for Saline County entered an order on January 8, 1996, finding Sean to be Taylar's father and ordering him to pay child support.

Mandy, Sean, and Taylar lived together, initially in Nebraska and then in Texas, from the time Taylar was 2 months old until she was approximately 2 years old. In October 1997, Mandy took Taylar to live with her and a male companion in Arlington, Texas, approximately 20 miles from where Sean was then living. They remained there for approximately 1 year and then moved to Mansfield, Texas, located approximately 35 miles from Sean's residence. Mandy returned to Nebraska with Taylar in June 1999, without giving prior notice to Sean. During the ensuing 3 years, Mandy and Taylar lived in at least five different locations in Sprague and Crete, Nebraska.

During this period, the parties had an informal arrangement whereby Sean would have visitation with Taylar at Christmas and one or two other times per year in Nebraska, usually on major holidays. In addition, Taylar would spend between 4 to 8 weeks with Sean in Texas each summer. Sean testified that he would call Taylar approximately twice each month but was often unable to reach her because either the telephone had been disconnected or Mandy had moved without informing him.

On November 26, 2001, Mandy was convicted of driving while under suspension and sentenced to a period of incarceration. On May 1, 2002, while her appeal was pending but in anticipation of her incarceration, Mandy executed a power of attorney authorizing her mother, Cynthia Boshart, to have the care and custody of Taylar for a period of 6 months. Sean was not informed of Mandy's conviction or the possibility of her incarceration. Mandy lost her appeal and was incarcerated for a period of 60 days from June 11 to August 8. Mandy and members of her family concealed this information from Sean. During Mandy's incarceration, Boshart told Sean that Mandy was in Ogallala, Nebraska, taking care of a sick relative and that Taylar's summer visitation was to be limited to only 1 week. When Sean tried to contact Mandy to request more time with Taylar, he was unable to reach her. Sean

kept Taylar in Texas and contacted his former attorney in Nebraska to assist him in determining Mandy's whereabouts. This inquiry led to Sean's discovery of Mandy's incarceration.

When Sean did not return Taylar to Nebraska as Boshart had instructed, she filed a petition in Lancaster County Court seeking to be appointed Taylar's guardian. A hearing was held on the guardianship petition on July 30, 2002, at which both Boshart and Sean appeared. The matter was continued, but was ultimately dismissed before the next scheduled hearing.

On August 5, 2002, Sean filed an ex parte application in the district court for Saline County in which he sought temporary and permanent child custody and child support. The court granted Sean temporary custody and set a permanent custody hearing, which hearing was continued at Mandy's request. At the September 26 hearing, Sean and Mandy presented evidence in support of their respective claims for permanent custody of Taylar. In an order entered on October 30, the district court determined that it was in Taylar's best interests to remain in Sean's custody, subject to Mandy's reasonable rights of visitation. The order directed that Mandy was to "pay her own costs with regard to visitation." However, in ordering her to pay child support in the amount of $215 per month, the court noted that this amount represented a "deviation of $50.00 per month from the Nebraska Child Support Guidelines as a visitation expense for the benefit of [Mandy]." The district court awarded Sean the right to claim the income tax exemption for Taylar. Mandy perfected this timely appeal.

II. ASSIGNMENTS OF ERROR

Mandy assigns, consolidated and restated, that the district court erred in (1) granting Sean's ex parte temporary custody order, (2) awarding Sean permanent custody of Taylar, (3) failing to grant Mandy specific parenting time, (4) granting Sean the income tax exemption for Taylar, and (5) ordering Mandy to provide visitation transportation when it did not grant her a deviation from the Nebraska Child Support Guidelines.

III. STANDARD OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record

to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988).

[2] An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion. See *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

IV. ANALYSIS

1. Ex Parte Temporary Custody Order

Mandy argues that the trial court erred in granting Sean's ex parte temporary custody order because he failed to plead those facts required under Neb. Rev. Stat. § 43-1209 (Reissue 1998), see, currently, Neb. Rev. Stat. § 43-1246 (Supp. 2003) of the Uniform Child Custody Jurisdiction and Enforcement Act, and because he neither requested the court's permission to remove Taylar from Nebraska during the pendency of the action, nor notified the court that he would be doing so.

It is undisputed that the application for temporary and permanent custody filed on behalf of Sean in the Saline County District Court lacked certain information required by § 43-1209, including Taylar's whereabouts for the preceding 5 years and the fact that Sean was living in Texas, not Nebraska. In addition, the application failed to disclose the pending guardianship proceeding in Lancaster County. At the hearing on the ex parte motion, Sean's attorney acknowledged that she had mistakenly failed to include such information.

[3] Sean argues on appeal that the trial court did not err in granting his ex parte temporary custody order, which did not greatly differ from his normal summer visitation schedule with Taylar, and that even if it was erroneous, the temporary order was rendered moot when the permanent custody order was entered on October 30, 2002. 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. *Rath v. City of*

Sutton, 267 Neb. 265, 673 N.W.2d 869 (2004); *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003). The issue of whether the temporary order was granted in error was relevant only from the time it was ordered until it was replaced by the order determining Taylar's permanent custody placement. Therefore, the issues pertaining to the ex parte order are moot and need not be addressed in order to resolve this appeal.

2. Permanent Custody

Mandy contends that the district court erred in awarding permanent custody of Taylar to Sean because (1) Sean failed to meet the two-part test laid out in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), for removal of a child from the jurisdiction of this state, (2) Sean came before the court with unclean hands because he was over $5,000 in arrears on his child support obligation, and (3) it was not in Taylar's best interests to change custody.

(a) Legal Standard

Mandy argues that the two-part test from *Farnsworth, supra*, most recently applied in *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002), is applicable in this case. The test requires a custodial parent who is seeking permission to relocate to another state with a minor child to prove that the parent has a legitimate reason for leaving the state and that such a move is in the best interests of the child. Unlike *Farnsworth* and *Vogel*, however, this case does not concern parental relocation or the modification of a previous court-ordered custody agreement. The order before us on appeal is the first court order assigning custody to one parent or the other, and therefore modification was never an issue. In addition, the parents in this case have lived over 600 miles apart for a number of years prior to the custody determination. The issue before the district court was not whether one or the other of the parents was free to relocate with the child, but, rather, which parent should be awarded permanent custody of Taylar as a matter of initial judicial determination. This question must be resolved on the basis of the fitness of the parents and the best interests of the child. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); *Lancaster v. Brenneis*, 227 Neb. 371,

417 N.W.2d 767 (1988). Accordingly, the district court was not required to apply the *Farnsworth* standard in resolving the disputed custody issue in this case.

(b) Unclean Hands

[4] Mandy argues that because Sean was not current on his child support obligation, he should have been barred from seeking custody under the doctrine of unclean hands. With respect to that doctrine, we have stated:

> " ' "Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." ' "

Marr v. Marr, 245 Neb. 655, 658, 515 N.W.2d 118, 120 (1994), quoting *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (1983). Generally, issues of child support and custody are treated as separate and distinct issues. See *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). We have also held that when a party owes past-due child support, the failure to pay must be found to be a willful failure to pay, in spite of an ability to pay, before an application to modify child support may be dismissed on the basis of unclean hands. *Marr, supra*; *Voichoskie, supra.*

Mandy relies on *Snodgrass v. Snodgrass*, 241 Neb. 43, 486 N.W.2d 215 (1992), in which a noncustodial father, after having been found to be in willful contempt of court for failure to make child support payments for his two minor children, filed an application to modify the divorce decree. In the application, he alleged that he was not the father of the older child and sought a paternity determination as well as custody of the younger child. The mother of the children successfully contended that the application should be dismissed on the ground that the petitioner had failed to come to the court with clean hands by virtue of the contempt order and child support arrearage. In affirming the district court's dismissal of the application, we determined that it was supported by a record which showed that the "[father's] conduct since the dissolution of the marriage has been to pay no child support unless

compelled by the court" and that it was his "flagrant and continuing contempt of court" which precluded him from obtaining relief. *Snodgrass*, 241 Neb. at 48, 486 N.W.2d at 218.

At the time of the hearing in this case, Sean had recently returned to his job as an airline worker after being furloughed following the September 11, 2001, terrorist attacks. Although Sean had been paying child support for Taylar, he had done so sporadically at times and at the time of trial was over $5,000 in arrears. Since his return to work, however, Sean had been paying his current support obligation as well as making payments on the past-due amounts. Although it is undisputed that Sean was in arrears on his child support, there has never been a finding of contempt or of willful or intentional withholding of support. The record does not reflect that Sean sought custody of Taylar in order to avoid his past-due or current child support obligations. Unlike the circumstances in *Snodgrass*, this record does not reflect willful and contumacious nonpayment of child support which would bar Sean from seeking custody under the unclean hands doctrine.

(c) Best Interests

[5] Mandy contends that the district court erred in determining that it was in Taylar's best interests to be in the custody of Sean. While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). In filiation proceedings, we have applied the standards for determination of custody set forth in Neb. Rev. Stat. § 42-364(2) (Reissue 1998), thus disregarding the fact that a child was born out of wedlock in deciding custody disputes between natural parents. *State ex rel. Ross v. Jacobs*, 222 Neb. 380, 383 N.W.2d 791 (1986); *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981). Section 42-364(2) sets forth the following nonexhaustive list of factors to be considered in determining the best interests of a child for purposes of awarding custody:

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;

(b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;

(c) The general health, welfare, and social behavior of the minor child; and

(d) Credible evidence of abuse inflicted on any family or household member.

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

Both parents presented evidence in support of their respective claims that it was in Taylar's best interests to be placed in their permanent custody. Mandy testified that since her release from incarceration, she has been living with Boshart and working full time at a telemarketing firm. She testified that Taylar has her own room in Boshart's home. Sean testified that he was working full time at American Airlines and was living with his mother and brother in a four-bedroom home. At the time of trial, Sean was sharing a bedroom with Taylar, but he stated that depending on the outcome of the trial, it was his intention to have Taylar's own bedroom ready within a week.

The record reflects that Taylar does very well in school but that she missed an excessive number of days in kindergarten and first grade while in Mandy's custody. Mandy's explanation for the excessive absences was that Taylar "was sick a lot" and "didn't want to go" to kindergarten. Shari Keola, Sean's sister, testified that Mandy had provided daycare for Keola's four children but

that she terminated the arrangement because Mandy was either late in taking her children to school or they did not go at all. Sean testified that since she has been in his custody, Taylar is healthy and enjoys school. Sean is a member of the PTA, and also works as a substitute teacher. Sean takes Taylar to a Christian church on Sundays and also plans to introduce her to Buddhism because he feels it is important for her to understand his culture.

Each parent presented evidence disparaging the stability and moral fitness of the other. Court records reflect that from February 1994, when Mandy was still a minor, to May 2002, she has been arrested for and convicted of numerous traffic and criminal offenses. The majority of offenses with which she has been charged relate to operation of a motor vehicle and include numerous traffic and speeding violations, as well as five or six occurrences of driving under suspension. In addition, Mandy was arrested once in 2000 and twice in 2002 on charges of possession of marijuana. At the custody hearing, Mandy testified that she no longer uses marijuana and that the last time she had used it was in April of that year. Sean testified that when he visited Mandy in November 2001, he failed to recognize her because of her "weight loss and her scabbed arms and her dingy hair." Sean testified that Mandy's explanation for her appearance was that she had been using methamphetamines.

Mandy married a Mexican national in April 2002. She testified that she has known him for 3 years but that she has never lived with him and that he was deported during her incarceration. Keola testified that Mandy told her she had received $10,000 for marrying this person, but Mandy denied having received any money.

Mandy testified that Sean physically abused her on three occasions. The first occasion was May 18, 1996, when they fought over money and Sean punched or pushed Mandy after she broke a window in his car. Mandy filed a police report following the incident which led to Sean's being convicted of a Class I misdemeanor for assault. Mandy also testified that during Memorial Day weekend in 1996, she and Sean were fighting, and that he punched her in the back of the head while she was driving. Taylar and Mandy's sister were also in the car, and Mandy's sister corroborated the incident. The third incident occurred on Easter in 1997 at Sean's mother's house in Texas when they got into a fight

and Mandy testified that Sean punched her in the face. Mandy did not report either the second or third incidents to police. Sean denied that he was ever aggressive with Mandy other than the May 18, 1996, incident and testified that he feels he made a mistake in that instance and that he has matured since then.

Mandy testified that she would be a better custodial parent than Sean because she has had Taylar in her care for 7 years and that she and her family are all that Taylar knows. Sean testified that it would be in Taylar's best interests to remain in his custody because she is doing well in school, making new friends, and is living in a wholesome environment.

[7] Our task on appeal is to determine whether the trial court abused its discretion in concluding, based upon the evidence we have summarized, that it was in Taylar's best interests to be in the permanent custody of Sean. 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); *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). The evidence in this case reflects that while neither party has an unblemished personal record, both are fit parents who have established a familial relationship with Taylar. It appears that Taylar did well while in Mandy's custody and has continued to do well in Sean's custody. Nevertheless, there is substantial evidence that Mandy has had an unstable lifestyle marked by numerous law violations, substance abuse, and frequent changes of residence. In light of this evidence, we cannot say that the district court abused its discretion in awarding custody to Sean. See *State ex rel. Ross v. Jacobs*, 222 Neb. 380, 383 N.W.2d 791 (1986) (determining that award of custody to father was not abuse of discretion where there was substantial evidence of mother's past unstable lifestyle).

3. Other Issues

(a) Tax Exemption

[8] Mandy contends that the district court erred in ordering that Sean shall be entitled to claim the income tax exemption for

Taylar commencing in 2002. This award is consistent with the general rule that a custodial parent is presumptively entitled to the federal tax exemption for a dependent child. See, I.R.C. § 152(e) (2000); *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991). We have held that a Nebraska court having jurisdiction in a divorce action shall have the power to allocate tax dependency exemptions as part of the divorce decree and may order the custodial parent to execute a waiver of his or her right to declare the tax exemptions if the situation of the parties so requires. *Hall, supra.* We hold that a court having jurisdiction in a filiation proceeding possesses the same power. However, we find no circumstances in this case which would warrant departure from the presumptive rule by which the dependency exemption is allocated to the custodial parent, and we therefore conclude that the district court did not abuse its discretion in allocating the exemption to Sean.

(b) Visitation Expenses

Mandy also contends that the district court erred in instructing her to "pay her own costs with regard to visitation." She testified that because of her inability to drive, she would have difficulty with transportation for visitation if Taylar were permitted to remain with Sean in Texas, and she requested a deviation from the Nebraska Child Support Guidelines to help her "provide and pay for that cost of transportation." She argues on appeal that the district court abused its discretion when it did not grant her requested deviation.

[9,10] "[T]he matter of travel expenses associated with visitation is 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." *Vogel v. Vogel*, 262 Neb. 1030, 1040-41, 637 N.W.2d 611, 620 (2002). No case has "[set] an immutable standard for the allocation of travel expenses, and instead the determination of reasonableness is made on a case-by-case basis." *Id.* at 1041, 637 N.W.2d at 620-21.

The order of the district court expressly stated that the $215 per month Mandy was required to pay in child support "is a deviation of $50.00 per month from the Nebraska Child Support Guidelines as a visitation expense" for Mandy's benefit. We are

directed to nothing in the record which would substantiate a claim that the amount of the deviation is inadequate, and we therefore conclude that Mandy was given the relief that she requested with respect to visitation expenses.

(c) Parenting Time/Visitation

[11] Mandy argues that the trial court abused its discretion by awarding her "reasonable rights of visitation" with Taylar rather than specific parenting time. Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent, and the determination of reasonableness is to be made on a case-by-case basis. *Vogel, supra.*

At trial, Mandy requested that she be awarded visitation rights every other holiday, as well as 6 to 8 weeks in the summer in the event Sean was granted permanent custody. The record reflects that when Taylar was in the custody of Mandy, the parties arranged for reasonable visitation with Sean without the necessity of a court order. Mandy testified that she had been "pretty lenient" with Sean, allowing him to see Taylar "whenever he wants," and that she had never denied him visitation. Sean indicated at trial that he likewise had no objections to Mandy's being awarded reasonable rights of visitation. The district court did not explain its reasons for ordering "reasonable rights of visitation" instead of a specific visitation schedule.

[12] Although we have held that the initial custody determination in this case was not governed by the analysis used in parental relocation cases, it nevertheless does involve circumstances where the custodial and noncustodial parents reside in different states hundreds of miles apart. Thus, as in the parental relocation cases, preservation of the familial relationship between the minor child and the noncustodial parent is an important objective in the exercise of the court's equity jurisdiction. In the absence of a stipulation or agreement, the fact that the parties were able to agree upon reasonable visitation before custody became a contested issue provides no assurance that they will be able to do so now that the court has resolved the issue in favor of one parent and against the other. Where, as here, a noncustodial parent of a child who resides with a custodial parent in another state requests

a Nebraska court having jurisdiction to specify his or her visitation rights and parenting time, we conclude that it is an abuse of discretion not to do so. Resolution of this issue as a part of the custody determination serves the best interests of the child, the parents, and efficient judicial administration.

The record does not afford sufficient current information about the circumstances of the parties to enable us to fashion a specific visitation order. Accordingly, we vacate that portion of the decree granting Mandy "reasonable rights of visitation" with Taylar and remand the cause for further proceedings for a determination of Mandy's specific visitation rights and parenting time.

V. CONCLUSION

The judgment of the district court is affirmed in all respects, except that portion of the judgment ordering "reasonable rights of visitation," which is vacated, and the cause is remanded to the district court for the sole purpose of determining the specific visitation rights and parenting time to which Mandy is entitled.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

KIM L. BURKE, AS MOTHER AND NEXT FRIEND OF TROY JOSEPH BURKE, A MINOR, APPELLANT, V. ROBERT M. MCKAY ET AL., APPELLEES.

679 N.W.2d 418

Filed May 21, 2004. No. S-02-1371.

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 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. **Negligence: Words and Phrases.** As currently codified, "assumption of risk" as an affirmative defense means that (1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger.

4. **Negligence.** The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Affirmed.

Maren Lynn Chaloupka and Robert Paul Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Kimberli D. Dawson and Bruce L. Hart, of Hart, Dawson & Sudbeck, P.C., L.L.O., for appellee The Nebraska High School Rodeo Association.

Robert F. Peterson, of Laughlin, Peterson & Lang, for appellee McKay Rodeo Company.

Curtis D. Ruwe and C.J. Gatz for appellee Robert M. McKay.

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

STEPHAN, J.

This is an action filed by Kim L. Burke, as mother and next friend of Troy Joseph Burke (Burke), seeking damages for personal injuries sustained by Burke while competing in a high school rodeo in Madison, Nebraska, on May 26, 2000 (the Madison rodeo). The action was initially brought against rodeo stock contractor McKay Rodeo Company, Inc. (MRC), and Robert M. McKay, its sole shareholder. The Nebraska High School Rodeo Association (NHSRA) was subsequently joined as a defendant. Based upon its determination that Burke had assumed the risk of injury as a matter of law, the district court for Madison County entered summary judgment in favor of all defendants. Burke's mother filed this timely appeal, which we moved to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTS

Burke was born on August 20, 1981, and was 18 years old at the time of the Madison rodeo. A resident of Box Butte County, Nebraska, he grew up riding horses and began competing in rodeos when he was 10 or 11 years old. He began participating in bareback riding when he was approximately 15 years old. Burke estimated that he had competed in 60 to 80 rodeos between his sophomore year in high school and the day of his injury, which occurred a week after his graduation. Although Burke had previously been thrown from rodeo animals and had once dislocated his shoulder when riding a bull, he otherwise suffered only "bruises and bumps" prior to the injury which is the subject of this action. At the time of the Madison rodeo, Burke was the defending high school state champion in the bareback event.

The NHSRA is a nonprofit corporation doing business in the State of Nebraska. Its purpose is to offer high school students the opportunity to learn and compete in the sport of rodeo. The NHSRA sanctions 23 to 25 high school rodeos per year which are sponsored by local rodeo committees. Before sanctioning a high school rodeo, the NHSRA must first review and approve the proposal of the local committee with respect to the date and time of the rodeo, the judges, and the rodeo stock contractor.

The NHSRA sanctioned the Madison rodeo held on May 26, 2000. The rodeo was sponsored by the Northeast Nebraska High School Rodeo Club, which contracted with MRC to provide stock for the rodeo. The contract provided in part: "An event director or arena director may declare a particular animal unsatisfactory. Animals used in a contest shall be closely inspected and objectionable ones eliminated." John Mundorf, the director of NHSRA, testified that a stock contractor for a high school rodeo is expected to provide adequate stock which is safe for the participants in the sense that the animal would "not intentionally bring harm to an individual."

Prior to competing in the Madison rodeo, Burke and his parents signed a document entitled "Minor's Release, Assumption of Risk and Indemnity Agreement." This agreement was effective for 1 year beginning August 1, 1999, and was read and signed by Burke and both of his parents. It provided in relevant part:

> [W]e, the undersigned, on behalf of the minor and for ourselves . . . do hereby:
>
> 1. RELEASE, DISCHARGE AND COVENANT NOT TO SUE the . . . rodeo association [and] sponsors . . . (. . . hereinafter collectively referred to as "releasees") from any and all claims and liability arising out of strict liability or ordinary negligence of releasees . . . which causes the undersigned injury, death [or] damages . . . .
>
> 2. UNDERSTAND that minor's entry into the restricted area and/or participation in rodeo events contains DANGER AND RISK OF INJURY OR DEATH TO MINOR, that . . . rodeo animals are dangerous and unpredictable, and that there is INHERENT DANGER in rodeo which we each appreciate and voluntarily assume because the minor and we choose to do so. Each of the undersigned has observed events of the type that the minor seeks to participate in. . . . WE EACH VOLUNTARILY ELECT TO ACCEPT ALL RISKS connected with the minor's entry into the restricted area and/or participation in any rodeo events.

The entry form for the Madison rodeo was signed by Burke and his father. It stated in part that in consideration for Burke's being able to participate, his parents agreed

> to make no claims against the [NHSRA], sponsors of all NHSRA sanctioned activities, or their members or anyone acting through or for them, for any loss or damage, or injury to property, animals, or persons resulting from any cause, including any negligence of any person connected with any of the activities of the rodeo[.]

Signs posted at the Madison rodeo stated the following:

> WARNING
>
> Under Nebraska Law, an equine professional is not liable for an injury to or the death of a participant in equine activities resulting from the inherent risks of equine activities, pursuant to this act.

On the day of the Madison rodeo, the draw for the bareback event was posted approximately 2 hours before the competition began. Upon checking the posting, Burke discovered that he had drawn a horse designated as "No. 18." Burke remembered the number and, after looking at the horse, confirmed his belief that

No. 18 was the same horse that he had seen at a May 1999 rodeo in O'Neill, Nebraska (the O'Neill rodeo). At the O'Neill rodeo, Burke had witnessed horse No. 18 go over backward or "flip" onto its rider, injuring him. Burke testified that after observing this, he formed the opinion that horse No. 18 "just went over by himself." Burke testified that he was concerned about riding horse No. 18 in the Madison rodeo because of the incident he had observed at the O'Neill rodeo. Burke talked to another competitor at the Madison rodeo, Beau Saner, and asked him if he had seen horse No. 18 "buck out" at another rodeo. Saner told Burke that he had seen horse No. 18 at another rodeo and that it "bucked straight out" without any trouble and did not go over backward onto its rider. Burke testified that based on his discussion with Saner, he did not have any apprehension about riding horse No. 18.

Burke's father had participated in rodeos and was aware of the potential for injury in rodeo competition. He attended both the O'Neill and the Madison rodeos. Burke's father witnessed horse No. 18 flip over onto its rider at the O'Neill rodeo. Prior to that time, he had never seen a horse flip over onto a rider, and it made an impression on him. He was aware that Burke had drawn horse No. 18 in the Madison rodeo but did not recognize the horse as the same one he had seen flip in O'Neill until the horse was coming into the chute for Burke's ride. When he realized it was the same horse, he was concerned. Burke's father did not, however, say anything to anyone about his concerns until after the chute had opened. He gave Burke advice about how to approach the ride but did not say anything about his concerns regarding the horse or about the possibility of turning the horse out because he felt that it "would be Troy's decision." Three or four minutes elapsed from the time Burke's father recognized horse No. 18 and when the chute opened. He agreed that both he and Burke knew that horse No. 18 was the same horse involved in the incident at the O'Neill rodeo and that they each had an opportunity to stop the ride, but chose not to do so.

Upon leaving the chute with Burke as its rider, horse No. 18 "stood up on his back legs and threw himself to the rear in such a way that he fell over backwards, suddenly crushing [Burke]

between his back and the ground." Burke suffered injuries as a result.

McKay had acquired horse No. 18 in November 1998 for use in bucking events at rodeos. He testified that he bucked the horse twice with a dummy and once with a rider in the spring of 1999 and observed nothing unusual about the animal. McKay testified that the horse was first used in competition at the May 1999 O'Neill rodeo, where it flipped over onto its rider. McKay's son told McKay that he subsequently took horse No. 18 to a rodeo in Wisner, Nebraska, in July 1999 and that it bucked normally without incident. The horse was subsequently injured during that same month and put out to pasture until March 2000. The horse was not ridden between July 1999 and the Madison rodeo in May 2000. McKay testified that he knows more about horse No. 18 than anyone else and that he believed that the horse was reasonably safe or he would not have brought the horse to the Madison rodeo.

Mundorf testified that he had observed the incident involving horse No. 18 at the O'Neill rodeo. He testified that he asked McKay at that time "'if he had bucked that horse,'" to which McKay replied that he had and also told Mundorf that "'the horse was fine.'" Mundorf testified that he then asked McKay not to bring the horse to any more high school rodeos. McKay testified that Mundorf made this request after Burke's injury at the Madison rodeo in May 2000, but not before that event.

The operative second amended petition alleges that Burke's injuries were proximately caused by the negligence of NHSRA in "permitting horse #18 to be used in the rodeo when its employees and representatives knew or should have known the horse was unreasonably dangerous to the foreseeable participants," and by the negligence of McKay in "bringing a horse to the competition which he knew or should have known was unreasonably dangerous to the foreseeable participants" and in "bringing horse #18 to the rodeo competition when he had been specifically instructed by Officers of the [NHSRA] not to bring the horse." In their answers, defendants denied the allegations of negligence and asserted affirmative defenses conferred by Neb. Rev. Stat. §§ 25-21,249 through 25-21,253 (Cum. Supp. 2000),

including assumption of risk, release, and immunity. The affirmative defenses were denied by reply.

Each defendant filed a motion for summary judgment. In its order granting the motions, the district court determined from the uncontroverted evidence that Burke was aware of the general danger inherent in rodeo competition and the specific danger of riding horse No. 18 in light of its history of going over backward at the O'Neill rodeo. The court further determined that Burke understood the danger and voluntarily exposed himself to it by choosing to ride horse No. 18, thereby assuming the risk of injury.

ASSIGNMENT OF ERROR

Burke's mother assigns that the district court erred in granting defendants' motions for summary judgment.

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. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004); *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003); *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (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. *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003); *Big Crow v. City of Rushville, supra.*

ANALYSIS

[3] Although the answers assert several alternative affirmative defenses, the district court sustained defendants' motions for summary judgment on the basis of its specific determination that Burke assumed the risk of injury. The defense of assumption of risk is derived from the maxim "volente non fit injuria" which means that "where one, knowing and comprehending the danger,

voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom." *Hollamon v. Eagle Raceway, Inc.*, 187 Neb. 221, 224, 188 N.W.2d 710, 711 (1971), *disapproved on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992). As currently codified, "assumption of risk" as an affirmative defense means that "(1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger." Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995). See, also, *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002); *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). Where the requisite knowledge, understanding, and voluntary exposure are proved, this court has upheld the application of the defense as a bar to the personal injury claim of a minor. *Schmidt v. Johnson*, 184 Neb. 643, 171 N.W.2d 64 (1969).

[4] The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. *Jay v. Moog Automotive, supra*; *Pleiss v. Barnes, supra.* For example, in *Pleiss*, the plaintiff was injured when a ladder on which he was standing flipped, twisted, and started to slide, causing him to fall. The plaintiff testified that he knew that ladders "could 'get shaky and fall' " but that he had never seen a ladder "flip, twist, and slide" prior to his injury. 260 Neb. at 775, 619 N.W.2d at 829. Applying the subjective standard set forth above, we wrote that

> the question is not whether [the plaintiff] knew that in general ladders could be dangerous, but whether he knew and understood that this particular ladder, either because of its placement or because it was not tied down, created a specific danger that it could flip, twist, and slide, causing him to fall.

Id. at 776, 619 N.W.2d at 830. We determined that because the record did not indicate any such specific knowledge or understanding, the trial court erred in instructing the jury on assumption of risk.

In applying this subjective standard to the facts in this case, we must first identify the specific danger upon which the defense of assumption of risk is predicated. Viewed in a light most favorable to Burke, the evidence reflects that while a horse ridden in a rodeo bareback competition can be expected to throw its rider by bucking, it is unusual for such a horse to flip over backward and land on top of the rider. Thus, Burke's acknowledged familiarity with the general risks of injury inherent in rodeo competition cannot form the basis of the assumption of risk defense with respect to the injury he sustained at the Madison rodeo. Rather, his conduct must be examined with respect to the specific danger that horse No. 18 would not buck normally, but would instead rear up and flip over backward on top of the rider, causing injury.

Our primary inquiry in this regard is whether Burke knew of and understood the specific danger involved in riding horse No. 18 in the Madison rodeo. The undisputed evidence is that horse No. 18 fell backward onto its rider on only one previous occasion, at the O'Neill rodeo in May 1999. Burke and his father were present and witnessed the incident and were aware of the resulting injury to the rider. Both regarded the actions of horse No. 18 as unusual for a bucking horse. Burke did not observe any physical cause for the horse's actions, testifying that "[i]t appeared to me that he just went over by himself." When Burke drew horse No. 18 at the Madison rodeo, he recognized it as the same horse which had gone over backward onto its rider at the O'Neill rodeo. Likewise, his father recognized the horse before Burke's ride. Thus, there is uncontroverted evidence that Burke and his father knew of and understood the specific risk posed by horse No. 18.

The next inquiry is whether, as a matter of law, Burke voluntarily exposed himself to the danger. The record reflects that the draw for the bareback event in the Madison rodeo was posted approximately 2 hours before the competition began. Both Burke and his father admitted that Burke could have elected not to ride horse No. 18. After discussing the horse with Saner, another competitor, Burke concluded that the behavior of the horse at the O'Neill rodeo was a "one-time deal" and assumed that he could ride the animal, a decision which he subsequently characterized as "a mistake." The record thus establishes that

Burke considered the specific risk posed by riding horse No. 18 and made a conscious decision to expose himself to the potential danger by riding the horse in competition. Moreover, it is uncontroverted that the injuries for which damages are sought in this action occurred as a result of this decision.

There is conflicting testimony with respect to whether Mundorf told McKay not to bring horse No. 18 to any high school rodeo events after the O'Neill rodeo incident. Under our standard of review, which entitles the nonmoving party to the benefit of all favorable inferences, we therefore assume that Mundorf did issue this instruction to McKay. However, we conclude that this does not constitute a genuine issue of material fact with respect to the defense of assumption of risk because Mundorf's statement to McKay was based upon information which was fully known to both Burke and his father, namely, the fact that horse No. 18 fell over backward onto its rider during the O'Neill rodeo. There is nothing in the record to suggest that either Mundorf or McKay had knowledge with respect to the bucking tendencies or propensities of horse No. 18 superior to that of Burke or his father. Cf. *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997) (superior knowledge of invitor is foundation for liability, absent which no liability exists). Mundorf, McKay, Burke, and Burke's father all witnessed the only prior occasion when the horse fell over backward onto its rider during a rodeo competition. While it is true that Burke's injury could have been avoided if McKay had complied with Mundorf's instruction not to bring the horse to future high school rodeos because of what occurred at the O'Neill rodeo, it is equally true that the injury could have been avoided if, based upon his personal knowledge of the same incident, Burke had elected not to ride the horse in the Madison competition. Burke's deliberate, considered, and voluntary decision to ride the horse with full knowledge of the specific risk of danger based upon the animal's prior actions thus constitutes assumption of risk as a matter of law.

[5] An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 639 N.W.2d 88 (2002). Because we conclude that all claims asserted in this action are

barred as a matter of law by the defense of assumption of risk as set forth in § 25-21,185.12, we do not reach the issues of whether such claims would be barred by the waiver and release agreement executed by Burke and his parents, or under the provisions of §§ 25-21,249 through 25-21,253.

CONCLUSION

For the foregoing reasons, we conclude that uncontroverted evidence establishes that Burke knew and appreciated the specific danger posed by riding horse No. 18 in the Madison rodeo and that he voluntarily exposed himself to that danger by electing to ride the horse in the rodeo competition. All claims with respect to injuries occurring as a result of such exposure are therefore barred as a matter of law by the doctrine of assumption of risk as codified at § 25-21,185.12, and the district court did not err in entering summary judgment in favor of defendants.

AFFIRMED.

HENDRY, C.J., dissenting.

I respectfully dissent. The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002). Whether the plaintiff assumed a risk usually presents a question of fact. See *id.*

The Restatement (Second) of Torts § 496 D, comment *e.* at 575 (1965), is in accord:

> Whether the plaintiff knows of the existence of the risk, or whether he understands and appreciates its magnitude and its unreasonable character, is a question of fact, usually to be determined by the jury under proper instructions from the court. The court may itself determine the issue only where reasonable men could not differ as to the conclusion.

See, also, *Mandery v. Chronical Broadcasting Co.*, 228 Neb. 391, 399, 423 N.W.2d 115, 120 (1988) ("'[e]xcept where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of

the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk' "); NJI2d Civ. 2.02B (defendant has burden to show that "the plaintiff knew of and understood the *specific* danger" (emphasis supplied)).

As the majority notes, shortly after Burke realized he had drawn horse No. 18 at the Madison rodeo, he talked to Saner, a coparticipant. Saner told Burke that he had observed horse No. 18 at another rodeo and that it had "bucked straight out" without any trouble and did not go over backward onto its rider. This evidence is uncontroverted. Based on Saner's statement, Burke concluded that the O'Neill incident, which occurred approximately 1 year earlier, was a "one-time deal with [the rider in O'Neill] . . . and [the horse] would buck fine." Burke stated that after talking to Saner, he did not have any apprehensions about riding the horse and that he also believed McKay would bring suitable livestock to a high school rodeo.

Viewing this evidence in the light most favorable to Burke, and giving him the benefit of all reasonable inferences as we must do, see *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000) (where reasonable minds differ as to whether inference supporting ultimate conclusion can be drawn, summary judgment should not be granted), I am of the view that Burke's conclusion based on Saner's observation creates a genuine issue of fact as to Burke's subjective appreciation and understanding of the specific risk, to wit: that the horse would not buck normally, but would instead rear up and flip over backward. Whether Burke was negligent in reaching that conclusion is not the issue presented by this appeal.

Because I do not believe it is appropriate for Burke's assumption of the risk to be decided as a matter of law, I would reverse the granting of summary judgment on this basis and remand the matter to the district court for further proceedings.

CONNOLLY and GERRARD, JJ., join in this dissent.

BRIAN MOGENSEN, DOING BUSINESS AS PREMIUM FARMS, APPELLANT, V. BOARD OF SUPERVISORS, ANTELOPE COUNTY, NEBRASKA, APPELLEE.

679 N.W.2d 413

Filed May 21, 2004. No. S-02-1408.

1. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
2. **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.
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. ____: ____. When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte.
5. **Administrative Law.** An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.
6. **Statutes.** 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: Legislature: Intent.** When a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question to ascertain the intent of the Legislature.
8. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
9. ____. If a conflict exists between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes.
10. **Political Subdivisions: Appeal and Error.** An appeal from a board of supervisors denying a conditional use permit is to be taken in accordance with Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 1997) and not by a petition in error.

Appeal from the District Court for Antelope County: PATRICK G. ROGERS, Judge. Appeal dismissed.

Rodney M. Confer and Joseph A. Wilkins, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

Michael L. Long, Antelope County Attorney, for appellee.

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

CONNOLLY, J.

This case requires us to decide what is the proper procedure to appeal a county board of supervisors' decision to deny a conditional use permit. Brian Mogensen, doing business as Premium Farms, appeals the dismissal of his petition in error. Mogensen sought to appeal the denial of a conditional use permit by the Antelope County Board of Supervisors (Board of Supervisors). We determine that the district court lacked jurisdiction to hear the petition in error because Mogensen failed to appeal to the Antelope County Board of Adjustment (Board of Adjustment) as required by Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 1997). Accordingly, we dismiss the appeal.

BACKGROUND

Mogensen applied for a conditional use permit to apply nutrients from gray water at a hog confinement lagoon through irrigation pivots or trucks. The Antelope County Planning Commission voted to recommend to the Board of Supervisors that a conditional use permit be granted. The recommendation included conditions about the location Mogensen could pump, a requirement that pumping occur only during the growing season, and a requirement that a neighbor be contacted when there was a south wind, to determine if pumping could be done.

The Board of Supervisors held public hearings on May 7 and 15, 2002. Minutes from the second hearing state that there was discussion on (1) chiseling in the nutrients, spreading them on the ground, and dispersing them through a pivot; (2) untimely waste dispersion by Mogensen during the off season; and (3) downsizing the hog operation. Without stating its reasons, the Board of Supervisors denied the permit. On June 4, the Board of Supervisors clarified its decision denying the permit, stating that it was " 'due to concern of citizens within the set backs.' "

Mogensen filed a petition in error in the district court, assigning five errors. He later dismissed all assigned errors except one. He alleged that the Board of Supervisors, by failing to state reasons for disapproving the permit, violated the Antelope County zoning regulations and acted arbitrarily in denying the permit.

The district court stated that there appeared to be two ways to appeal the ruling of the Board of Supervisors: by petition in

error and by appealing to the Board of Adjustment. The court addressed the matter under the petition in error statute, Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2002). The court determined that Mogensen failed to show that the Board of Supervisors' decision was not supported by relevant evidence. Thus, the court dismissed the petition in error. Mogensen appeals.

ASSIGNMENTS OF ERROR

Mogensen assigns that the district court erred by failing to reverse the denial of the permit because (1) the Board of Supervisors failed to provide an equitable process to obtain a permit under Neb. Rev. Stat. § 23-114.01 (Reissue 1997) and (2) there was no evidence to support a rational basis to deny the permit.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is a matter of law. *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003).

[2] 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. *Mitchell v. French*, 267 Neb. 656, 676 N.W.2d 361 (2004).

ANALYSIS

First we address what is the proper procedure to appeal a denial of a conditional use permit by a board of supervisors. Here, Mogensen filed a petition in error with the district court. The parties, however, do not discuss the procedural issue in their briefs. The court noted that §§ 23-168.01 to 23-168.04 also provide a method for appeal. Thus, the question is whether Mogensen, by filing a petition in error, properly perfected an appeal. If a petition in error is not the proper procedure for appealing the Board of Supervisors' decision, then the court lacked jurisdiction.

[3,4] 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*, 267 Neb. 288, 673 N.W.2d 558 (2004). When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court

to raise and determine the issue of jurisdiction sua sponte. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

Because of the procedural tension, we must interpret a series of statutes. The petition in error statute states that a "judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court." § 25-1901. But § 23-168.02 states in part:

> (1) An appeal to the board of adjustment may be taken by any person or persons aggrieved, or by any officer, department, board, or bureau of the county affected by any decision of an administrative officer or planning commission. Such appeal shall be taken within a reasonable time, as provided by the rules of the board of adjustment, by filing with the board a notice of appeal specifying the grounds thereof. The officer or agency from whom the appeal is taken shall transmit to the board of adjustment all the papers constituting the record upon which the action appealed from was taken.

In addition, § 23-168.03 provides:

> The board of adjustment shall, subject to such appropriate conditions and safeguards as may be established by the county board, have only the following powers:
>
> (1) To hear and decide appeals where it is alleged by the appellant that there is an error in any order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of any zoning regulation or any regulation relating to the location or soundness of structures[.]

Finally, § 23-168.04 states in part:

> Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any officer, department, board, or bureau of the county, may present to the district court for the county a petition, duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of the illegality.

Section 23-168.03(1) gives a board of adjustment the power to hear appeals of any "order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of any zoning regulation." Thus, we must

determine whether the Board of Supervisors is an "administrative official or agency."

[5-7] We have stated that an administrative agency is "a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking." *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 366, 527 N.W.2d 185, 193 (1995). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003). But when a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question to ascertain the intent of the Legislature. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002). Here, however, the statutes do not define whether the Board of Supervisors is an agency.

The Nebraska Court of Appeals recently examined legislative history in determining whether an appeal could be taken to a board of adjustment from a board of supervisors' decision. *Niewohner v. Antelope Cty. Bd. of Adjustment*, 12 Neb. App. 132, 668 N.W.2d 258 (2003). In *Niewohner*, the board of supervisors denied a conditional use permit which was then appealed to the board of adjustment. The board of adjustment determined that it lacked jurisdiction over the appeal. The district court affirmed, and the Court of Appeals reversed, holding that the district court had jurisdiction.

Referring to §§ 23-168.01 to 23-168.04 along with the county zoning regulations that were virtually identical to § 23-168.03, the Court of Appeals determined that the board of adjustment had jurisdiction over the appeal. The Court of Appeals relied heavily on legislative history showing that the Legislature intended the board of adjustment to be the quasi-judicial authority that would review appeals from the board of supervisors.

For example, when introducing the bill, Senator Doug Bereuter stated:

> "The [County Board of Supervisors] implements any regulations [it] might have enacted through the building inspector. . . . If [the building inspector] denies [a building permit,] the citizen can take an appeal to the Zoning Board of Adjustment. . . . [T]he appeal provisions beyond [the Zoning

> Board of Adjustment are] to the district court and on up the court system."

Niewohner, 12 Neb. App. at 136, 668 N.W.2d at 262 (quoting Committee on Government, Military, and Veterans' Affairs, L.B. 186, 85th Leg., 1st Sess. (Feb. 18, 1977)). Senator Bereuter then stated:

> "[T]he Zoning Board of Adjustment . . . is a judicial or quasi judicial body and can do only three things under the existing state law. One, it can interpret boundaries of districts; two, it can grant variances under various specific conditions which are very closely delineated by law, wherefore unusual conditions like topography or the shape of a lot, a strict application of the rules wouldn't permit any kind of construction on that lot. In those cases[,] the variance can be granted. The Zoning Board of Adjustment is the only body that can grant such variance[.] The third area . . . is . . . [the Zoning Board of Adjustment] serves as an appeal mechanism when the citizen feels that the building inspector or the governing body didn't follow their own regulations or perhaps discriminated unfairly against that citizen."

Niewohner, 12 Neb. App. at 137, 668 N.W.2d at 262. Senator Bereuter further commented that under the proposed statutory provisions,

> "the County [Supervisors] may not appoint themselves to the Zoning Board of Adjustment. . . . The reason I feel strongly about this matter is that the Zoning Board of Adjustment is the quasi judicial body. It does serve as an avenue of appeal for the decisions of the [County Board of Supervisors] or the building inspector. Therefore, if you have one of the County [Supervisors] sitting on the [Board of Adjustment] he in fact is ruling on the appeal of a decision he might have made himself. Or certainly his body made."

Id. at 137, 668 N.W.2d at 263.

Considering the statutory provisions, zoning regulations, and the legislative history, the Court of Appeals determined that the board of supervisors was an administrative agency and that the Legislature intended appeals from the board of supervisors to be taken to the board of adjustment. The court found particularly persuasive the concern that a member of the board of supervisors

could not simultaneously serve on the board of adjustment because he or she could face the problem of ruling on the appeal of a decision he or she might have made. Accordingly, the Court of Appeals reversed, and remanded. A petition for further review was not filed in the case.

We agree with the Court of Appeals that an appeal may be taken from a board of supervisors. A question remains, however, whether the procedure in §§ 23-168.01 to 23-168.04 forecloses the ability to appeal through a petition in error under § 25-1901. We determine that it does.

[8,9] The petition in error statutes allow a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions to be reversed, vacated, or modified by the district court. Further, a court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *In re Estate of Eickmeyer*, 262 Neb. 17, 628 N.W.2d 246 (2001). If a conflict exists between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes. *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998).

[10] Here, the Legislature considered the Board of Supervisors to be an administrative agency and the Board of Adjustment as a body that performs judicial or quasi-judicial functions. Thus, by adopting a specific method for appeal, the Legislature provided for an appeal specifically outside of the petition in error. Accordingly, we determine that an appeal from a board of supervisors denying a conditional use permit is to be taken in accordance with §§ 23-168.01 to 23-168.04 and not by a petition in error.

CONCLUSION

We conclude that Mogensen should have filed an appeal with the Board of Adjustment. The district court lacked jurisdiction to hear his appeal on a petition in error. Accordingly, we dismiss the appeal.

APPEAL DISMISSED.

STEPHAN, J., not participating.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF W.G. WOLTEMATH, ALSO KNOWN AS WILMER WOLTEMATH, ALSO KNOWN AS WILMER JOHAN GOTLIEB WOLTEMATH, AN INCAPACITATED AND PROTECTED PERSON. KATHLEEN A. REENTS, APPELLANT, V. ROBERT J. WOLTEMATH, ATTORNEY IN FACT FOR W.G. WOLTEMATH AND TRUSTEE OF THE WILMER G. WOLTEMATH TRUST, APPELLEE.

680 N.W.2d 142

Filed May 28, 2004. No. S-02-550.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Attorney Fees: Judgments: Final Orders.** When a motion for attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 1995) is made prior to the judgment of the court in which the attorney's services were rendered, the judgment will not become final and appealable until the court has ruled upon that motion.
4. **Jurisdiction: Appeal and Error.** After an appeal to an appellate court has been perfected in a civil case, a lower court is without jurisdiction to hear a case involving the same matter between the same parties.
5. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.
6. **Appeal and Error.** A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court.
7. **Judgments: Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a lower court announces a decision that would be appealable if immediately followed by the entry of judgment.
8. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
9. **Fees: Time: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002), an untimely docket fee has the same effect as an untimely notice of appeal.
10. **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.
11. **Jurisdiction: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction.
12. ____: ____. When an appellate court is without jurisdiction to act, the appeal must be dismissed.

Appeal from the County Court for Douglas County: THOMAS G. MCQUADE, Judge. Appeal dismissed.

William E. Seidler, Jr., of Seidler & Seidler, P.C., for appellant.

Gregory C. Scaglione, of Koley Jessen P.C., L.L.O., for appellee.

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

GERRARD, J.

BACKGROUND

Kathleen A. Reents (Kathleen), the appellant, and Robert J. Woltemath (Robert), the appellee, are the adult children of W.G. Woltemath (W.G.). In 1995, W.G. executed a series of estate planning documents prepared by an attorney from the Koley Jessen law firm, which represented W.G. at that time and represents Robert in the current proceeding. In particular, W.G. executed a "springing" durable power of attorney, a health care power of attorney, a last will and testament, and a revocable trust. As pertinent, the durable power of attorney appointed Robert as W.G.'s attorney in fact in the event of his disability or incapacity, and Robert was named cotrustee of the trust in the event that W.G. became incompetent. The power of attorney and trust documents did not provide how W.G.'s disability, incapacity, or incompetence were to be determined.

By January 2001, W.G. was suffering from dementia of the Alzheimer's type, and Robert and Kathleen met to discuss the management of their father's affairs. They disagreed with respect to several issues. In April 2001, Kathleen filed a petition in the county court for appointment of a guardian and conservator for W.G., nominating herself as guardian, and a neutral attorney as conservator. Robert filed a responsive pleading alleging the existence of, and his authority pursuant to, the 1995 documents. Kathleen replied that the 1995 power of attorney was a "Springing" power of attorney that was effective only after a *judicial* determination of W.G.'s disability or incapacity to manage his own affairs and further that there had been no judicial determination of W.G.'s incompetence to manage the revocable trust. Robert replied that a judicial determination was unnecessary to activate his authority pursuant to those documents.

Kathleen also filed a motion to disqualify Koley Jessen from representing Robert, based on an alleged conflict of interest arising from the firm's prior representation of W.G. The county court denied that motion, but appointed independent counsel to represent W.G.

The matter proceeded to trial. Significantly, prior to trial, the parties stipulated that W.G. had properly executed the 1995 documents, that W.G. had become incompetent to handle his own affairs, and that "the Durable Power of Attorney executed by W.G. . . . on December 27, 1995 *has now become effective* due to the agreed upon incompetency of W.G." (Emphasis supplied.) After trial, Robert, joined by counsel for W.G., moved to dismiss Kathleen's petition. The county court granted the motion, finding no evidence, let alone clear and convincing evidence, that appointment of a guardian or conservator was necessary or advisable. After this decision, which was announced from the bench, Kathleen filed a notice of appeal and paid the required docket fee. Subsequently, the court entered a file-stamped order dismissing Kathleen's petition. Kathleen filed another notice of appeal, but this time did not pay the docket fee.

The county court's order dismissing Kathleen's petition specifically reserved the issue of attorney fees, which had been requested in Robert's responsive pleadings pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995). Kathleen's first two notices of appeal preceded the court's ruling on attorney fees. The county court subsequently awarded attorney fees against Kathleen, to Robert in the amount of $42,418.97 and to W.G.'s attorney in the amount of $12,568.72. Kathleen subsequently filed another notice of appeal, but again did not pay the docket fee. At that point, the procedural sequence of events occurring in 2002 stood as follows:

May 7	The county court announced, from the bench, its decision to dismiss the petition, and its intention to award attorney fees, but reserved ruling on the amount and to whom the attorney fees would be assessed.
May 15	Kathleen filed her first notice of appeal and paid the docket fee.

May 21	The county court filed a written order memorializing the decision announced from the bench on May 7, but still reserved ruling on attorney fees.
June 19	Kathleen filed her second notice of appeal, styled as an "Amended Notice of Appeal," purporting to relate to the May 21 file-stamped order. Kathleen did not pay another docket fee.
June 20	The county court filed its order assessing attorney fees against Kathleen.
June 28	Kathleen filed another "Notice of Appeal." Kathleen again did not pay the docket fee.

ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

Kathleen assigns, consolidated and restated, that the county court erred in (1) not appointing a guardian or conservator for W.G. because Robert failed to obtain the judicial declaration necessary to give effect to the springing durable power of attorney, (2) not disqualifying Koley Jessen from representing Robert, and (3) ordering Kathleen to pay attorney fees.

Robert argues that this court lacks jurisdiction because of Kathleen's failure to pay the docket fee for the only notice of appeal she filed with respect to a final, appealable order. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000) (filing of notice of appeal and depositing of docket fee are both mandatory and jurisdictional). Robert also argues that Kathleen has waived her assignment of error respecting the disqualification of Koley Jessen by not seeking timely review of that issue in a mandamus action. See *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004) (appellate action is inadequate means of presenting attorney conflicts of interest for review; party seeking review of order denying disqualification should seek mandamus).

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. *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

ANALYSIS

[2] We first turn to Robert's contention that we lack appellate jurisdiction. 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*, 267 Neb. 288, 673 N.W.2d 558 (2004). Robert contends that we lack jurisdiction because Kathleen's first two notices of appeal were premature, and because her final notice of appeal was not accompanied by the required docket fee. Kathleen argues, in response, that (1) her May 15, 2002, notice of appeal divested the county court of jurisdiction to rule on attorney fees, (2) the notice of appeal filed on May 15 should be treated as filed on June 20 pursuant to Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002), and (3) the docket fee filed with the May 15 notice of appeal should relate forward to the notice of appeal filed on June 28.

[3] As a preliminary matter, we note, although the parties do not contend otherwise, that the notices of appeal filed on May 15 and June 19, 2002, were premature and not taken from a final, appealable order. When a motion for attorney fees under § 25-824 is made prior to the judgment of the court in which the attorney's services were rendered, the judgment will not become final and appealable until the court has ruled upon that motion. *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002). Kathleen's May 15 and June 19 notices of appeal were not taken from final, appealable orders and failed to confer appellate jurisdiction on this court.

[4-6] This conclusion is also dispositive of Kathleen's first argument with respect to jurisdiction: that the county court was divested of jurisdiction by the May 15, 2002, notice of appeal. Generally, after an appeal to an appellate court has been perfected in a civil case, a lower court is without jurisdiction to hear a case involving the same matter between the same parties. However, a party may appeal from a court's order only if the decision is a final, appealable order. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court. *Id.*; *Holste v. Burlington Northern RR. Co.*, 256

Neb. 713, 592 N.W.2d 894 (1999). Because Kathleen's first two notices of appeal were taken from a nonappealable order, see *Salkin, supra*, the county court retained jurisdiction to award attorney fees.

Kathleen's argument that the May 15, 2002, notice of appeal should be treated as having been filed on June 20 is also without merit. She relies upon § 25-1912(2), which provides that

> [a] notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

However, the plain language of § 25-1912(2) provides for the relation forward of a notice of appeal or docket fee only when filed or deposited "after the announcement of a decision or final order," but before "entry of the judgment" pursuant to Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002). This statute essentially codifies our prior rule, expressed in *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994), that a notice of appeal filed after the trial court announced its decision, but before a judgment has been rendered, is effective to confer jurisdiction on the appellate court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered in accordance with the decision which was announced and to which the notice of appeal relates. See, also, *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *Janssen v. Tomahawk Oil Co.*, 254 Neb. 370, 576 N.W.2d 787 (1998).

As with the rule we set forth in *McDowell, supra*, § 25-1912(2) was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment. See, *General Television Arts, Inc. v. Southern Ry. Co.*, 725 F.2d 1327 (11th Cir. 1984); *Hess, supra*. The language of § 25-1912(2) is functionally identical to that of Fed. R. App. P. 4(a)(2). See *id.* ("notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry"). Under rule 4(a)(2), the relation forward of a premature notice of appeal applies only to a decision that will be appealable once it is entered. See 20 James Wm.

Moore et al., Moore's Federal Practice § 304.12 (3d ed. 2004). "Although an appeal need not be from a final *judgment*, it must be from a final *decision*." *Id.*, § 304.23 at 304-74.

The U.S. Supreme Court, addressing the effect of rule 4(a)(2), explained that the rule permits a notice of appeal filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment. See *FirsTier Mtge. Co. v. Investors Mtge. Ins. Co.*, 498 U.S. 269, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991). However, the Court stated that a premature notice of appeal relates forward to the date of entry of a final "judgment" only when the ruling designated in the notice is a "decision" for purposes of the rule. See *id.* Thus, the rule does not permit a notice of appeal from a clearly interlocutory decision. See *id.* Rather, the rule "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment." (Emphasis in original.) 498 U.S. at 276. Based on that holding, the Court concluded that the notice of appeal at issue in that case related forward, because it had been filed after a bench ruling that purported to dispose of all of the pending claims. See *id.* See, e.g., *American Totalisator v. Fair Grounds Corp.*, 3 F.3d 810 (5th Cir. 1993) (notice of appeal related forward because it was filed after disposition of all outstanding issues). Compare, e.g., *In re Jack Raley Const., Inc.*, 17 F.3d 291 (9th Cir. 1994) (premature notice of appeal did not relate forward under rule 4(a)(2) because matter of prejudgment interest was not decided until after notice of appeal had been filed).

[7] The reasoning of *FirsTier Mtge. Co.* with respect to rule 4(a)(2) is equally applicable to the functionally identical language of § 25-1912(2). See, *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring) (U.S. Supreme Court interpretation of federal statute is persuasive where state law is identical to federal law at issue); *In re Application of Northland Transp.*, 239 Neb. 918, 479 N.W.2d 764 (1992). We also assume that when the Legislature used the language of rule 4(a)(2), it was aware of the U.S. Supreme Court's authoritative explanation of the effect of that rule. Consequently, we hold that § 25-1912(2) permits a notice of

appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a lower court announces a decision that would be appealable if immediately followed by the entry of judgment. See *FirsTier Mtge. Co., supra.*

Based on that holding, we conclude that neither the county court's pronouncement from the bench on May 7, 2002, nor the county court's written order of May 21, announce a "decision or final order" within the meaning of § 25-1912(2). The notices of appeal of May 15 and June 19 were filed before the issue of attorney fees was finally determined and cannot relate forward. In short, the May 7 order was not an "announcement of a decision or final order" within the meaning of § 25-1912(2) because it was not a decision that would have been appealable if immediately followed by the entry of judgment. See, *FirsTier Mtge. Co. v. Investors Mtge. Ins. Co.*, 498 U.S. 269, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991); *In re Jack Raley Const., Inc., supra*; *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002). The only timely and effective notice of appeal filed in this case was filed on June 28, as it was the only notice filed after the county court announced a final decision and entered a final, appealable order.

We now turn to Kathleen's final contention, and the fundamental issue of appellate jurisdiction presented in this case: whether the docket fee deposited with the May 15, 2002, notice of appeal satisfied the jurisdictional requirements associated with the June 28 notice of appeal. As relevant, § 25-1912(1) provides that

> proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and . . . by depositing with the clerk of the district court the docket fee required by section 33-103.

See, also, Neb. Rev. Stat. § 30-1601 (Cum. Supp. 2002) (appeals from county court in probate cases taken to Nebraska Court of Appeals in same manner as appeal from district court). Section 25-1912(4) further provides, in relevant part, that

> an appeal shall be deemed perfected and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court, and after being perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional.

[8] We conclude that Kathleen's argument, that the docket fee she paid should relate forward, is inconsistent with the plain language of § 25-1912, and that she was required to deposit the required docket fee after the entry of final judgment in order to perfect her appeal. Section 25-1912(1) requires that an appeal is perfected by filing a notice of appeal and depositing the docket fee "within thirty days *after* the entry of such judgment, decree, or final order." (Emphasis supplied.) See *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002). The plain language of § 25-1912(1) requires that both the notice of appeal and the docket fee must be filed *after* the entry of the final order from which the appeal is taken. See *Haber, supra*. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Estate of Breslow*, 266 Neb. 953, 670 N.W.2d 797 (2003).

[9] Furthermore, Kathleen's argument is inconsistent with § 25-1912(2) and (3). Section 25-1912(2) states that a docket fee deposited after the "announcement of a decision or final order," but before the entry of judgment, shall be treated as deposited after the entry of judgment. Section 25-1912 provides that both the notice of appeal and docket fee are jurisdictional, and the statute establishes identical criteria for determining whether they were timely filed and whether they should relate forward. See *id.* In other words, under § 25-1912, *an untimely docket fee has the same effect as an untimely notice of appeal.* We have already concluded that the May 15, 2002, notice of appeal cannot relate forward, because it was not filed after the announcement of a decision or final order that would have been appealable if followed immediately by the entry of judgment. The May 15 docket fee is subject to the same statutory language, and cannot relate

forward to the June 20 judgment or June 28 notice of appeal for the same reasons.

Similarly, § 25-1912(3) provides that if a party files a motion that terminates the running of the time for filing a notice of appeal, such as a motion for new trial, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect. The statute provides that a new notice of appeal shall be filed after the entry of the order ruling on the terminating motion, but that "[n]o additional fees are required for such filing." *Id.*

[10] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). Section 25-1912 expressly provides for the relation forward of a docket fee that has been prematurely deposited and sets forth the circumstances under which such a relation forward is to occur. Were we to conclude that any prematurely filed docket fee relates forward to a subsequently filed notice of appeal, the specific provisions of § 25-1912 would be superfluous. Rather, we must conclude that the Legislature's positive statement of when a relation forward is to occur was intended to foreclose a notice of appeal or docket fee from relating forward under other circumstances. See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002) (applying principle that expression of one thing is exclusion of others).

[11,12] For the foregoing reasons, we conclude that the jurisdictional requirements of § 25-1912 were not satisfied by the May 15, 2002, docket fee, which was not deposited "within thirty days after" the entry of the final order from which this appeal was taken. Kathleen's appeal, based on the June 28 notice of appeal, was not perfected pursuant to § 25-1912(4), and we consequently lack appellate jurisdiction. An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994). When an appellate court is without jurisdiction to act, the appeal must be dismissed. *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

APPEAL DISMISSED.

CONNOLLY, J., not participating.

IN RE PETITION OF OMAHA PUBLIC POWER DISTRICT. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLEE, V. TRACT NO. 1 ET AL., APPELLANTS.

680 N.W.2d 128

Filed May 28, 2004. No. S-02-899.

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. **Judges: Words and Phrases: Appeal and Error.** 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 the judicial system.
3. **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 assigning the error.
4. **Trial: Courts: Jury Instructions: Appeal and Error.** It is not necessarily prejudicial error for a court, without notice to and outside the presence of counsel and after deliberations have already begun, to direct the jury to consider the instructions previously given.
5. **Eminent Domain: Damages.** The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement.
6. **Jury Instructions: Words and Phrases.** A supplemental instruction is one which would have been proper in the first charge.
7. **Trial: Judges: Proof.** With respect to judicial misconduct, the complaining party bears the burden of proving both that an unauthorized private communication occurred and that the complaining party suffered prejudice as a result.
8. **Motions for New Trial: Juror Misconduct.** An application for new trial may properly be based upon allegations of misconduct of the jury.
9. **Motions for New Trial: Juror Misconduct: Proof.** In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence.
10. **Motions for New Trial: Juror Misconduct: Verdicts.** In a motion for new trial, the misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict.
11. **New Trial: Jury Misconduct: Proof.** In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.
12. **Jury Misconduct: Appeal and Error.** The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.
13. **Rules of Evidence: New Trial: Jurors: Testimony.** Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), does not equate with, or govern, grounds for a new trial, but merely governs the competency of jurors to testify concerning the jury process.
14. **Rules of Evidence: Verdicts: Juries.** Under Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), a juror may testify as to whether the jury considered

prejudicial information emanating from a source other than evidence presented at trial, but a juror's testimony may not be used to establish the effect of such information upon the jury or its influence on the jury or jury motives, methods, misunderstandings, thought processes, or discussions during deliberations which entered into the verdict.

15. **Jury Misconduct: Proof.** Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant.
16. **Rules of Evidence: Jurors.** For purposes of Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), while one may not inquire as to whether the presence of the evidence affected the juror's mind, it is proper and necessary that evidence be presented by the objecting party to show that extraneous prejudicial information was improperly brought to the jury's attention.
17. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.
18. ____: ____. The amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved.
19. ____: ____. An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

William G. Dittrick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, and J. Patrick Green for appellants.

Roger L. Shiffermiller and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Duane J. Dowd, Frances D. Dowd, Frank W. Bemis, Connie B. Bemis, and Roberta F. Bemis, condemnees in a condemnation action brought by the Omaha Public Power District (OPPD), appeal an order denying their motion for new trial following a jury verdict awarding damages in their favor. Condemnees allege that the district court for Sarpy County communicated with the jury after it retired to deliberate, that the jury awarded inadequate damages, and that juror misconduct occurred. We affirm.

II. BACKGROUND

Condemnees are the owners of a tract of land located on the southwest corner of 156th Street and Giles Road in Sarpy County, Nebraska (Dowd/Bemis property). According to testimony at trial, the Dowd/Bemis property is approximately 68 acres, which is adjacent to a very large area of parkland and lake otherwise known as the Chalco Hills Recreation Area. On January 22, 1999, OPPD filed a petition for condemnation to condemn a permanent right-of-way easement consisting of 1.49 acres of the Dowd/Bemis property for the purpose of constructing a 345,000-volt electric powerline along the border of the property. On July 15, condemnees filed an appeal in the district court for Sarpy County. Condemnees alleged that as owners of the Dowd/Bemis property, which property OPPD sought to condemn and acquire by eminent domain, the $30,000 sum awarded for the taking of their property was neither fair nor adequate. The case ultimately proceeded to trial, and the jury returned a verdict in favor of condemnees.

During trial, condemnees produced testimony regarding the nature of the easement and the property subject to the easement. Randal L. Samson, at the time of the condemnation of the Dowd/Bemis property, was the manager of transmission engineering with OPPD. He described the Dowd/Bemis property as having four power poles 135 to 140 feet in height, approximately 3½ feet in diameter, and currently carrying seven total wires. The lines attached to the poles on the Dowd/Bemis property were 345,000-volt lines, which were the largest transmission lines used by OPPD in either Douglas County or Sarpy County. The transmission lines had already been constructed on the Dowd/Bemis property at the time OPPD filed its condemnation action.

Condemnees also called appraisal expert Leroy L. Verschuur. Verschuur testified that the easement placed no limits on the number of poles OPPD could erect on the Dowd/Bemis property, the height of the poles, or the number of wires that could be placed on the poles. Verschuur noted that OPPD had erected four poles on the easement property. Verschuur also testified that the easement placed no limit on how much power OPPD could push through the lines and that the easement gave OPPD control over access to the property. Using the comparable sales approach,

Verschuur calculated the value of the 1.49-acre parcel subject to the easement at $31,290. Calculating damages to the remaining property as a result of the easement at $391,000, Verschuur calculated total damages to condemnees at $422,000. OPPD's expert appraiser, Thomas E. Stevens, agreed that, after the taking, the Dowd/Bemis property no longer had unlimited access rights, but Stevens testified that he did not feel this influenced the value of the property. Instead, Stevens limited his valuation of condemnees' property to current use only and valued condemnees' damages at $29,800.

After considering the evidence, the jury returned a verdict for condemnees of $31,290, on which judgment was entered. Condemnees subsequently filed a motion for new trial alleging, inter alia, juror misconduct, trial court error, and inadequate damages. With respect to their claim of trial court error, condemnees contended that the court, after jury deliberations began and following a written question from the jury, gave an oral explanation of a jury instruction to the jury. This was done without notification to or consent of counsel, and without reducing the explanation to writing. The written question was given back to the jury and has not been located. Condemnees offered juror testimony, and both parties offered juror affidavits in support of their respective positions relative to condemnees' motion for new trial. The trial court denied the motion for new trial. Additional facts relevant to each of condemnees' contentions in this appeal will be discussed later in this opinion. Condemnees timely appealed, and we moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

III. ASSIGNMENTS OF ERROR

It is noted that all of condemnees' assignments of error relate to the trial court's order denying condemnees' motion for new trial. Condemnees assign, restated, that the trial court erred in (1) denying their motion for new trial; (2) finding that its decision to confer with the jury in the jury room after deliberations had begun, outside the presence of counsel, without having the jury's question or the court's discussion with the jury recorded, and

without having the court's response permanently memorialized, was not prejudicial; (3) finding that a statement made by a juror, who was an electrical engineer, to the jury during deliberations that a 345,000-volt transmission line and a 161,000-volt transmission line were the same did not go to a material issue in the case and was not prejudicial; (4) concluding that a visit by one of the jurors to the condemnation site was not material and, therefore, not prejudicial; and (5) failing to find the jury awarded inadequate damages, thereby justifying a new trial.

Although condemnees' assignments of error Nos. 2 through 4, as set forth in their brief, claim that the trial court found harmless error, we will examine the actions of the trial court for error and whether such error was prejudicial.

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. *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003); *Loving v. Baker's Supermarkets*, 238 Neb. 727, 472 N.W.2d 695 (1991).

[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 the judicial system. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998); *Kaminski v. Bass*, 252 Neb. 760, 567 N.W.2d 118 (1997).

V. ANALYSIS

1. Judicial Misconduct

In restated assignment of error No. 2, condemnees contend that the trial court erred in answering a written question from the jury after the jury had retired, orally and out of the presence of and without notice to counsel, and without a court reporter present to preserve the discussion and the written question and response of the court. Condemnees further claim that because the nature and extent of the court's conversation with the jury is not clear from the record, prejudice should be presumed, thereby necessitating a new trial.

Condemnees offered the testimony and affidavits of jurors J.W. and A.H. in support of their motion for new trial. Juror J.W.'s affidavit states that during deliberations, the jury sent a written question to the trial judge relating to the jury instruction that addressed the " 'full extent of the easement.' " Juror J.W.'s affidavit further states that "[t]he judge then came in and orally talked to the jury about this question." During the hearing on the motion, juror J.W. testified as follows:

> Q Okay. Do you remember what that question was, sir?
> A It had to do with the easement.
> Q Okay.
> A Size of the easement.
> . . . .
> Q Can you tell me, to the best of your recollection, what the question was?
> A As I remember, we were discussing the easement itself, and we wanted to know what it covered exactly.

Juror A.H.'s affidavit states that "[d]uring the actual jury deliberation of this matter, the jury sent a written question to the Judge about the instruction dealing with 'the full extent of the easement' and to what land this applied to. [The trial judge] then orally talked to the jury about this question."

[3] OPPD objected to both jurors J.W.'s and A.H.'s affidavits on the bases of relevance and that the statements therein constitute interdeliberational statements of the jury. The trial court overruled these objections. OPPD did not cross-appeal and assign the trial court's ruling as error, and therefore, we do not consider the objections. 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 assigning error).

OPPD offered the affidavits of jurors C.B. and A.W. Jurors C.B.'s and A.W.'s affidavits both state in paragraph 2 that "[d]uring jury deliberation of this matter, the jury sent a written question to the Judge. In response to this question, the Judge came into the jury room and told the members of the jury to refer to the jury instructions previously given." No objection was made to paragraph 2 of these juror affidavits.

The only dispute in this case is damages. Specifically, condemnees contend that the damage award may have been adversely affected by the trial court's failure to notify condemnees and give them the opportunity to request appropriate supplemental jury instructions.

Neb. Rev. Stat. § 25-1115 (Reissue 1995) provides:

> No oral explanation of any instruction authorized by the preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein.

Neb. Rev. Stat. § 25-1116 (Reissue 1995) provides:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

Although condemnees have asserted as error a violation of §§ 25-1115 and 25-1116, we have determined that directing a jury to reread properly given instructions is not an instruction as contemplated by § 25-1115. See *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. 7, 409 N.W.2d 298 (1987) (determining trial court did not further instruct jury when it told them to reread jury instructions previously given). As such, § 25-1115 is inapplicable here. However, pursuant to § 25-1116, we conclude that the trial court committed error (1) in answering the jury's question without notice to the parties or their counsel in violation of § 25-1116 and (2) in addressing the jury's question in the jury room as opposed to open court as required by § 25-1116. However, we will conclude in this opinion that these errors are not prejudicial.

[4] We have previously concluded that it is not necessarily *prejudicial* error for a court, without notice to and outside the

presence of counsel and after deliberations have already begun, to direct the jury to consider the instructions previously given. See, *Sesostris Temple Golden Dunes v. Schuman, supra*; *Hansen v. Hasenkamp*, 192 Neb. 530, 223 N.W.2d 44 (1974); *Anderson v. Evans*, 168 Neb. 373, 96 N.W.2d 44 (1959). In *Sesostris Temple Golden Dunes*, after deliberations began, the jury submitted several questions to the trial court. Without notifying counsel, the trial court responded to the jury's requests by stating, " 'Reread the instructions. The answers to your questions can be found there.' " *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. at 11, 409 N.W.2d at 301. On appeal, plaintiff contended that the trial court erred in failing to notify counsel of the jury's questions submitted during deliberations, resulting in prejudice to plaintiff. Plaintiff contended that counsel should have been given an opportunity to draft clearer instructions or submit a special verdict form. Finding plaintiff's assignment without merit, we noted that the jury instructions initially given to the jury before retiring to deliberations did answer the jury's subsequent questions to the trial court. We concluded that plaintiff was not prejudiced by the court's response to the jury's question. *Id.* Thus, in the instant case, if the jury instructions given were correct, then the trial court's action of directing the jury, without notice to and outside the presence of counsel, to refer to the instructions previously given was not prejudicial.

This condemnation case involves the taking of an easement. As such, NJI2d Civ. 13.06, applicable to easements, is the appropriate instruction.

NJI2d Civ. 13.06 states:

> III. Owner's Compensation
>
> The plaintiff is entitled to recover the difference[, if any,] between the fair market value of the property before the easement was taken and its fair market value after the easement was taken. In addition, the plaintiff is entitled to recover (his, her, its) reasonable abstracting expenses.

The instructions given in this case regarding the method of determining condemnees' damages is contained in instruction No. 2, under "C. Burden of Proof." This instruction states: "The Condemnees are entitled to recover the difference between the fair market value of it's [sic] property before the easement was taken,

and it's [sic] fair market value after the easement was taken." A review of the record shows that condemnees objected to instruction No. 2 on only two grounds. First, condemnees requested that the word "immediately" be added before the phrase "after the easement was taken." Condemnees also objected to the language found in instruction No. 2 relating to the purpose for the condemnation, which is not an issue in this case, and requested that its proposed jury instruction No. 2 be used instead. However, jury instruction No. 2 given by the trial court was the appropriate instruction.

[5] In *Ward v. Nebraska Electric G. & T. Coop., Inc.*, 195 Neb. 641, 240 N.W.2d 18 (1976), we held that the measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. See, also, *Fulmer v. State*, 178 Neb. 664, 134 N.W.2d 798 (1965). We conclude that instruction No. 2 with regard to the measure of damages correctly states the law, was not misleading, and adequately covered the issue. See, *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001); *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000).

The trial court's failure to record the jury's question requires us to speculate as to which jury instruction or instructions may have been implicated, if at all, by the jury's question. It is, however, condemnees' contention that the central issue on appeal relates to the jury's failure to award condemnees remainder or severance damages. The instructions to the jury regarding calculation of damages are found in jury instruction No. 2 given by the court. We have already determined that instruction No. 2 comports with NJI2d Civ. 13.06, which sets forth the method of calculating damages in an action involving condemnation of an easement. Therefore, rereading the instructions in this case, as the trial court directed the jury to do, would produce a jury properly instructed.

[6] Condemnees contend that if they had been notified of the jurors' question, they could have requested a supplemental instruction. A supplemental instruction is one which would have been proper in the first charge. *Hofrichter v. Kiewit-Condon-Cunningham*, 147 Neb. 224, 22 N.W.2d 703 (1946). In the instant case, however, we have already determined that the instructions given to the jury in the first charge were the correct instructions.

[7] The complaining party bears the burden of proving both that an unauthorized private communication occurred and that the complaining party suffered prejudice as a result. See *In re Estate of Corbett*, 211 Neb. 335, 318 N.W.2d 720 (1982) (concluding communication between court and jury was harmless error where appellant failed to show prejudice).

As previously stated, we have concluded that an unauthorized communication occurred in this case. We now determine that the condemnees failed to meet their burden of establishing that they were prejudiced by the trial court's errors noted above. Because condemnees failed to meet their burden of proving prejudice, the trial court's decision on restated assignment of error No. 2 was not an abuse of discretion.

2. JUROR MISCONDUCT

[8-12] Condemnees advance two grounds upon which the trial court should have found juror misconduct and granted condemnees' motion for new trial. Condemnees contend, first, that a juror gave expert testimony during deliberations and, second, that another juror made an unauthorized viewing of the Dowd/Bemis property. An application for new trial may properly be based upon allegations of misconduct of the jury. See, Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002); *Leavitt v. Magid*, 257 Neb. 440, 598 N.W.2d 722 (1999). In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict. *Smith v. Papio-Missouri River NRD, supra*. In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred. *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992). The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion. See, *id.*; *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988).

(a) Juror's Statement Based on Personal Knowledge

Condemnees argue that juror C.B., who was an electrical engineer, impermissibly testified as an expert in the jury room to facts contrary to those brought forth at trial. Specifically, condemnees contend that juror C.B. told the other members of the jury during deliberations that he was an electrical engineer and that there was no difference between 345,000-volt and 161,000-volt transmission lines. Juror J.W.'s affidavit states that "[d]uring the deliberations, there were statements made by the electrical engineer on the jury about the sameness of 161KV lines and 345 KV lines." During the hearing on the motion, juror J.W. testified that juror C.B. told the jury that there was no difference between 345,000-volt and 161,000-volt lines with respect to their effect on people living near them and that juror J.W. responded by calling juror C.B. a liar. Juror A.H.'s affidavit states that "[d]uring the deliberations, there were statements made by the electrical engineer on the jury that there was no difference between 161KV lines and 345 KV lines. There was a heated discussion about this statement."

Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), provides:

> 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.

[13] Rule 606(2) does not equate with, or govern, grounds for a new trial, but merely governs the competency of jurors to testify concerning the jury process. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

[14,15] Under rule 606(2), a juror may testify as to whether the jury considered prejudicial information emanating from a source other than evidence presented at trial, but a juror's testimony may not be used to establish the effect of such information upon the jury or its influence on the jury or jury motives, methods, misunderstandings, thought processes, or discussions during deliberations which entered into the verdict. *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992); *Rahmig v. Mosley Machinery Co., supra*. Thus, extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Loving v. Baker's Supermarkets*, 238 Neb. 727, 472 N.W.2d 695 (1991).

In determining whether we may consider that portion of the jurors' affidavits relating to juror C.B.'s statement in support of condemnees' claim of juror misconduct, we analyze whether juror C.B.'s statement constituted extraneous prejudicial information. In its opinion and order, the trial court found that the factual circumstances of this case did not directly relate to the difference between 345,000-volt and 161,000-volt lines. Based upon our review of the record, we conclude that condemnees failed to prove prejudice as required by rule 606(2). Juror C.B.'s statement did not relate to an issue submitted to the jury and, accordingly, could not have affected the verdict.

Condemnees contend that the issue at trial related to "the relative impact of different possible electromagnetic fields on valuation of property." Brief for appellants at 26. Condemnees failed, however, to produce evidence proving any damages resulting from the placement of a 345,000-volt powerline on the Dowd/Bemis property versus a 161,000-volt powerline. The testimony at trial established that the 345,000-volt line is OPPD's largest transmission line in both Douglas County and Sarpy County. Samson, the manager of transmission engineering with OPPD, testified at trial that volts are "the electromotive force that pushes electrons down the wire. The higher the voltage, the higher the force to push them." Thus, volts represent the force behind the power flowing

down the line. Condemnees' evidence did not draw any connection between voltage and the corresponding effect electromagnetic fields may have on property values.

Samson further testified that OPPD has gathered information relating to the public's concern regarding the aesthetics and location of powerlines as well as concerns about electric and magnetic fields. Based on this information, Samson testified that when OPPD plans to site or lay a transmission line, it evaluates the proximity to homes, businesses, and other existing facilities. Condemnees, however, did not produce any testimony or evidence that the public's concerns are heightened and have a greater corresponding impact on property values with the placement of a 345,000-volt line rather than a 161,000-volt line.

Condemnees' expert, Verschuur, testified that developers developing property with 161,000-volt lines have incurred additional costs to visually screen out powerlines, such as by using fences, bushes, and trees. However, condemnees failed to produce evidence that 345,000-volt lines are any different in size or appearance than 161,000-volt lines. Verschuur testified only that a 161,000-volt line is "two and a half times smaller" than a 345,000-volt line. On cross-examination, Verschuur admitted that this comparison had nothing to do with the size of the structures or size of the lines. Verschuur admitted that he had no idea and was not qualified to state whether this comparison had any significance whatsoever other than as a mathematical computation. While Verschuur provided testimony tending to establish that property values are adversely affected by powerlines, condemnees did not put on evidence to establish that a 345,000-volt line has a larger detrimental effect on the market value of property compared to a 161,000-volt line.

The issue at trial in this case centered around the impact on market value of the placement of powerlines on real property. While condemnees did offer some evidence regarding the public's concern regarding electromagnetic fields, condemnees did not offer evidence establishing that higher voltage powerlines lead to heightened public concern regarding electromagnetic fields. Nor did condemnees establish that higher voltage powerlines have a greater detrimental impact on property values. Because of condemnees' failure of proof in this regard, condemnees would not

have been entitled to a damage award on this basis. Juror C.B.'s statement did not relate to an issue submitted to the jury and there is no reasonable possibility that the statement detrimentally affected the verdict.

Condemnees failed to meet their burden of proving prejudice under rule 606(2). Accordingly, the juror affidavits and testimony are not sufficient to impeach the jury's verdict. Because no competent evidence exists to establish condemnees' claim of juror misconduct, the trial court did not abuse its discretion in denying condemnees' motion for new trial.

(b) Unauthorized View of Property

For their fourth assignment of error, condemnees contend that during trial, and contrary to the trial court's admonitions, juror J.W. viewed the Dowd/Bemis property, by himself, without notice to any party, and without being accompanied by any court personnel. Juror J.W.'s affidavit states that "[d]uring the trial of this case, I drove out to the property in question, owned by the Dowd and Bemis families, and looked at the same. I told the other jurors that I had done the same."

As previously observed, in a motion for new trial, allegations of misconduct must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998). In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred. *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992).

Juror J.W.'s affidavit constitutes the sole source of support for this claim of juror misconduct. Before we resolve the issue of juror misconduct, however, we must first determine whether juror J.W.'s affidavit is admissible evidence pursuant to rule 606(2). That is, we must determine whether juror J.W.'s affidavit contains information related to one of the two exceptions provided by rule 606(2), i.e., (1) extraneous prejudicial information improperly brought to the jury's attention or (2) outside influence improperly brought to bear on a juror. See *Leavitt v. Magid*, 257 Neb. 440, 598 N.W.2d 722 (1999). Condemnees do

not contend that an outside influence was improperly brought to bear on a juror. Therefore, we must determine whether the allegations contained in juror J.W.'s affidavit constitute extraneous prejudicial information.

[16] For purposes of rule 606(2), while one may not inquire as to whether the presence of the evidence affected the juror's mind, it is proper and necessary that evidence be presented by the objecting party to show that *extraneous prejudicial* information was improperly brought to the jury's attention. *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982). In *Woodward*, we stated that where the record failed to establish that extraneous prejudicial information was improperly brought to the jury's attention, a juror's unauthorized view of the scene was not prejudicial. In *Woodward*, the defendant was tried for burglarizing a gas station. During deliberations, the jury traveled to dinner and passed through the intersection where the crime took place. One of the jurors testified that he could not recall any comment being made about the intersection, and another juror did recall that some comment was made about what could or could not be seen, but could not recall specifically what the comment was. We noted that without evidence establishing what was said by the jurors regarding what they saw, there was no way to determine if what they saw was prejudicial.

Likewise, in the instant case, the record does not reveal anything regarding juror J.W.'s unauthorized view of the property. All the record shows is that juror J.W. drove out to the Dowd/Bemis property and looked at it. The record reveals nothing regarding what juror J.W. saw or the observations he may or may not have made. Moreover, to the extent juror J.W. made any observations, he did not communicate them to the other members of the jury.

We also observe that the fact the Dowd/Bemis property appeared as it was described at trial minimizes any claim of prejudice. In *Kohrt v. Hammond*, 160 Neb. 347, 70 N.W.2d 102 (1955), we concluded that a juror's unauthorized view of the scene of an automobile accident was not prejudicial where there was no dispute in the evidence regarding the matters observed by the juror. By contrast, in *Kremlacek v. Sedlacek*, 190 Neb. 460, 209 N.W.2d 149 (1973), we held that an unauthorized view by a

juror was prejudicial error warranting the granting of a new trial where the juror's view of the scene differed from testimony at trial. In *Kremlacek*, an action for damages sustained in an automobile accident, we noted that a crucial issue involved the location of a row of seven red cedar trees on the south side of the east-west road. On a motion for new trial, a juror's affidavit offered and received into evidence stated that he had driven out to the scene of the accident during the trial, had observed the scene of the accident, and that in his opinion, the trees located near the scene of the accident were farther back from the corner of the intersection than the testimony indicated. We concluded that the evidence was amply sufficient to sustain the trial court's finding that prejudicial error occurred.

Unlike *Kremlacek*, juror J.W.'s view of the Dowd/Bemis property would have been entirely consonant with the evidence offered at trial describing the property. Juror J.W. made his unauthorized view of the subject property during the trial of this case. The construction of OPPD's powerlines on the Dowd/Bemis property was completed before this condemnation action was filed. Moreover, there was no dispute at trial regarding the description of the Dowd/Bemis property and its landscape. Accordingly, to the extent juror J.W. drove to and looked at some part of the Dowd/Bemis property, the land would have looked no different than how it was described at trial.

As previously stated, rule 606(2) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). Rule 606(2) does not equate with, or govern, grounds for a new trial, but merely governs the competency of jurors to testify concerning the jury process. *Rahmig v. Mosley Machinery Co., supra.* Because condemnees failed to fulfill their burden of demonstrating prejudice, juror J.W.'s affidavit is not admissible to impeach the jury's verdict. As such, condemnees have no competent evidence with which to establish this claim of juror misconduct. The trial court did not abuse its discretion in denying condemnees' motion for new trial on this basis. We find this assignment of error to be equally without merit.

3. Inadequate Damages

[17-19] For their final assignment of error, condemnees contend that the trial court erred by failing to find the jury awarded inadequate damages thereby justifying a new trial. On appeal, the fact finder's determination of damages is given great deference. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993) (citing *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993)). The amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). However, an award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate 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).

Regarding whether the damages award was supported by the evidence, we stated in *Patterson v. City of Lincoln*, 250 Neb. 382, 388, 550 N.W.2d 650, 655 (1996), a condemnation case, that

> an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine. . . .
>
> The jury verdict fell in between the two conflicting sets of expert testimony. The expert witness testimony is not binding on the triers of fact. The amount of damages sustained is peculiarly of a local nature and ordinarily is to be determined by the jury, and this court will not ordinarily interfere with the verdict if it was based upon admissible testimony. When the evidence is conflicting, the verdict of the jury will not be set aside unless it is clearly wrong.

Here, Stevens testified that condemnees' total damages were $29,800 and Verschuur valued total damages at $422,000. Thus, the jury's damage award of $31,290, fell between the range of damage estimates proffered by both parties' experts during trial. Moreover, the damages awarded by the jury were identical to the $31,290 Verschuur assigned to the value of the easement. We

conclude, therefore, that the jury's award was supported by the evidence. This assignment of error is also without merit.

VI. CONCLUSION

We conclude that condemnees failed to establish prejudice as a result of the trial court's unauthorized private communication with the jury during deliberations. Moreover, condemnees failed to produce any competent evidence in support of their claims of juror misconduct. Finally, we conclude that the damages awarded were not inadequate. Accordingly, the trial court did not abuse its discretion in overruling condemnees' motion for new trial.

AFFIRMED.

ROBERT W. SADLER, APPELLEE, V. JORAD, INC., A NEBRASKA CORPORATION, APPELLEE, AND CRAIG R. CRAMM AND GEIL E. CRAMM, APPELLANTS.
ROBERT W. SADLER, APPELLEE, V. THE SHOVELHEAD GROUP, L.L.C., APPELLEE, AND CRAIG R. CRAMM AND GEIL E. CRAMM, APPELLANTS.

680 N.W.2d 165

Filed May 28, 2004. Nos. S-02-1212, S-02-1213.

1. **Derivative Actions: Equity: Accounting.** A derivative action which seeks an accounting and the return of money is an equitable action.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Derivative Actions: Words and Phrases.** A derivative action is a suit by a shareholder to enforce a cause of action belonging to the corporation.
4. **Derivative Actions: Pleadings: Corporations.** Normally, to maintain a derivative action, a stockholder must allege that he has made demand upon the corporation unless circumstances excuse the stockholder from making such demand.
5. **Corporations: Presumptions: Words and Phrases.** The business judgment rule is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.
6. **Actions: Corporations.** According to the business judgment rule, courts are precluded from conducting an inquiry into actions of corporate directors taken in good

faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.

7. **Corporations: Accounting: Proof.** Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, where another is in control of the books and has managed the business, that other is in the position of a trustee and must make a proper accounting.
8. **Proof.** The burden of proof is upon the party holding a confidential or fiduciary relationship to establish the fairness, adequacy, or equity of the transaction with the party with whom he holds such relation.

Appeals from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed as modified.

Jeffrey H. Bush for appellants.

Dean F. Suing, of Katskee, Henatsch & Suing, for appellee Robert W. Sadler.

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

WRIGHT, J.

I. NATURE OF CASE

Robert W. Sadler brought suit in the Douglas County District Court against Craig R. Cramm; Geil E. Cramm; Jorad, Inc.; and The Shovelhead Group, L.L.C. (Shovelhead), seeking an accounting and the return of money. Sadler, who held a minority interest in Jorad and Shovelhead, claimed that the Cramms had misused corporate assets. The district court entered judgment in favor of Sadler in a combined amount of $108,350.70, and the Cramms timely appealed. The cases were consolidated for purposes of oral argument and disposition.

II. SCOPE OF REVIEW

[1] A derivative action which seeks an accounting and the return of money is an equitable action. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

[2] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one

version of the facts rather than another. *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003).

III. FACTS

1. JORAD

In 1994, Sadler, who owned an electrical contracting business in Omaha, met Craig Cramm, who was working for a company engaged in asbestos and hazardous material abatement. The men discussed starting up a hazardous material abatement company for which Sadler would provide the primary funding. Sadler, Craig Cramm, and Cramm's wife, Geil Cramm, subsequently formed Jorad. The Cramms owned 80 percent of the stock in Jorad, and Sadler owned 20 percent.

The first meeting of Jorad's board of directors occurred in March 1995. At this meeting, Craig Cramm was elected president, vice president, and chief executive officer of the corporation. Geil Cramm was elected secretary and treasurer. Craig Cramm was to be paid and compensated in an amount not to exceed $75,000 annually during the first 3 years of Jorad's operation. This amount was to include salary and bonuses but did not include the payment of benefits and/or expenses.

At the second meeting of Jorad's board of directors in December 1995, it was determined that Craig Cramm was to be paid a salary of $75,000 for the years 1996 through 1998. In 1996 and 1997, he was to receive a 5-percent bonus based on the taxable income of the corporation at the end of the respective business years. This bonus was reduced to 1.5 percent for 1998.

Jorad operated until 2000. Jorad and Shovelhead have not been dissolved, but their operations have been wound up.

A dispute arose between Sadler and the Cramms concerning the Cramms' handling of funds in the operation of Jorad and Shovelhead. Sadler sued the Cramms, claiming that they had acted illegally, oppressively, and in a fraudulent manner with regard to the operation of the business and that they had committed corporate waste in its operation. Sadler requested equitable relief, including an accounting, the liquidation of corporate assets, and a judgment against the Cramms for funds that were diverted from the business. The Cramms denied all acts of

malfeasance and alleged that Sadler had waived his claims by attending corporate meetings and ratifying their actions.

The district court found that a forensic audit of the year 2000 conducted by Jeffrey Hamernik disclosed that excess salaries had been paid in contravention of the parties' agreement, that excess depreciation had been claimed for assets not related to the operation of the business, that expenses had been charged back to the business during the calendar years 1995 through 1998 which were not ostensibly related to the business of asbestos or lead abatement, and that the Cramms had taken excessive distributions from the operation of Jorad. The court also found that many of the records referred to by the Cramms had been destroyed, were missing, or were not produced by the Cramms for discovery and trial.

Specifically, in its order, the district court noted that although Geil Cramm testified she was a bookkeeper and office manager for Jorad and performed all of the corporation's bookkeeping and accounting functions, Trudy Riggs, a full-time employee from 1996 to 2000, testified that she was doing essentially the same work. The court imputed to Geil Cramm a salary of $30,000 per year but concluded that "the Cramms were using Geil as a balancing entry, and . . . were compensating her essentially whatever they needed that wasn't covered under Craig's compensation."

The district court found that the Cramms were unable to demonstrate a relationship between certain questioned expenses and the necessary and reasonable operation of the hazardous material abatement business. The Cramms also failed to show that the assets for which depreciation was claimed had a connection to the operation of Jorad. The court further found that Sadler had not approved these expenditures and that Sadler, a 20-percent equity owner, was entitled to $83,791.69, which represented his share of the excess compensation, the expenses that were not business related, the excess distributions, and other unnecessary or unreasonable expenses.

2. Shovelhead

Shovelhead was formed in August 1996 for the purpose of purchasing a building where Jorad's business was to be conducted. The building was located on development property owned by

Sadler. As was the case with Jorad, the Cramms owned 80 percent of the stock in Shovelhead and Sadler owned 20 percent.

On June 14, 2002, the Shovelhead building was sold to a third party, and the proceeds of the sale were $106,000. The district court concluded that because the building had been constructed under an agreement whereby it received tax increment financing (TIF) from the city of Ralston, the moneys due Sadler had never been liquidated. The court noted that the Cramms had taken approximately $50,000 from the sale and placed it in a brokerage account in their names.

The district court found that the TIF credit attributable to the building as of June 30, 2002, was $4,094.57 and that this amount should be shown as a credit against Sadler's share. The court concluded that Sadler's distributive share of the proceeds of the sale was $28,653.58 and that Sadler was entitled to a judgment in the sum of $24,559.01 upon the liquidation of Shovelhead.

3. Judgment of District Court

The district court concluded that the Cramms had a duty to keep an accurate record of the expenses and earnings of both corporations and that the burden of proof was upon the Cramms to establish the fairness and accuracy of the transactions. The court found that the liability of the Cramms was joint and several, and it entered judgment in a combined amount of $108,350.70 in favor of Sadler together with taxable costs and postjudgment interest. The Cramms timely appealed.

IV. ASSIGNMENTS OF ERROR

The Cramms assign the following summarized and restated errors with regard to the district court's judgment in the case involving Jorad: (1) the court's disregard of the business judgment rule, (2) its determination that Sadler had no knowledge of the conduct of the corporation, (3) its exclusion of evidence of corporate meetings in 1996 and 1997, (4) its finding that Geil Cramm's salary was excessive, (5) its imputing a salary of $30,000 per year to Geil Cramm, (6) its finding that the Cramms incurred expenses not related to the necessary and reasonable operation of the business, (7) its finding that the Cramms claimed excessive depreciation, and (8) its finding that the Cramms did not make any capital contributions in the form of cash.

The Cramms assign the following restated errors with regard to the district court's judgment in the case involving Shovelhead: (1) the court's disregard of the purchase agreement between the parties, (2) its failure to retain jurisdiction over Shovelhead so that the proceeds of the TIF could be computed and paid to the interested parties, and (3) its failure to consider the settlement of water damages in calculating the amount owed to Sadler.

V. ANALYSIS

1. JORAD

The issue with regard to Jorad is whether the Cramms are personally liable for the purported misuse of corporate funds. The Cramms have grouped their arguments into essentially four areas: (1) the failure of the district court to apply the business judgment rule, (2) the court's errors with respect to findings of fact, (3) the court's findings as to excessive compensation and bonuses, and (4) the court's findings regarding expenses not related to the business and depreciation.

[3] Before addressing the Cramms' arguments, we note that this is a derivative action brought by a minority shareholder against the remaining two shareholders, who are the officers and directors of the corporation. A derivative action is a suit by a shareholder to enforce a cause of action belonging to the corporation. *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993). A derivative action which seeks an accounting and the return of money is an equitable action. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

[4] Normally, to maintain a derivative action, a stockholder must allege that he has made demand upon the corporation unless circumstances excuse the stockholder from making such demand. See, *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *Kowalski v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 71 N.W.2d 147 (1955); *Association of Commonwealth Claimants v. Hake, supra.* However, we conclude that requiring Sadler to make a demand on Jorad would be futile.

Jorad consists of only three shareholders, and Sadler, the minority shareholder, claims that the Cramms, the other two shareholders, have misused corporate funds. Therefore, Sadler

could bring this derivative action without first having made demand upon Jorad to bring the action. A shareholder is not required to make such an effort if it would be unavailing. See *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983).

(a) Business Judgment Rule

[5] The Cramms argue that their corporate activities were protected by the business judgment rule and that the district court erred in disregarding the rule. The business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled in part on other grounds, Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). The Cramms assert that it was Sadler's burden to overcome the business judgment rule and that he failed to establish that Jorad suffered harm under their management. They claim that Sadler also had the burden to prove that their actions were not in good faith or in the best interests of the corporation. The Cramms argue that in the absence of fraud, gross negligence, or transgression of statutory limitations, the court should not have interfered merely to overrule and control the discretion of the directors on questions of corporate management, policy, or business. See *Royal Highlanders v. Wiseman*, 140 Neb. 28, 299 N.W. 459 (1941).

[6] According to the business judgment rule, courts are precluded from conducting an inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. *Association of Commonwealth Claimants v. Hake, supra.* "Within the limits of their authority directors possess full discretionary powers, and in the honest and reasonable exercise of such powers are not subject to control by stockholders or by courts at the instance of stockholders." *Royal Highlanders v. Wiseman*, 140 Neb. at 38, 299 N.W. at 464.

In 1995, Nebraska adopted the Business Corporation Act, which can now be found at Neb. Rev. Stat. § 21-2001 et seq. (Reissue 1997, Cum. Supp. 2002 & Supp. 2003). The Legislature

codified the business judgment rule as § 21-2095, which provides standards of conduct for corporate directors:

> (1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:
> (a) In good faith;
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.
>
> . . . .
>
> (4) A director shall not be liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.

In summary, the Cramms argue that to prevail in this action Sadler had to prove that their activities with regard to Jorad were contrary to § 21-2095. We disagree. Instead, the Cramms had the burden to establish the fairness and reasonableness of their operation of the corporation.

In *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983), a dispute arose between the minority and majority shareholders of a two-shareholder corporation. We recognized that where the intimate relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court. We pointed out that in *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 328 N.E.2d 505 (1975), the court held that stockholders in a close corporation owed one another the same fiduciary duty as that owed by one partner to another in a partnership.

We conclude that the district court did not err with regard to the application of the business judgment rule in the case at bar. As early as *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548, 556, 54 N.W. 830, 833 (1893), we recognized that "the relation of directors to the corporation of which they are officers is of a fiduciary character" and that "dealings with respect to the corporate property will be carefully scrutinized by the courts."

[7] Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, where another is in control of the books and has managed the

business, that other is in the position of a trustee and must make a proper accounting. *Anderson v. Clemens Mobile Homes, supra.* The Cramms maintained control of Jorad's books and managed the business. They each held the position of trustee and were required to make an accounting of the business activities and expenses of the corporation.

In *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001), the parties were married to each other. George Woodward, a minority shareholder, alleged that Nancy Andersen, the president of the corporation, mismanaged the corporation and wrongfully withdrew funds therefrom. We held that under such circumstances, Andersen, an officer and director of the corporation, owed a fiduciary duty to the corporation and its stockholders and was considered a trustee, citing *Evans v. Engelhardt*, 246 Neb. 323, 518 N.W.2d 648 (1994). Once Woodward presented evidence of an alleged breach of Andersen's duty, the burden shifted to Andersen to prove the fairness of those transactions.

[8] *Evans* was a derivative action by a minority shareholder who alleged that the majority shareholders had paid themselves unreasonable salaries. The minority shareholder sought an accounting and the return of money. We held that an officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and is treated by the courts as a trustee. We noted that the burden of proof is upon the party holding a confidential or fiduciary relationship to establish the fairness, adequacy, or equity of the transaction with the party with whom he holds such relation, citing *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944). We concluded in *Evans* that it was the burden of the majority shareholders to show that their salaries were reasonable.

Sadler presented evidence that the Cramms had allegedly breached their fiduciary duty to him. Accordingly, the burden shifted to the Cramms to establish by a preponderance of the evidence the fairness, adequacy, and equity of their actions. See *Woodward v. Andersen, supra.*

The Cramms were required to show that the actions they took as directors and officers of the corporation were performed in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a

manner that they reasonably believed to be in the best interests of the corporation. See § 21-2095. They failed to do so. Thus, the Cramms' argument that the district court misapplied the business judgment rule is without merit.

(b) Findings of Fact

The Cramms assert that the district court erred in finding that Sadler had no knowledge of the Cramms' conduct in running the corporation and that Sadler had been oppressed by the Cramms. They claim that the court improperly excluded evidence of corporate meetings. We conclude that there is no merit to this claim.

The judgment of the district court was based upon its determination that the Cramms had misappropriated corporate funds. The court found that the Cramms had breached their fiduciary duties by acting in a manner that was detrimental to the value of the business and the assets of the corporation. The court also found that the Cramms misappropriated assets and moneys belonging to Jorad.

The Cramms argue that the district court erred in finding that Sadler had no knowledge of the activities of the corporation and in excluding evidence of corporate meetings for the years 1996 through 1998. When the Cramms attempted to offer the notices and minutes of said corporate meetings, Sadler objected because the exhibits had not been included in the documents requested during discovery. The court sustained the objection, and the Cramms made an offer of proof to show that Sadler was present at the annual corporate meetings in February 1996 and 1997. We note that the offer of proof for 1997 is not consistent with the corresponding exhibit. The exhibit does not show that Sadler was present at the 1997 meeting. No one contends that Sadler was present for the 1998 meeting.

Although the district court stated that Sadler testified that there were no corporate meetings in 1996 or 1997, whether there were corporate meetings in 1996 or 1997 is not material to the decision in this case. The minutes of the meetings merely reflected who was present and who was elected to serve as the officers and directors of the corporation. Therefore, even if the court should not have excluded the evidence of the corporate meetings in 1996 and 1997, we conclude it was harmless error.

The judgment of the court was based upon the Cramms' misuse of corporate funds. The court found that the Cramms had breached their fiduciary duties to Jorad and Shovelhead by acting in a manner that was detrimental to the value of the business and assets of the corporation. It was upon this activity that the court found against the Cramms.

In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). The evidence as to the manner in which the Cramms ran the corporation was in conflict, and we accept the district court's findings of fact regarding these issues.

(c) Excessive Compensation

The Cramms argue that the district court erred in finding that Geil Cramm's salary was excessive. They claim that Sadler presented no expert testimony regarding industry standards for the compensation of executives in the hazardous material abatement business. Sadler testified that he believed $25,000 per year was a reasonable salary for Geil Cramm.

During the peak years of its operation, Jorad had 27 employees, and the Cramms set the salaries of the employees. Craig Cramm testified that he set the salary for Geil Cramm and that he generally used industry standards and the experience of the individual to set the appropriate salary. He claimed that he set Geil's salary based upon her level of involvement with the corporation's activities.

During 1997, Geil Cramm worked away from the office at the site of a new building project. Riggs testified that in January 1997, she took over the work that Geil Cramm had been doing prior to that time. Hamernik, who testified on behalf of Sadler, stated that based upon Jorad's bylaws and his discussions with Riggs, it was his opinion that Geil Cramm should not have been paid any amount in 1997.

Testimony was presented at trial which established that a large portion of Geil Cramm's compensation stemmed from the payment of periodic bonuses. Craig Cramm testified that he consulted one of Jorad's accountants before any of these bonuses were paid to Geil Cramm and that the purpose behind the bonuses was to pay estimated taxes.

The district court imputed a salary of $30,000 per year to Geil Cramm. The forensic audit showed that she was paid $36,445, $68,867, $104,790, and $36,372 in 1995 through 1998 respectively. The audit showed that for the same years, Craig Cramm was paid $113,235, $75,992, $75,490, and $137,369. The court concluded that the Cramms were using Geil Cramm's salary as a balancing entry and "were compensating her essentially whatever they needed that wasn't covered under Craig's compensation." It was the combination of salary paid and bonuses received that led the court to conclude that Geil Cramm's compensation was excessive.

Where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *id.* We accept the district court's findings, and we conclude that the Cramms' argument regarding Geil Cramm's salary is without merit.

(d) Expenses Not Related to Business and Depreciation

The Cramms argue that the district court erred in its findings regarding expenses not related to the business and depreciation. With respect to the expenses, Craig Cramm testified that the Internal Revenue Service (IRS) had reviewed the Cramms' tax statements for the years 1996 through 1998 and that while some of the expenses listed as business deductions were not allowed, the majority were allowed. His accountant testified that there was an IRS examination in the summer of 1997 which resulted in no changes to the corporation's tax liability.

Our review of the record shows that there is little, if any, evidence to support the Cramms' testimony as to these expenses. Exhibits 64 and 86, which were introduced by the Cramms on this issue, do not show what expenses were examined by the

IRS. The Cramms had the burden of proof to establish the fairness, adequacy, and equity of the transactions in question.

With regard to the questioned expenses, the district court was faced with a conflict in the evidence, and it elected to give more credence to Hamernik's report than to the evidence offered by the Cramms. The court noted that many of the records referred to by the Cramms had been destroyed or were missing. The court accepted one version of the facts as opposed to another, and we conclude that it did not err in this respect.

Regarding the excess depreciation, Hamernik's report shows that these figures were based on a number of automobiles that the Cramms claimed were used as corporate vehicles. The Cramms argue that the district court erred in failing to find that the automobiles for which the depreciation was claimed had a connection to the operation of Jorad.

The record indicates that the district court included this depreciation when calculating the monetary damages awarded to Sadler. The court found that the total depreciation claimed for assets not related to the operation of the business was $51,750.51, and it awarded Sadler 20 percent of this amount, or $10,350.10. We conclude there is no evidence that would establish how this depreciation would equate with a direct cash loss of $10,350.10 to Sadler. We therefore reduce the judgment with regard to the claim involving Jorad from $83,791.69 to $73,441.59.

2. Shovelhead

As to Shovelhead, the Cramms have asserted three assignments of error. The first two involve the district court's calculation of the amount owed Sadler due to the sale of the property formerly owned by Shovelhead and the winding up of the affairs of the company.

First, the Cramms argue that the district court disregarded exhibit 61, the purchase agreement whereby Shovelhead purchased property from Sadler and his wife. In particular, the Cramms believe that the court failed to give credence to the following language:

> The parties agree and confirm that a Tax Increment and Financial application has been approved by the [C]ity of Ralston on behalf of the Sadler Business Park Development.

> It is the intent of the party [sic] that One Hundred percent of the benefits from the tax increment financing apportioned according to the amount of property owned by The Shovelhead Group L.L.C., as a percentage of the development shall be payable to purchaser in accordance with the ownership interests in Shovelhead Group L.L.C. which has been established in accordance with Nebraska Law. The disbursements made by the City of Ralston as a result of the T.I.F. shall be paid out in accordance with the ownership interests of the L.L.C. no more than ten (10) days after receipt from the local government entity. Payments shall be made directly from purchaser to the shareholders of the L.L.C. in accordance with their percentage of ownership.

According to the Cramms, this language sets no limitation on the payments to be made to Shovelhead as a result of the TIF.

Sadler testified that the TIF was to last for 15 years. The Cramms assert that Sadler has never paid any portion of the TIF to Shovelhead. The Cramms consider Sadler's distribution from the sale of the Shovelhead property and the winding up of Shovelhead to be equivalent to the TIF which was to be paid over the entire 15-year period. They believe that they are holding this amount in trust for Shovelhead and its interest holders.

The Cramms' second assignment of error pertains to the district court's failure to retain jurisdiction over Shovelhead so that the proceeds of the TIF can be computed and paid out over the 15-year period. When the court made its calculations regarding Shovelhead, it started with the figure it had calculated to be Sadler's distributive share as of June 30, 2002. This was the end of the month during which the Shovelhead property was sold to a third party. The court then discounted this figure by the amount of the TIF still owed to the Cramms as of the end of June.

A review of the purchase agreement finds this method of calculating Sadler's distribution to be correct. While the Cramms contend that the agreement contains no language limiting the payments to be made as a result of the TIF, the agreement clearly states that the TIF is to be paid in proportion to the amount of the property owned by Shovelhead. Since Shovelhead ceased owning the property as of June 14, 2002, that was the appropriate time for the TIF payments to Shovelhead to cease. The district

court did not err in this respect, and the Cramms' first two assignments of error have no merit.

The Cramms' final assignment of error pertains to the district court's failure to consider a settlement related to water damage to the Shovelhead property in calculating Sadler's distribution. Craig Cramm testified that the Shovelhead property experienced water damage due to the faulty installation of a wall and that Sadler was aware of this damage. When the Shovelhead property was sold to a third party, a settlement was reached as to this damage in the amount of $4,000.

The Cramms argue that Sadler was never held responsible for his share of the $4,000 settlement, which would be $800. However, since the $4,000 was deducted from the sale price of the property, Sadler has been held responsible for his share of the settlement via the discounted sale price. Accordingly, the district court did not err in its failure to discount Sadler's distribution by this amount.

VI. CONCLUSION

For the above-stated reasons, the decision of the Douglas County District Court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
JAMES R. WORM, APPELLANT.

680 N.W.2d 151

Filed May 28, 2004. No. S-02-1506.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
4. **Convicted Sex Offender: Sentences: Appeal and Error.** Under Neb. Rev. Stat. § 29-4005 (Cum. Supp. 2002), the lifetime registration requirement for an offender convicted of an aggravated offense under the amended provisions of Nebraska's Sex

Offender Registration Act is part of the sentencing court's judgment for purposes of filing an appeal.

5. **Constitutional Law: Convicted Sex Offender: Police Officers and Sheriffs: Appeal and Error.** A sex offender's constitutional challenges to the notification provisions of Nebraska's Sex Offender Registration Act are not ripe for appellate review before the Nebraska State Patrol has assessed the offender's notification level.
6. **Statutes: Constitutional Law: Sentences.** Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
7. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
8. **Criminal Law: Other Acts: Time.** Retroactive application for civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited.
9. **Convicted Sex Offender: Constitutional Law: Statutes: Legislature: Intent.** In analyzing whether Nebraska's Sex Offender Registration Act is "punishment" for purposes of an ex post facto challenge, it is necessary to determine whether the Legislature intended statutory sanction to be criminal or civil and whether the statutory sanction is so punitive in purpose or effect as to negate an intent to create a civil regulatory scheme.
10. **Criminal Law: Statutes: Appeal and Error.** Whether the Legislature intended a statutory scheme to be civil or criminal is primarily a matter of statutory construction. However, an appellate court must also look at the statute's structure and design.
11. **Convicted Sex Offender: Statutes: Legislature: Intent.** The Legislature intended Nebraska's Sex Offender Registration Act to be a civil regulatory scheme to protect the public from the danger posed by sex offenders, which intent is not altered by the statute's structure or design.
12. **Statutes: Legislature: Intent.** In analyzing whether the purpose or effect of a civil sanction statute is so punitive as to negate the Legislature's intent, the following factors are considered: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.
13. **Criminal Law: Convicted Sex Offender.** The registration provisions of Nebraska's Sex Offender Registration Act do not impose criminal punishment.
14. **Due Process.** Procedural due process limits the government's ability to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause.
15. ____. The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.
16. **Constitutional Law.** Reputational damage caused by state action which results in a person's stigmatization can implicate a protected liberty interest, but only if it is coupled with some more tangible interest such as employment.

17. **Constitutional Law: Convicted Sex Offender.** A sex offender fails to show he or she has been deprived of a protected liberty interest when a claim of reputational damage is related to community notification, the level and application of which has not yet been determined.
18. **Sentences: Probation and Parole: Appeal and Error.** Whether the sentence imposed is probation or incarceration is a matter within the trial court's discretion, whose judgment denying probation will be upheld in the absence of an abuse of discretion.
19. **Sentences: Appeal and Error.** 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.
20. **Sentences.** 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: JEFFRE CHEUVRONT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, Mark D. Raffety, and Jeffrey J. Lux for appellee.

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

CONNOLLY, J.

I. INTRODUCTION

James R. Worm appeals his sentence for attempted first degree sexual assault on a child and the district court's finding that he was subject to the amended provisions of Nebraska's Sex Offender Registration Act (Act), Neb. Rev. Stat. §§ 29-4001 to 29-4013 (Cum. Supp. 2002). The court determined that Worm had committed an aggravated offense under an amendment that was not a part of the Act when the offense occurred. Worm contends that the court's finding violated the ex post facto clause and that he was denied procedural due process. We affirm.

II. BACKGROUND

In April 2002, the State filed an information against Worm, charging him with first degree sexual assault on a child, a Class II felony. The victim was the 7-year-old daughter of the woman that Worm was then dating. The offense occurred on March 29, 2002.

In August, under a plea agreement, the State amended the information to charge Worm with attempted first degree sexual assault on a child, a Class III felony. At the hearing, the court informed Worm of the factual basis for the charge and the possible imprisonment terms, fines, and collateral consequences of a plea of guilty, including that he would be subject to the Act's terms and conditions. Worm pleaded guilty, and the court accepted his plea. Worm was also committed to the Lincoln Regional Center for psychiatric observation and treatment not to exceed 60 days.

In November 2002, after the 2002 amendments were in effect, Worm appeared for sentencing. Worm argued that the offense had occurred before the Act was substantively changed by the April 2002 amendments, which became effective July 20, 2002, see 2002 Neb. Laws, L.B. 564, and that the amended provisions should not be applied retroactively. The hearing was continued on this issue until December 13. When the hearing reconvened, the court determined the law's purpose was regulatory rather than punitive and that, therefore, the amendment was applicable to Worm. Also, the court found that Worm had committed an aggravated offense under § 29-4005(4)(a)(ii), but that the evidence did not show he was a sexually violent predator. The court informed Worm that because he had committed an aggravated offense, he must register for life, and explained his duties under the Act. The court sentenced him to 8 to 12 years' imprisonment, with credit given for time served.

III. ASSIGNMENTS OF ERROR

Worm assigns that the district court erred in (1) determining that he had committed an aggravated offense under the amended Act in violation of the Ex Post Facto Clauses of the Nebraska and federal Constitutions, (2) determining that he had committed an aggravated offense under the amended Act without affording him procedural due process, and (3) imposing an excessive sentence.

IV. STANDARD OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court

below. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002).

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

V. ANALYSIS

In April 2002, the Nebraska Legislature amended the Act to bring it in compliance with the federal law. The 1996 original Act required a person convicted of an enumerated sex offense, or its equivalent in another jurisdiction, to register with the Nebraska State Patrol's sex offender registry. Under this Act, the offender had to verify that registration on an annual basis for a period of 10 years after his or her release from a correctional facility or other institution, or after discharge from probation, parole, or supervised release. See §§ 29-4003 to 29-4005 (Cum. Supp. 2000).

In addition, the amendments added new sex offenses, aggravated offenses and repeat offenses, which require the offender to verify his or her registration annually. §§ 29-4003 and 29-4005(2) (Cum. Supp. 2002). An aggravated offense is defined as "any registrable offense . . . which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years." § 29-4005(4)(a). The amendments require the sentencing court to make the finding of an aggravated or repeat offense as part of the sentencing order. § 29-4005(2).

The amendments also require an offender to provide his or her place of vocation and any school which he or she attends in addition to the previous requirement of providing the offender's address and place of employment. 2002 Neb. Laws, L.B. 564. Under both versions, the Act is retroactive to defendants convicted of or pleading guilty to most registrable offenses on or before January 1, 1997. *Id.*

The amendments, however, did not substantively change the sections concerning community notification. The Nebraska

State Patrol's registration and community notification division is responsible for assigning a notification level after an offender initially registers. The assigned notification corresponds to the offender's assessed recidivism risk, which can be assessed as low, moderate, or high. See § 29-4013(2). If the risk is low, law enforcement officials who are likely to encounter the offender are notified of the registry information. § 29-4013(2)(c)(i). If the recidivism risk is moderate, schools, daycare centers, and youth and religious organizations are additionally notified. § 29-4013(2)(c)(ii). If the recidivism risk is high, individuals likely to encounter the offender must also be notified, in addition to those notified for low and moderate notification levels. § 29-4013(2)(c)(iii). If a risk assessment indicates that public notification is warranted, it can be accomplished by direct contact, news releases, or a method using a telephone system, including an electronic database. *Id.* See, also, 272 Neb. Admin. Code, ch. 19, § 013.06 (2003). The State Patrol maintains a public Web site, which disseminates specified information about offenders only if they are assigned a high-risk notification level.

1. Ripeness

(a) Registration Provisions

The State argues that Worm's constitutional challenges are not properly before this court because the Act's requirements are collateral to the criminal conviction. The State relies on two cases in which we held that the registration provisions were collateral to the defendant's conviction. See *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998), and *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). Worm, however, contends that his constitutional challenges to the Act are properly before this court, because after the Act was amended, the sentencing court had an affirmative duty to determine whether an aggravated offense had occurred, thus triggering a lifetime registration requirement.

In *Torres*, we held that a defendant who was subject to the registration requirements lacked standing to challenge the Act in a direct appeal from the underlying conviction because the Act's registration requirements were separate and collateral to the sexual offense that had triggered the requirements. We held that "the

district court's order did not address the [Act's] requirements; rather, the [Act's] registration requirements arose solely and independently by the terms of the [A]ct itself only *after* Torres' conviction." (Emphasis in original). 254 Neb. at 95, 574 N.W.2d at 155.

Torres is distinguishable in two respects. First, the defendant in *Torres* argued that the Act constituted an ex post facto law because it *potentially* increased his sentence by imposing an additional penalty if he *failed* to register. He did not argue that the registration requirements themselves violated the ex post facto clause as retroactive punishment.

Second, unlike the 10-year registration requirement for the registrable offense in *Torres*, the lifetime registration requirement for an aggravated offense does not arise solely and independently from the defendant's conviction. Rather, the amendments require the court, as part of the sentence, to determine if the defendant committed an aggravated offense. See § 29-4005(2). As such, the court's finding that Worm committed an aggravated offense was part of the court's judgment. See *People v. Hernandez*, 93 N.Y.2d 261, 711 N.E.2d 972, 689 N.Y.S.2d 695 (1999).

Neither is *Schneider* controlling. In *Schneider*, this court determined that a guilty plea was not involuntary or unintelligent because the trial court failed to inform the defendant of the Act's requirements before accepting his plea. We relied on *Torres* in concluding that the requirements were a collateral consequence of the defendant's plea and that it had no direct effect on the range of the defendant's possible sentences or incarceration periods. *Schneider, supra*. Ripeness, however, was not an issue in that case. We specifically declined to use the intent-effects test for analyzing the penal nature of the statutory scheme because the defendant had not raised a double jeopardy or ex post facto challenge. *Id.*

[4] Thus, we determine that the registration requirement for an offender convicted of an aggravated offense under the Act's amended provisions is part of the sentencing court's judgment for purposes of filing an appeal. Worm's constitutional challenges to the Act's registration provisions are properly before this court.

(b) Notification Provisions

Worm also argues that the Act's notification provisions are punitive and violate his right to procedural due process. Worm, however, is currently incarcerated, and thus, has not yet registered. Under both the original and the Act's amended versions, offenders sentenced to a term of incarceration for a registrable offense are not required to register until they are released, paroled, or placed on probation, unless they are free pending an appeal. See 2002 Neb. Laws, L.B. 564. Because he has not registered, he has not yet been assessed for the applicable level of community notification. See 272 Neb. Admin. Code, ch. 19, § 012.01 (2003).

[5] Worm, however, argues that "[g]iven the district court's determination . . . that [Worm] committed an aggravated offense, the State Patrol is very likely to classify [him] as a high risk offender, and thus subject to having his personal information readily available to the public through the Internet and through print media." Brief for appellant at 13-14. The Act however, does not require a mandatory high-risk assessment for persons who have committed an aggravated offense. Rather, it requires the State Patrol to assess a registrant based on many factors, including the sex offender's response to treatment and behavior while confined. § 29-4013(2)(b). This assessment has not been made, and the notification level that the State Patrol will assign to Worm is mere speculation at this point. Worm's argument demonstrates that his constitutional challenges to the Act's notification provisions are not yet ripe for appellate review. See *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000) (declining to address challenge to statute allowing court to order compliance with alcohol assessment when assessment had not been made). See, also, *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235 (3d Cir. 1996) (determining that constitutional challenges to notification provisions of New Jersey's Sexual Offender Registration Act were not ripe when notification hinged upon risk assessment that had not yet been performed). We limit Worm's constitutional challenges to the registration requirements.

2. Ex Post Facto Challenge

Worm argues that the court's finding that he had committed an aggravated offense violated the ex post facto clause because

an aggravated offense and its attendant requirements did not exist when he committed a registrable offense. He argues that the clause is violated because the amendment is punitive, since he now must register for life, instead of 10 years.

[6,7] Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts. *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003). This court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution. See, e.g., *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999), citing *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

[8,9] Admittedly, the lifetime registration requirement for committing an aggravated offense did not exist when Worm committed his offense in March 2002. See 2002 Neb. Laws, L.B. 564 (approved April 16, 2002, and effective July 20, 2002). However, the retroactive application for civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited. See, *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997). Cf. *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). Here, whether the amendment violates state and federal constitutional proscriptions against retroactive punishment is analyzed under the U.S. Supreme Court's two-prong, "intent-effects" test for analyzing punishment. See *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). If a court determines that the Legislature intended a statutory scheme to be civil, that intent will be rejected " 'only where a party challenging the [statute] provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention.' " *State v. Isham*, 261 Neb. 690, 694, 625 N.W.2d 511, 515 (2001).

We recognized that the intent-effects test can apply to either a double jeopardy or ex post facto challenge to a statutory scheme. *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). Although we have not applied the test in analyzing an ex post

facto challenge to a statutory scheme, we have applied it to a double jeopardy challenge. See, *Isham, supra*; *Howell, supra.*

(a) Legislative Intent Prong

[10] The Act will pass the intent prong if the Legislature intended to establish a civil regulatory scheme to remedy a present situation and " 'the restriction of the individual comes about as a relevant incident to [the] regulation.' " *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1254 (3d Cir. 1996), quoting *De Veau v. Braisted*, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960). See *Howell, supra.* Whether the Legislature intended the amendments to be civil or criminal is primarily a matter of statutory construction. However, we must also look at the statute's structure and design. *Isham, supra*; *Howell, supra.*

The Legislature stated two main reasons for enacting the original Act: (1) sex offenders present a high risk to commit repeat offenses and (2) law enforcement agencies' efforts to protect communities, conduct investigations, and quickly apprehend sex offenders had been impaired by a lack of available information about sex offenders who live in their jurisdictions. § 29-4002 (Cum. Supp. 2000). These findings show that the Act has a dual purpose: protecting the public and assisting law enforcement in future efforts to investigate and resolve sex offenses. Moreover, this court has held that promoting public safety evidences a civil regulatory scheme. See, *Isham, supra*; *Howell, supra.*

Worm, however, argues that assisting law enforcement agencies with future investigations and prosecutions evidences a punitive purpose in enacting the law. But assisting future law enforcement efforts by monitoring an offender's whereabouts does not inflict punishment and furthers the legitimate regulatory goal of protecting the public and preventing crime. See, e.g., *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *Artway, supra.*

When looking at the statute's structure and design, the primary consideration is the procedural mechanisms established by the Legislature to enforce the statute. *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). The regulations use an administrative hearing and an appeal process under Nebraska's Administrative Procedure Act for challenging the registration and notification

requirements. See 272 Neb. Admin. Code, ch. 19, § 004 (2003). Thus, the requirement that an offender follow the Administrative Procedure Act for contesting and appealing administrative decisions evidences a civil, nonpunitive statute. See *Howell, supra.*

Moreover, that the sentencing court must find whether an aggravated offense occurred as part of the sentencing order does not indicate an intent to impose punishment because the court has no discretion; the finding is mandatory. The U.S. Supreme Court recently considered an ex post facto challenge to Alaska's sex offender registry in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Alaska's statutes similarly required a sentencing court to set out in the written judgment " 'the requirements of [the Alaska Sex Offender Registration Act] and, if it can be determined by the court, whether that conviction will require the offender or kidnapper to register for life or a lesser period.' " 538 U.S. at 95. The Court determined that this sentencing requirement did not make the registration punitive. It reasoned that using the sentencing court provided a timely and adequate notice to offenders of their registration obligations and the criminal consequences for failing to comply. *Id.*

[11] Similarly in Nebraska—if the offender is not incarcerated pending an appeal or if the offender is sentenced to probation—the registration requirements begin immediately. See 272 Neb. Admin. Code, ch. 19, § 006.03 (2003). Thus, prompt notification of the Act's requirements and its criminal penalty for noncompliance is essential in some cases. As in *Smith*, the Act's mandatory requirement of a finding whether an aggravated offense occurred provides a prompt notification. We conclude that the Legislature intended to create a civil regulatory scheme to protect the public from the danger posed by sex offenders, which intent is not altered by the statute's structure or design.

(b) Effects of Registration Requirements

[12] Next, we analyze whether the purpose or effect of the statute is so punitive as to negate the Legislature's intent. In making that determination, we consider the factors set out by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963):

> "(1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as punishment'; (3) 'whether it comes into play only on a finding of *scienter*'; (4) 'whether its operation will promote the traditional aims of punishment—retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.' "

State v. Isham, 261 Neb. 690, 695, 625 N.W.2d 511, 515-16 (2001), quoting *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). See, also, *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980).

(i) Relevance of Scienter and Criminal Behavior Factors

In *Smith*, the Court concluded that two factors received little weight in analyzing the effect of Alaska's registry statutes: (1) whether the regulation comes into play only upon a finding of scienter and (2) whether the behavior to which it applies is already a crime. The Court determined that because the statutory concern was recidivism, the offender's past criminal conduct was a necessary beginning point. *Id.* See, also, *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). Here, we agree that the scienter and criminal behavior factors are not relevant to determining whether a criminal registration statute imposes punishment.

(ii) Affirmative Disability or Restraint

The Alaskan statutes considered in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), required registrants who had been convicted of an aggravated offense to verify their registration quarterly for life. But the Court determined that the requirement was not an affirmative disability or restraint because registrants were free to live and work where they wanted without supervision. *Id.* Accord, *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *State v. Ward*, 123 Wash. 2d 488, 869 P.2d 1062 (1994).

Similarly, although Worm must notify law enforcement agencies of changes in his address, occupation, vocation, or school

attendance, the Act does not require him to seek permission. See *Cutshall, supra*. After his initial registration, which must be completed in person, Worm may verify his registration information annually. See 272 Neb. Admin. Code, ch. 19, §§ 006.07 and 009 (2003). These requirements pose a lesser burden than revoking a driver's license or a professional license—sanctions which this court has previously held are civil in nature. See, *Isham, supra*; *State v. Wolf*, 250 Neb. 352, 549 N.W.2d 183 (1996). Further, the statute upheld in *Smith* required offenders who had committed an aggravated offense to verify their registration on a quarterly basis for life. Here, the burden posed by the Act's registration provisions is slight. The annual verification obligation is significantly less burdensome than the quarterly verification obligation upheld in *Smith*. We conclude that Nebraska's registration provisions do not impose an affirmative disability or restraint on the registrant.

(iii) Historically Regarded as Punishment

Sex offender registries are a relatively new occurrence and have not been historically regarded as punishment. See, *Smith, supra*; *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997). The Supreme Court noted in *Smith* that the "imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.' " 538 U.S. at 93, quoting *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Further, criminal registration in general has not been traditionally viewed as punishment; instead, it serves to make relevant information available to law enforcement. See, *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) (felony registration is permissible law enforcement procedure); *People v. Adams*, 144 Ill. 2d 381, 581 N.E.2d 637, 163 Ill. Dec. 483 (1991).

(iv) Traditional Aims of Punishment

Courts generally hold that registration statutes do not promote the traditional aims of punishment: retribution and deterrence. It is true that regardless of a sex offender's risk assessment, local law enforcement will be notified of the offender's presence in

their community. This fact would presumably have some deterrent effect on the registrant's activities, but this effect is minimal when compared to the threat of conviction and incarceration for a new offense. See, *State v. Burr*, 598 N.W.2d 147 (N.D. 1999); *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995); *Adams, supra*. Compare *State v. Hansen*, 249 Neb. 177, 189, 542 N.W.2d 424, 433 (1996) (concluding that "substantial remedial purposes underlie the administrative license revocation statutes" which are "not defeated by the fact that the statutes also play a role in deterring others from driving drunk"). See, also, *Smith v. Doe*, 538 U.S. 84, 98, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment").

Further, the registration provisions cannot be said to serve a retributive purpose. We have already determined that the requirement does not impose an affirmative disability. Nor does registration in itself involve public notice. Unless an offender is assessed as having a moderate or high recidivism risk, the registration information is provided only to law enforcement agencies, which already have access to criminal histories. See Neb. Rev. Stat. §§ 29-3501 to 29-3528 (Reissue 1995, Cum. Supp. 2002 & Supp. 2003) (Security, Privacy, and Dissemination of Criminal History Information Act). Thus, registration, considered apart from notification, is unlikely to result in any stigma.

(v) Sanction's Excessiveness in Relation to Alternative Purpose

Finally, the registration requirement is not excessive in relation to its assigned nonpunitive purpose—to protect the public and aid law enforcement. The length of the registration requirement must necessarily correspond to the recidivism risk for that offense classification to carry out the statute's intent. "The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences," particularly for minor conditions such as registration. *Smith*, 538 U.S. at 103-04 (noting that duration of registration requirement is based on empirical research showing that reoffenses can occur as much as 20 years after release).

We determine that the Act's offense categories and related registration periods "are reasonably related to the danger of recidivism" and "consistent with the regulatory objective." See 538 U.S. at 102.

[13] We conclude that Worm has failed to show by the clearest proof that the Act's registration provisions are so punitive in either purpose or effect as to negate the State's intention. Because the registration provisions are not punitive, we defer to the Legislature's determination of what remedial action is necessary to achieve the Legislature's goals. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

3. Due Process

Worm contends that the Act violated his right to procedural due process because it did not afford him notice and a hearing before the district court determined that he had committed an aggravated offense. This determination increased the applicable registration period for him from 10 years to life. Worm argues that the Act deprives him of a liberty interest in privacy because publicly disclosing his personal information, including employment information, will likely make employers reluctant to hire him.

[14,15] Procedural due process limits the government's ability to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause. Due Process requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. *Id.*

[16] Reputational damage caused by state action which results in a person's stigmatization can implicate a protected liberty interest, but only if it is coupled with some more tangible interest such as employment. See *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001), quoting *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). This requirement of a tangible interest is referred to as the "stigma plus" test. *Benitez, supra.*

Worm correctly argues that the regulations currently provide that the State Patrol "may" disseminate employment information if an offender is determined to have a high risk classification. See

272 Neb. Admin. Code, ch. 19, § 013.05 (2003). As discussed, however, Worm's risk classification and notification level has not been made. For offenders with a low recidivism risk, the registry information is made available only to the law enforcement agencies in the jurisdiction where an offender lives after release from incarceration or during placement on parole or probation. Thus, at this point, Worm has failed to show that he will be subjected to any public notification, and the issue is not yet ripe for review. Additionally, we note that all offenders are given an opportunity to ask for a hearing on their assigned risk classification level after the State Patrol notifies them. See 272 Neb. Admin. Code, ch. 19, § 015.01 (2003) (allowing offenders 5 days to mail in request for hearing to contest classification after receiving notice).

[17] The only issue currently before this court is the registration requirements, which do not involve public notice. Because Worm's argument for reputational damage is related only to the notification provisions, he has failed to show that he has a liberty interest entitled to due process protection. We conclude that Worm's due process argument must fail. See *Benitez, supra.*

4. Excessive Sentence

Finally, Worm argues that the district court abused its discretion by imposing an 8- to 12-year prison sentence and by not placing him on probation. He further argues that his crime was mitigated by his history of mental health disorders.

[18,19] 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. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). Whether the sentence imposed is probation or incarceration is a matter within the trial court's discretion, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001). 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. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

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

The offense for which Worm was convicted, attempted first degree sexual assault, is a Class III felony. See Neb. Rev. Stat. §§ 28-319(1)(c) and (2) (Reissue 1995) and 28-201(4)(b) (Cum. Supp. 2002). Worm's 8- to 12-year prison sentence is within the statutory limits of Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2000), which provides for a maximum of 20 years' imprisonment for a Class III felony.

Worm's presentence investigation report indicated that he was not a candidate for intensive supervision probation because of the offense, his criminal history, and his risks or needs assessment. His psychiatric examinations and interviews showed a diagnosis of pedophilia, antisocial personality disorder, and other mental health disorders. Although Worm argues that his previous convictions did not involve violent offenses, the presentence investigation report showed an inability to control aggressive and violent behaviors. Worm's presentence report showed he had a moderate risk of future sexual offending and a high risk for general recidivism within a 7- to 10-year timeframe.

We conclude that the trial court did not abuse its discretion in sentencing as it did, nor in refusing to place Worm on probation.

VI. CONCLUSION

We conclude that Worm's lifetime registration requirement for an aggravated offense under the amended provisions of Nebraska's Sex Offender Registration Act is part of the sentencing court's judgment for purposes of filing an appeal. Thus, his constitutional challenges to the registration requirement are properly before this court in his direct appeal. We conclude that his challenges to the Act's notification provisions, however, are not yet ripe for appellate review. We conclude that the registration requirements do not impermissibly impose retroactive punishment and that Worm's due process argument must fail because Worm has failed to show that the registration requirement deprives him of a protected liberty interest. Finally, we conclude that the district court did not abuse its discretion in the sentence it imposed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GREGORY G. HALL, APPELLANT.

679 N.W.2d 760

Filed May 28, 2004. No. S-03-590.

1. **Pleas: Appeal and Error.** A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.
2. **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.
3. **Pleas.** To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.
4. **Habitual Criminals: Sentences.** In connection with a habitual criminal advisement, the Nebraska Supreme Court has stated that a court must inform a defendant of the possibility of an increased sentence imposed because of a habitual criminal statute.
5. **Sentences.** Under Nebraska law, a defendant must be informed of those consequences which affect the range of possible sentences or periods of incarceration for each charge and the amount of any fine to be imposed as a part of the sentence.
6. **Habitual Criminals: Sentences.** A critical feature of a habitual criminal advisement is that a defendant be informed of the possibility that an increased sentence will be imposed if the defendant is found to be a habitual criminal under the habitual criminal statute.
7. **Habitual Criminals: Prior Convictions: Right to Counsel: Proof.** A showing of the presence of counsel at sentencing will not alone establish the State's case that a defendant's prior conviction was counseled for purposes of the habitual criminal statute.
8. ____: ____: ____: ____. The State's burden of establishing prior, counseled convictions for habitual criminal purposes is the same whether a defendant's prior conviction is based on a plea of guilty, a jury verdict of guilty, or a finding of guilt by a trial court.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part sentence vacated and cause remanded with directions.

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

PER CURIAM.

INTRODUCTION

Appellant, Gregory G. Hall, pleaded guilty to delivery of a controlled substance, a Class III felony. See Neb. Rev. Stat. § 28-416 (Cum. Supp. 2002). After an evidentiary hearing, the district court concluded that Hall was a habitual criminal and sentenced him to 10 years' imprisonment. Hall appealed. Pursuant to Neb. Rev. Stat. § 24-1106(2) (Reissue 1995), we granted the State's petition to bypass. We affirm in part, and in part vacate the sentence and remand the cause with directions.

FACTUAL BACKGROUND

On September 27, 2002, Hall was charged in Sarpy County District Court with four substantive counts: one count of possession of a controlled substance with intent to deliver, one count of possession of a controlled substance, and two counts of delivery of a controlled substance. Hall was also charged as a habitual criminal. The district court explained Hall's rights to him in a group arraignment. After the court had completed the general rights advisory, Hall was individually advised of the penalties associated with the counts for which he had been charged. With respect to the habitual criminal charge, the court advised Hall as follows:

> I'll advise you that also there is a charge of being a habitual criminal and the elements of enhancement will be, as follows: (1) That you have been at least twice previously been [sic] convicted of crimes; (2) That you were sentenced and committed for each crime to prison in this state for a term of not less than one year; and (3) That if you are to become convicted of the charge under Counts I, II, III, or IV, or any lesser charge that is a felony, then the penalty phase is enhanced and the punishment is not less than 10 years nor more than 60 years imprisonment.

The State and Hall subsequently entered into a plea agreement wherein Hall agreed to plead guilty to one count of delivery of a controlled substance, a Class III felony. In return, the State agreed to dismiss the remaining substantive counts against Hall, but did not agree to dismiss the habitual criminal charge. On January 6, 2003, Hall pleaded guilty pursuant to this agreement.

At an evidentiary hearing on the habitual criminal charge, the State introduced evidence of prior convictions from Platte County and Douglas County, Nebraska, and Bernalillo County, New Mexico. The district court found Hall to be a habitual criminal and sentenced him to 10 years' imprisonment. Hall appeals.

ASSIGNMENTS OF ERROR

Hall claims that the district court erred in finding that (1) his plea was knowingly, voluntarily, and intelligently entered and (2) he was a habitual criminal.

STANDARD OF REVIEW

[1,2] A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion. *State v. Smith*, 266 Neb. 707, 668 N.W.2d 482 (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. *Id.*

ANALYSIS

Acceptance of Plea: Habitual Criminal Advisement.

In his first assignment of error, Hall claims that the district court's advisement failed to advise him that a conviction in another state could be used to prove that he was a habitual criminal and that thus, his guilty plea was not freely, intelligently, and voluntarily entered. We reject this argument.

This court has adopted the U.S. Supreme Court's due process requirements for a validly entered guilty plea delineated in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Under *Boykin*, a guilty plea must be knowingly and voluntarily entered because the plea involves the waiver of certain constitutional rights. *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

[3,4] We have held that to support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant,

(4) the right to a jury trial, and (5) the privilege against self-incrimination. *State v. Smith, supra.* The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *Id.* In connection with a habitual criminal advisement, we have specifically stated that "a court must inform a defendant of the possibility of an increased sentence imposed because of a habitual criminal statute." *State v. Schneider*, 263 Neb. at 324, 640 N.W.2d at 13.

Hall does not argue that the general rights advisory given by the district court was in error. Rather, he argues that the district court's habitual criminal advisement was in error to the effect that the relevant priors consisted of crimes for which he had been "sentenced and committed . . . to prison *in this state* for a term of not less than one year." (Emphasis supplied.) Hall generally claims that this advisement failed to parallel the language of the habitual criminal statute, which applies to persons "twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States," see Neb. Rev. Stat. § 29-2221(1) (Reissue 1995), and specifically failed to alert him to the fact that a prior conviction from another state could be used for purposes of enhancement under the habitual criminal statute. Hall contends that because of these failures, he was not informed as to the total penal consequences of his plea and that, therefore, his plea cannot be said to have been freely, voluntarily, and intelligently entered.

[5,6] This court has held that "under Nebraska law, a defendant must be informed of those consequences which affect the range of possible sentences or periods of incarceration for each charge and the amount of any fine to be imposed as a part of the sentence." *State v. Schneider*, 263 Neb. at 324, 640 N.W.2d at 13. As noted above, a critical feature of a habitual criminal advisement is that a defendant be informed of the possibility that an increased sentence will be imposed if the defendant is found to be a habitual criminal under the habitual criminal statute. *Id.* Although the advisement in this case did not state that convictions in other states could serve as prior convictions, the advisement did inform Hall of the range of penal consequences and was not inadequate.

In this case, Hall was advised by the district court, in relevant part, as follows: "For a violation of a Class III Felony the maximum punishment is 20 years imprisonment, a $25,000 fine, or both, [and] carries a minimum of one year imprisonment." Hall was also advised that

> there is a charge of being a habitual criminal and the elements of enhancement will be [in part] as follows: . . . (3) That if you are to become convicted of the charge under Counts I, II, III, or IV, or any lesser charge that is a felony, then the penalty phase [due to a habitual criminal finding] is enhanced and the punishment is not less than 10 years nor more than 60 years imprisonment.

These advisements alerted Hall to the range of possible sentences and periods of incarceration for the charge to which he pleaded guilty, as well as the amount of any fine that might be assessed against him. The district court's advisement regarding the habitual criminal charge informed Hall that if he was convicted of any of the charges against him, upon proof of two prior convictions, his penalty could be enhanced and that he could be sentenced to 10 to 60 years' imprisonment. We further observe that the information alleged that Hall was a habitual criminal based upon convictions "in this or some other state."

Although it is preferable that a habitual criminal advisement refer to specific in-state, out-of-state, and United States convictions as the relevant prior convictions under § 29-2221, in this case, Hall was adequately advised and the due process requirements were met. The district court did not abuse its discretion in accepting Hall's plea. Hall's first assignment of error is without merit.

Habitual Criminal: Representation by Counsel.

In his second assignment of error, Hall claims that the district court erred in finding that he was a habitual criminal. The district court found that a Platte County, Nebraska, conviction and a New Mexico conviction were eligible to serve as prior convictions under § 29-2221. Regarding the New Mexico conviction, the district court stated that "the judge in the [New Mexico] case entered a judgment of conviction on the date of the sentencing." Hall argues that his New Mexico conviction was not valid for

enhancement under § 29-2221, because the State failed to show that Hall was represented by counsel at the time of his conviction in the New Mexico case. We conclude there is merit to Hall's claim.

Hall concedes that the State met its burden with respect to the Platte County conviction and that this conviction is valid for enhancement purposes. The issue now before us is whether the record demonstrates that the New Mexico conviction is valid for enhancement purposes. In support of his contention that the New Mexico conviction cannot be used for habitual criminal enhancement, Hall relies on this court's decision in *State v. Thomas*, 262 Neb. 985, 1012, 637 N.W.2d 632, 658 (2002), where we stated:

> In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *State v. Nelson*, [262 Neb.] 896, 636 N.W.2d 620 (2001); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996).
>
> . . . .
>
> The record does not show that the trial court ascertained whether [L.T.] Thomas was represented by counsel or waived his right to counsel at the time of the earlier convictions. The journal entries simply show that Thomas was present with counsel at the time of sentencing, but they do not demonstrate whether he was represented by counsel prior to that time. The evidence offered by the State at the enhancement hearing did not establish that Thomas was represented by counsel or had waived the right to counsel at the time of the prior convictions. We conclude that the evidence was insufficient to prove Thomas' earlier convictions for purposes of sentence enhancement.

Hall notes that, as in *Thomas*, the evidence offered by the State in this case did not establish that he was represented by or had waived counsel at the time of his New Mexico conviction. Hall notes that the evidence merely established that Hall was present with counsel at the time of sentencing. Furthermore, contrary to the district court's observations, Hall was not convicted

and sentenced on the same day, but, rather, was convicted by a jury on July 16, 1981, and thereafter sentenced on September 8. Given these facts, Hall argues that the record fails to show that he was represented by counsel at the time of the New Mexico conviction and that such conviction cannot be used for sentence enhancement purposes.

In opposing Hall's arguments, the State contends that *State v. Sherrod*, 229 Neb. 128, 425 N.W.2d 616 (1988), applies. *Sherrod* states in relevant part that

> the State establishes a prima facie case for proving a prior, counseled conviction by producing appropriate record evidence of a conviction which discloses that at a critical point in the proceedings—arraignment, trial, conviction, or sentencing—the defendant had either intelligently and voluntarily waived counsel or in fact was represented by counsel at one of those times. The defendant then has the burden of coming forward with evidence that in fact his prior conviction was uncounseled.

229 Neb. at 134, 425 N.W.2d at 621. See, *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991) (enhancement for third-offense driving while intoxicated); *State v. Dyke*, 231 Neb. 621, 437 N.W.2d 164 (1989) (enhancement for third-offense driving while intoxicated).

The State claims that it presented evidence that showed that Hall was represented by counsel at the time of his New Mexico sentencing, which is sufficient under *Sherrod*, and that as a result, Hall had the burden of coming forward with evidence to show that he had been uncounseled. Since Hall failed to present any evidence to that end, the State argues its burden had been met and that the New Mexico conviction was valid for enhancement.

[7] This court recognizes that there is tension between our decisions in *Sherrod* and *Thomas*. However, we conclude that *Sherrod* is an incomplete statement of the law and that *Thomas*, which is our latest pronouncement, controls the issue of whether under the habitual criminal statute, § 29-2221, the State can establish its burden of showing a prior, counseled conviction by merely showing that the defendant was represented at the time of sentencing. Under *Thomas*, which we reaffirm, a showing of the presence of counsel at sentencing will not alone establish the

State's case that a defendant's prior conviction was counseled for purposes of § 29-2221.

[8] We note that in *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), we stated that when the State seeks to use prior convictions based on pleas of guilty to enhance a defendant's sentence for habitual criminal purposes, the State has the burden of showing that the defendant had been represented by or had waived counsel. In the instant case, we note that Hall's prior New Mexico conviction was based upon a jury verdict of guilty rather than on a guilty plea. This court has stated that "making a plea of guilty is 'the equivalent of a conviction by trial and verdict or a finding of guilt by the court.' " *State v. Ondrak*, 212 Neb. 840, 842, 326 N.W.2d 188, 190 (1982) (quoting *Stewart v. Ress*, 164 Neb. 876, 83 N.W.2d 901 (1957)). As a result, we conclude that the State's burden of establishing prior, counseled convictions is the same whether a defendant's prior conviction is based on a plea of guilty, a jury verdict of guilty, or a finding of guilt by a trial court.

Given that *Thomas* is the prevailing authority, we apply *Thomas* to the facts of this case when considering whether the State has met its burden. The State in this case introduced into evidence an order entitled "Judgment, Sentence and Commitment" which reflected that Hall was sentenced in New Mexico on September 8, 1981, following his conviction on July 16. The judgment, sentence, and commitment order states that Hall appeared at the sentencing hearing with counsel. However, the record does not contain any evidence to affirmatively show that Hall had been represented by counsel or had waived counsel at the time of the jury's guilty verdict on July 16.

The facts in Hall's case mirror those of *Thomas*, where the State introduced evidence that Thomas had been represented by counsel at his sentencing on an earlier conviction, but the record contained no evidence showing that Thomas had been represented by counsel or had waived counsel prior to sentencing. In *Thomas*, we concluded that the evidence was insufficient to prove the earlier convictions were counseled for the purposes of habitual criminal sentence enhancement.

In this case, the State failed to meet its burden of showing that Hall had been represented by or had waived counsel at the time of

his New Mexico conviction and it was error for the district court to find Hall to be a habitual criminal. As a result, we must vacate Hall's sentence and remand the cause to the district court with directions for a new enhancement hearing and for resentencing following the hearing. In doing so, we observe that no presentence investigation was performed prior to the district court's initial sentencing of Hall, and in fact, Hall notes in his appellate brief that the district court imposed sentence upon him without the benefit of such an investigation. We note that the applicable version of Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2002) stated that "[u]nless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation . . . ." Upon remand, unless the district court determines that it is impractical to do so, the district court shall order a presentence investigation prior to Hall's resentencing.

CONCLUSION

We conclude that the district court did not err in accepting Hall's plea. However, with respect to enhancement, the State did not meet its burden of showing that Hall was represented by counsel at the time of his prior New Mexico conviction, and the district court's finding that Hall was a habitual criminal was error. We therefore vacate Hall's sentence and remand the cause with directions for a new enhancement hearing and for resentencing.

AFFIRMED IN PART, AND IN PART SENTENCE VACATED AND CAUSE REMANDED WITH DIRECTIONS.

PROFESSIONAL BUSINESS SERVICES CO., APPELLANT AND CROSS-APPELLEE, V. STEPHEN J. ROSNO, APPELLEE AND CROSS-APPELLANT.

680 N.W.2d 176

Filed June 4, 2004. No. S-02-1227.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly erroneous.

3. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
4. **Pleadings: Appeal and Error.** As a general rule, an appellate court disposes of a case on the theory presented in the district court.
5. **Trial: Contracts: Evidence: Custom and Usage.** Evidence of custom is admissible when there is a conflict as to the terms of the contract to explain the meaning of the words or phrases used, or where the contract is silent as to certain points which may be inherent in the nature of the contract.
6. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
7. **Principal and Agent.** Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency. This general rule forbids the doing of acts in competition with the principal and taking unfair advantage of the agent's position in the use of information or things acquired by him because of his position as an agent.
8. ____. Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Robert R. Otte, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., L.L.O., for appellant.

Jerry L. Pigsley, of Harding, Shultz & Downs, for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Professional Business Services Co. (PBS) appeals from a judgment of the district court for Lancaster County, Nebraska, finding a noncompetition covenant to be greater than reasonably necessary to protect PBS and, therefore, unenforceable. From this and other findings below, PBS appeals and the appellee, Stephen J. Rosno, cross-appeals.

II. BACKGROUND

During the relevant time in question, PBS served primarily the health care industry in essentially four areas: taxes, accounting and payroll, practice management, and billing and claims. PBS contracted with the Dale E. Gruntorad Company accounting firm

(Gruntorad) to operate PBS' tax practice area. From approximately 1987 to 1989, Rosno, employed by Gruntorad, performed a majority of PBS' work related to the tax practice area, including preparing all of the tax returns for and providing tax advice to PBS' clients. Rosno performed his work for PBS onsite, but did not have personal contact with PBS clients. PBS heavily relied upon the Gruntorad firm to provide tax services for PBS' business.

When PBS' founder died in 1989, PBS did not have an established client list. Due to his familiarity with PBS' client base, Rosno assisted PBS by preparing an inventory of PBS' clients. Rosno's role at PBS also began to take on more significance as Rosno became more heavily involved with advising clients for tax purposes. Rosno became a partner in the Gruntorad accounting firm and continued to prepare tax returns for PBS' clients.

Between June and September 1992, Rosno approached Steven Strasheim, one of PBS' principals, on several occasions, requesting that PBS hire Rosno as an employee. Initially, PBS rejected Rosno's requests for employment. Rosno told Strasheim that if Rosno left Gruntorad, pursuant to a noncompetition agreement with the accounting firm, the only way Rosno could continue providing services for PBS was to buy PBS' business from Gruntorad, a transaction Rosno explained he could not afford. Thus, PBS eventually agreed to hire Rosno. During the negotiation of Rosno's employment with PBS, Strasheim told Rosno that at that time, only he and his brother, the only other principal of PBS, had the level of professional experience necessary to maintain client relationships. Therefore, they would be looking to Rosno to help in that area. However, Strasheim and his brother also expressed to Rosno their concerns. If they hired Rosno and allowed him to take over the tax practice area, and begin having individual relationships with PBS' clients, Rosno might later leave PBS and take those clients with him. Rosno responded by suggesting the parties execute a noncompetition agreement to protect PBS.

On October 8, 1992, the parties executed a "Professional Employment Agreement" (employment agreement) drafted by PBS' attorney, which included a noncompete covenant. The effective date of the employment agreement was October 1, 1992; the

day Rosno began working as an employee of PBS. At the time the parties executed the employment agreement, the parties made several handwritten changes, which both parties initialed. One such change included a provision that the postterm noncompetition provision of the covenant "shall not apply to clients listed on Exhibit I." Exhibit I lists approximately 95 clients of PBS. The noncompetition covenant of the employment agreement provides:

> a. In-Term Covenant: The parties agree that during the term of this Agreement and during the term of Rosno's employment by the Employer, the respective clients of the Employer shall remain the clients of the Employer and that Rosno shall not, directly or indirectly, whether as an officer, director, shareholder, partner, advisor, consultant or employee or in any other capacity do business for or with any client of the employer outside of the scope of duties rendered for Employer pursuant to this Employment Agreement.
>
> b. Post-Term Covenant: Rosno further covenants and agrees that in the event of the termination of his employment, for whatever reason, he shall not directly or indirectly solicit, contact or perform services for any of Employer's clients for his own benefit or as an officer, director, shareholder, partner, advisor, consultant or employee of any third party. Said Post-Term Covenant shall continue for a period of two (2) years following such termination or separation for any reason whatsoever and shall include the area located within twenty-five (25) miles of Lincoln, Nebraska. The post-term covenant shall not apply to clients listed on Exhibit I.

The employment agreement's effective dates were October 1, 1992, to September 30, 1993, and included an option to extend Rosno's employment with PBS on a year-to-year basis. The employment agreement addressed issues related to bonuses, vacation time, and sick leave, and included a provision related to termination of the employment agreement:

> 3. Salary and Bonuses: . . . .
>
> Employer may pay Rosno a bonus at any time during the term of the Agreement. However, Rosno shall be paid a bonus of $5,000.00 after Rosno's first year of employment.

. . . .

4. Other Benefits: . . . .

. . . .

In addition to the foregoing, Rosno shall receive three (3) weeks of paid vacation per year a[t] such time as may be reasonable given the professional and work related demands of the Employer during the year.

In addition to the foregoing, Rosno shall have the opportunity to participate in any retirement, health insurance or other employee benefit plan offered by the Employer to its employees generally.

. . . .

6. Termination: Employer may terminate this Agreement with Rosno and Rosno's employment by Employer on September 30, 1993, for any reason upon . . . ninety (90) days advanced written notice to employee.

Additionally, Employer may terminate this Agreement and Rosno's employment by Employer at any time, without notice to Rosno for fraud, misrepresentation, theft, malfeasance, or upon the initiation by the Board of Accountancy of any proceedings to revoke or modify the permit to practice public accounting pursuant to the laws of the State of Nebraska.

Additionally, Employer may terminate this Agreement and Rosno's employment on thirty (30) days notice for failure of Rosno to complete his duties as required herein or reasonably requested by Employer.

Rosno may terminate this Agreement, and Rosno's employment hereunder at any time, for any reason, upon ninety (90) days advanced written notice to Employer.

The employment agreement also contained a provision prohibiting Rosno from using, directly or indirectly, for his own benefit, PBS' trade secrets. These included customer lists or other business operation information deemed by PBS to be secret and held in confidence.

On Friday, November 10, 1995, Rosno gave Strasheim a handwritten notice of termination of the employment agreement. At the time Rosno presented his notice terminating the employment agreement, Strasheim described Rosno as being

very hostile and stated that Rosno was threatening to make disparaging remarks about PBS. Rosno refused to say why he was resigning, but told Strasheim that "his feeling was our employment agreement was not valid and that he would be asking any PBS client he wanted to leave PBS and follow him to his new accounting firm." Strasheim asked Rosno to take the weekend to reconsider his position in that it was grounds for immediate termination. Strasheim met with Rosno the following Monday, at which time, Rosno gave Strasheim a list of clients whom Rosno believed he was entitled to, and intended to, solicit. Many of the clients on the list were not those listed on exhibit I attached to the employment agreement. Strasheim testified that Rosno then stated that " 'I'm going to ask anybody I want to follow me to my accounting firm and leave PBS' " and that he was not going to honor the noncompetition covenant of the employment agreement. At that point, Strasheim terminated Rosno's employment and asked him to gather his belongings and leave. Rosno admitted during cross-examination that his intention, had he been permitted to continue working for PBS during his 90-day notice period, was to continue working for PBS while simultaneously taking PBS' clients. Strasheim testified that this was the most hostile resignation he had ever experienced, that he was completely caught off guard by Rosno's attitude, and that there had been no prior warning signs foreshadowing Rosno's resignation. Following Rosno's termination, PBS copied thousands of client records and gave them to Rosno pursuant to record release forms received from Rosno and signed by PBS clients.

PBS originally filed this action alleging breach of the covenant not to compete and claiming damages pursuant to the liquidated damages provision of the employment agreement. The trial court sustained a demurrer filed by Rosno, finding that PBS' petition failed to set forth facts sufficient to constitute a cause of action. Specifically, the trial court found that the noncompete covenant in the employment agreement was more restrictive than reasonably necessary to protect PBS' legitimate interest and, thus, was invalid and unenforceable.

On appeal to this court, we reversed, and remanded with directions to reinstate the operative petition. See *Professional Bus.*

Servs. v. Rosno, 256 Neb. 217, 589 N.W.2d 826 (1999) (*Rosno I*). We noted the general rule that a covenant not to compete in an employment contract " 'may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.' " *Id.* at 225-26, 589 N.W.2d at 832. We noted that in its operative petition, PBS alleged that Rosno "had substantial contact with virtually all of PBS' clients." *Id.* at 227, 589 N.W.2d at 833. We also noted that PBS alleged that Rosno "had violated the terms of his contract with PBS by siphoning away PBS' goodwill." *Id.* at 222, 589 N.W.2d at 830. We concluded that the inferences of law and fact from the operative petition were that Rosno was being restricted from working for or soliciting PBS' clients or accounts with whom Rosno actually did business and had personal contact and that in his employment agreement, the covenant not to compete with respect to all of PBS' clients could be enforceable. *Id.* Accordingly, we concluded that PBS should be permitted to present evidence to support the facts. *Id.*

Upon remand, a bench trial ensued and evidence was adduced. Strasheim testified that when Rosno was hired at PBS, he was given the title of "tax specialist," and that PBS hoped Rosno would help the company grow and serve PBS' clients. Around that same time, PBS sent a letter to all of its clients welcoming Rosno to the company and suggesting to clients that they contact Rosno directly with any questions regarding tax or accounting issues. Strasheim testified that during the course of Rosno's employment with PBS, he was involved in PBS' four practice areas of taxes, accounting and payroll, practice management, and billing and claims. Rosno testified, however, that he spent 99 percent of his time in only the taxes, accounting and payroll, and practice management areas.

With respect to the tax practice area, Rosno was responsible for the preparation of every tax return PBS prepared and would have known "quite a bit about a person's life." Rosno was privy to information about client income, expenses, charitable contributions, medical expenses, significant health care issues, business loans, equipment purchases, and would have needed to "understand [a client's] business quite well."

With respect to the other areas of PBS' business, some of Rosno's responsibilities included answering questions from clients and their staff. These questions would be regarding their general ledgers, collecting information from clients to prepare tax returns, and occasionally taking calls from clients regarding billing issues. With respect to the practice management area of PBS' business, Strasheim testified that he began teaching Rosno how to "be sort of a physician specialist." Strasheim also sent him to Kansas City to receive training on how to be a practice management advisor. Strasheim noted that PBS had hired Rosno to supervise the accounting and payroll area, but that this supervisory role never came to fruition for Rosno.

PBS introduced into evidence a series of documents, exhibits 50 through 78, representing correspondence from Rosno to various clients and other documents. Strasheim testified that these exhibits reflect that Rosno had contact with "quite a few clients" and operated in areas other than the tax practice. Specifically, Strasheim testified that exhibits 50 through 78 demonstrated that Rosno was closely involved with PBS' billing practice, was intimately familiar with PBS' billing reports and billing systems, and solicited and marketed PBS' billing services to clients. Rosno testified, however, that he did not provide any services in the billing area of PBS' business. He testified that he did not train clients on their billing system, he did not field billing-related telephone calls, he did not provide any support for the billing system, and he did not engage in computer software development for the computer billing system. Rosno testified that the only involvement he had with PBS' billing and claims practice was in the use and analysis of reports generated by the billing system.

Two sets of client lists, exhibits 42 and 43, were offered by PBS and received into evidence. The parties referred to exhibit 42 as the personal contacts list (PC list) and to exhibit 43 as the list containing those clients who used PBS' billing services only (BO list). Strasheim testified that these two lists combined to make up the complete list of PBS clients at the time that Rosno was terminated.

The PC list contains a list of 359 clients of PBS. This list was produced by PBS in response to an interrogatory requesting that PBS identify those clients with whom Rosno had substantial

personal contact. The PC list contains a list of any client that was billed for accounting, payroll, or income tax services during the period of Rosno's employment with PBS. Strasheim testified that Rosno was the primary client services representative for the areas of accounting and payroll and tax practice. Strasheim testified that Rosno would have had contact with virtually 100 percent of the clients on this list. He would have substantial contact with a majority of the clients on this list either through correspondence, in-person meetings, or telephone calls, or through contact with the information in the clients' accounting and tax files. Rosno testified that with the exception of 10 to 12 clients, he provided tax or accounting services to all of the clients listed on the PC list. However, Rosno further testified that he did not have personal contact with 80 of the 359 clients listed on the PC list.

The BO list is a list of 93 PBS clients and was produced by PBS in response to an interrogatory requesting PBS to identify those clients with whom Rosno did not have substantial personal contact. This exhibit contains a list of the remainder of PBS' clients who were billed during the period of Rosno's employment for services other than accounting, payroll, or income tax work.

Strasheim testified that the clients listed on the BO list were "billing only" clients. Strasheim admitted that Rosno did not have personal contact with 100 percent of the clients listed on the BO list but had personal contacts with only some of the clients listed. Strasheim admitted that he could not prove with which clients on the BO list Rosno did, in fact, have personal contact, because, Strasheim stated, he did not track Rosno's client contacts. Rosno testified that he provided services for only three or four clients listed on the BO list and had personal contact with only two clients on that list.

Exhibit 92, offered and admitted into evidence, consists of copies of the PC and BO lists annotated by Rosno. Specifically, Rosno marked those clients of PBS for whom he provided any type of service or work while employed at PBS, and those clients of PBS for whom he had personal contacts while in PBS' employ. Rosno's annotations indicate he provided services for 4 of the 93 PBS clients listed on the BO list, but did not have personal contact with any of those 4. Rosno's annotations indicate he provided

services for 328 of the 359 clients listed on the PC list, and had personal contact with 151 of them while in PBS' employ.

With respect to the noncompete covenant, Strasheim testified that the employment agreement was important to PBS and that it would not have offered Rosno employment without it. Strasheim testified that he did not want Rosno taking any of PBS' clients and that it did not make any difference to him whether Rosno actually worked for or had personal contacts with them.

Following a bench trial, the trial court issued its order, finding in favor of Rosno on PBS' claim for damages for the alleged violation of the noncompete covenant. The court, finding that PBS failed to show that Rosno had substantial personal contacts with all of PBS' clients, held that the noncompete covenant was greater than was reasonably necessary. The employment agreement restricted Rosno from engaging in services with any of PBS' clients. With respect to Rosno's counterclaim, the trial court found against Rosno on his claim for payment of wages. The court found that when Rosno told Strasheim that he was leaving and would take PBS' clients with him, Rosno's actions constituted malfeasance. As such, the court concluded PBS' decision terminating Rosno's employment was within PBS' rights under the terms of the employment agreement. With respect to Rosno's claim for unpaid vacation and sick leave, the trial court found in Rosno's favor. The trial court found that based upon the employee handbook and PBS' past practices of paying out unused vacation and sick leave upon an employee's termination, Rosno was entitled to receive 32 hours of vacation pay and 72 hours of unused sick leave. The court found against Rosno on his claimed entitlement to a bonus, noting that the employment agreement did not require payment of a bonus, nor was Rosno promised one by PBS. PBS now appeals to this court.

III. ASSIGNMENTS OF ERROR

PBS assigns on appeal six assignments of error, which can be consolidated to four. PBS contends, restated, that the trial court erred in (1) finding the noncompetition covenant greater than reasonably necessary to protect PBS and in failing to correctly apply the three-prong test used to determine the validity of a covenant not to compete, (2) finding Rosno was due any unused

vacation or sick leave pay, (3) failing to apply the covenant of good faith and fair dealing, and (4) failing to find that Rosno anticipatorily breached the noncompetition covenant.

Rosno assigns on cross-appeal, restated, that the trial court erred in (1) failing to find that PBS breached paragraph 6 of the employment agreement with Rosno by terminating the agreement immediately after Rosno gave his 90 days' advance notice pursuant to paragraph 6 and not awarding Rosno his unpaid salary, vacation pay, and sick leave pay during the 90-day notice period and (2) failing to award Rosno his promised $5,000 annual bonus.

IV. STANDARD OF REVIEW

[1,2] A suit for damages arising from breach of a contract presents an action at law. *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly erroneous. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003); *Anderson Excavating v. SID No. 177, supra.*

[3] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001).

V. ANALYSIS

1. PBS' Appeal

(a) Noncompete Covenant

PBS contends on appeal that the noncompete covenant in Rosno's employment agreement was no greater than reasonably necessary to protect PBS' legitimate interest. The relevant provision of the covenant not to compete in this case provides: "[I]n the event of the termination of his employment, for whatever reason, [Rosno] shall not directly or indirectly solicit, contact or perform services for *any* of [PBS'] clients for his own benefit or as an officer, director, shareholder, partner, advisor, consultant or employee of any third party." (Emphasis supplied.)

In *Rosno I*, we stated:

> To determine whether a covenant not to compete is valid, a court must determine whether a restriction is reasonable in the sense that it is not injurious to the public, that it is not greater than is reasonably necessary to protect the employer in some legitimate interest, and that it is not unduly harsh and oppressive on the employee. *Moore* [*v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997)]. There is no indication or claim that enforcement of the noncompete clause in Rosno's contract will be injurious to the public or that the restriction is "unduly harsh" as that expression is used in the cases. Accordingly, we focus our analysis on whether or not the restriction of the covenant is no greater than reasonably necessary to protect PBS' legitimate interest as alleged in the second amended petition.
>
> An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee. *Moore v. Eggers Consulting Co.*[, *supra*], citing *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990). In *Moore*, we stated: "'"To distinguish between 'ordinary competition' and 'unfair competition,' courts and commentators have frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition."'" *Id.* at 401, 562 N.W.2d at 539, quoting *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).
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> . . . .
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> In *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 668, 407 N.W.2d 751, 756 (1987), this court reviewed several cases involving noncompete covenants and stated the general rule that a covenant not to compete in an

employment contract "may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact." In *Polly*, this court stated that generally, a noncompete covenant is more restrictive than reasonably necessary if it restricts an employee from working for or soliciting all of the former employer's clients or accounts, regardless of whether the former employee actually did business with and had personal contact with those clients. In *Polly*, this court reviewed *Dana F. Cole & Co. v. Byerly*, 211 Neb. 903, 320 N.W.2d 916 (1982), and observed that *Dana F. Cole & Co.*, by virtue of its facts, presented an exception to the general rule.

In *Dana F. Cole & Co., supra*, this court held that based on the evidence at trial, a covenant which restricted a former branch manager of an accounting firm from practicing accounting within 75 miles of the office he had managed was reasonable and enforceable. This court held that such a covenant was valid in light of evidence which showed that branch managers had personal relationships with clients served and that on the basis of past experience, the employer had the need to protect itself from the risk of a branch manager's taking clients with him or her when he or she left its employ.

In *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997), this court affirmed the grant of an employee's motion for summary judgment on a breach of covenant not to compete claim, determining that the scope of the covenant not to compete in that case was greater than necessary to protect a personnel recruiting corporation's legitimate interests and, thus, was unenforceable. In *Moore*, this court repeated the general rule that a covenant not to compete may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and had personal contact. In *Moore*, the covenant involved precluded the employee from entering into business with anyone of whom he had

> knowledge due to his employment with the corporation, rather than those clients of the corporation with whom the employee merely did business and had personal contact. In addition, the covenant in question precluded the employee from working in employment recruitment anywhere in the continental United States. In *Moore*, the summary judgment evidence showed that while with the employer, Moore worked primarily with clients of the employer in the Midwest, indicating that Moore had little personal contact with the employer's clients outside the Midwest. The employer failed to rebut the evidence of overbreadth or otherwise propose a rationale for such a broad restriction. The restriction was, thus, untenable.

Rosno I, 256 Neb. at 223-27, 589 N.W.2d at 831-33.

We continued, stating:

> After reviewing PBS' second amended petition, and liberally construing it as we must, we conclude that PBS' second amended petition taken as a whole states a cause of action. In this regard, we note that PBS has alleged, inter alia, that Rosno has had substantial contact with virtually all of PBS' clients. The inferences of law and fact from the second amended petition are that Rosno is being restricted from working for or soliciting PBS' clients or accounts with whom Rosno actually did business and had personal contact and that in his employment contract the covenant not to compete with respect to all of PBS' clients could be enforceable.

Id. at 227, 589 N.W.2d at 833.

[4] PBS contends in this appeal that in determining whether Rosno violated the covenant not to compete, we must look not only at Rosno's contacts with PBS' clients but also at the client information he acquired while employed with PBS. However, in *Rosno I*, citing to the rule in *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), we held that a covenant not to compete is valid only if it restricts a former employee from soliciting those clients with whom the former employee actually did business and had personal contact. PBS contended that the noncompete covenant was valid and enforceable under

the facts as alleged in the petition. We limit PBS to the allegations made in its petition and require that it show that Rosno actually did business and had personal contact with "virtually all" of PBS' clients. See *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002) (as general rule, appellate court disposes of case on theory presented in district court).

In its order, the trial court found that PBS failed to meet its burden of showing that Rosno had substantial personal contact with all of PBS' clients. Specifically, the trial court found that the evidence established, inter alia, that PBS admitted Rosno did not have substantial personal contact with those clients listed on the BO list. The trial court found that PBS was unable to definitively substantiate that Rosno had personal contact with all of the clients listed on the PC list. Accordingly, the trial court concluded that the noncompetition covenant of the employment agreement was greater than is reasonably necessary to protect PBS and is unenforceable. Based on our review of the record, we conclude that the trial court's findings are not clearly erroneous. This assignment of error is without merit. Because the noncompetition covenant is greater than reasonably necessary to protect PBS, PBS is not entitled to liquidated damages or any other relief on this basis.

(b) Payment of Vacation and Sick Leave

After the termination of Rosno's employment, PBS refused Rosno's request that he be paid his bonus as well as his earned but unused vacation or sick leave. Rosno's last payroll check stub indicated that Rosno had available 32 hours of vacation and 72 hours of sick leave. PBS argues that the trial court erred in finding that Rosno was entitled to his earned but unused vacation and sick leave pay.

The employment agreement provides, in pertinent part, as follows:

> 4. Other Benefits: . . . .
>
> . . . .
>
> In addition to the foregoing, Rosno shall receive three (3) weeks of paid vacation per year a[t] such time as may be reasonable given the professional and work related demands of the Employer during the year.

> In addition to the foregoing, Rosno shall have the opportunity to participate in any retirement, health insurance or other employee benefit plan offered by the Employer to its employees generally.

PBS contends that the phrase "other employee benefit plan" found in paragraph 4 of the employment agreement does incorporate the provisions of the employee handbook but applies only to plans similar to retirement or health insurance plans, such as dental or vision insurance or profit-sharing plans available to PBS employees.

The employment agreement does not define "employee benefit plan." However, the Nebraska Wage Payment and Collection Act, under which the trial court awarded Rosno his unpaid vacation and sick leave pay, defines "fringe benefits" to include "sick and vacation leave plans, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans, and any other employee benefit plans." Neb. Rev. Stat. § 48-1229(3) (Reissue 1998). Thus, vacation and sick leave pay is characterized as an "employee benefit plan" under the terms of the Nebraska Wage Payment and Collection Act. We will refer to PBS' employee handbook to determine whether Rosno was entitled to receive his earned but unused vacation and sick leave pay.

A copy of PBS' employee handbook was offered and admitted into evidence. The provision of the employee handbook relating to vacation pay provides, in relevant part:

> One week paid vacation will accrue after an employee has worked for one full year. No payment of vacation shall be payable for termination prior to the first year's full employment.
>
> Two weeks paid vacation shall accrue after two full years' employment. No payment for vacation shall be payable for termination during the work year with the following exceptions:
>
> 1. If the full two week vacation period is due at termination, the vacation will be paid.
>
> 2. If over seven months of a work year after the first year have elapsed, and the termination is due to illness or pregnancy, one week will be paid.

3. If an employee is terminated and the employee has seven months of the second or later years, the employee will be paid one week termination pay.

No accrual on voluntary termination.

. . . .

You may receive regular pay rate for any unused vacation.

The provision of the employee handbook regarding sick pay, provides, "Any sick leave not used will be paid to the employee at the time of termination."

[5] Evidence of custom is admissible when there is a conflict as to the terms of the contract to explain the meaning of the words or phrases used, or where the contract is silent as to certain points which may be inherent in the nature of the contract. *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994). Because neither the employment agreement nor the employee handbook is ambiguous, we need not consider the parties' respective evidence regarding PBS' current practice relative to payment of vacation and sick leave.

Accordingly, construing the terms of the employee handbook in conjunction with the employment agreement, we conclude that the trial court properly found that Rosno was entitled to his earned but unused vacation and sick leave pay. The employee handbook expressly states that any unused sick leave will be paid out upon termination. Moreover, Rosno began his employment with PBS in October 1992 and was terminated in November 1995. Rosno's termination falls within the third listed exception with regard to vacation pay in the employee handbook, and as such, he is entitled to receive his accrued vacation pay.

(c) Duty of Good Faith and Anticipatory Breach

[6] PBS next contends that the trial court erred in failing to find that Rosno breached his duty of good faith and fair dealing and anticipatorily breached the noncompetition covenant. PBS did not raise either of these arguments in its operative petition, nor did it argue these points to the trial court. Accordingly, we need not address them. See, *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003); *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002) (appellate

court will not consider issue on appeal that was not passed upon by trial court).

2. Rosno's Cross-Appeal

(a) Unpaid Salary and Vacation and Sick Leave Pay During 90-Day Notice Period

Rosno contends on cross-appeal that the trial court erred in failing to find that PBS breached paragraph 6 of the employment agreement with Rosno by terminating the agreement immediately after Rosno gave his 90 days' advance notice pursuant to paragraph 6 and in not awarding Rosno his unpaid salary and vacation and sick leave pay during the 90-day notice period.

The relevant termination provisions in the employment agreement provide:

> Additionally, Employer may terminate this Agreement and Rosno's employment by Employer at any time, without notice to Rosno for fraud, misrepresentation, theft, malfeasance, or upon the initiation by the Board of Accountancy of any proceedings to revoke or modify the permit to practice public accounting pursuant to the laws of the State of Nebraska.
>
> . . . .
>
> Rosno may terminate this Agreement, and Rosno's employment hereunder at any time, for any reason, upon ninety (90) days advanced written notice to Employer.

According to the terms of the employment agreement, Rosno was required to give 90 days' notice of termination. During this time, he would be entitled to any earned salary as well as vacation and sick leave accrued during that time. However, Rosno would not be entitled to receive his salary and earned vacation and sick leave during that 90-day period if PBS properly terminated Rosno for "fraud, misrepresentation, theft, malfeasance, or upon the initiation by the Board of Accountancy of any proceedings to revoke or modify the permit to practice public accounting pursuant to the laws of the State of Nebraska." Thus, we must determine whether Rosno committed any of the aforementioned acts.

[7] The Restatement (Second) of Agency § 387 at 201 (1958) provides that "[u]nless otherwise agreed, an agent is subject to a

duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." This general rule forbids the doing of acts in competition with the principal and taking unfair advantage of the agent's position in the use of information or things acquired by him because of his position as an agent. *Id.*, comments *a.* and *b.*

[8] The Restatement, *supra*, § 393 at 216, further provides that "[u]nless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency." Comment *e.*, § 393 at 218, provides, in relevant part:

> *e. Preparation for competition after termination of agency.* After the termination of his agency, in the absence of a restrictive agreement, the agent can properly compete with his principal as to matters for which he has been employed. . . . Even before the termination of the agency, he is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete. *He is not, however, entitled to solicit customers for such rival business before the end of his employment* nor can he properly do other similar acts in direct competition with the employer's business.

(Emphasis supplied.)

The trial court found that when Rosno told Strasheim that he was resigning and would take PBS' clients with him, Rosno's actions constituted malfeasance. Indeed, the record reflects that when submitting his termination of employment notice, Rosno told Strasheim that "I'm going to ask anybody I want to follow me to my accounting firm and leave PBS" and that he was not going to honor the noncompetition covenant. Rosno admitted during cross-examination that his intention, had he been permitted to continue working for PBS during his 90-day notice period, was to continue working for PBS while simultaneously taking PBS' clients. This was in direct contravention of his duty of loyalty to PBS. Based on these facts, combined with Strasheim's testimony that Rosno's was the most hostile resignation he had ever experienced, it would have been reasonable for PBS to

conclude that at the time Rosno submitted his termination of employment notice, he intended to and would have solicited PBS' clients during the 90-day notice period. Rosno's expressed intent to breach his duty of loyalty constitutes malfeasance under the terms of the employment agreement. Accordingly, we affirm the trial court's order declining to award Rosno his salary and vacation and sick leave pay that would have accrued during his 90-day notice period.

(b) Unpaid Bonus

With respect to bonuses paid to Rosno while employed with PBS, Strasheim testified that Rosno received a bonus on October 15, 1993, after his first year with PBS and again on December 31, 1994, after his second year with PBS. Thereafter, Rosno did not receive any further bonuses while employed with PBS. Rosno testified that when he met with another principal of PBS, Strasheim's brother, in the summer of 1995 to discuss Rosno's salary review, Rosno asked about his bonus. According to Rosno, Strasheim's brother responded by telling Rosno he would get the bonus in December. On cross-examination, Rosno testified that he was also told he had "earned" the bonus, but admitted he never received anything in writing stating he was going to receive a bonus for that year. Rosno also admitted that effective August 1995, he received a salary raise in an amount similar to his bonuses received in October 1993 and December 1994.

Rosno contends that the trial court erred in failing to award Rosno his promised $5,000 annual bonus. The relevant section of the employment agreement provides: "3. Salary and Bonuses: . . . Employer *may* pay Rosno a bonus at any time during the term of the Agreement. However, Rosno shall be paid a bonus of $5,000.00 after Rosno's first year of employment." (Emphasis supplied.)

According to the terms of the employment agreement, PBS was required to pay Rosno a bonus during his first year of employment only. PBS was not obligated to pay Rosno a bonus in any other year. While Rosno contends that Strasheim's brother orally promised him a bonus, the employment agreement requires that any changes to the employment agreement be made in writing. Rosno admitted that he did not receive anything in writing

from PBS confirming that he would receive a bonus in 1995. Accordingly, this assignment of error is without merit.

VI. CONCLUSION

We conclude that the covenant not to compete in the employment agreement is greater than is reasonably necessary to protect PBS and is unenforceable. We further conclude that Rosno is entitled to receive his vacation and sick leave pay earned but unused as of the date of his termination of employment on November 13, 1995, but is not entitled to his salary or vacation and sick leave pay that would have accrued during the 90-day notice period. Finally, we conclude that Rosno is not entitled to a bonus.

AFFIRMED.

TRI-PAR INVESTMENTS, L.L.C., APPELLANT, V. COLETTE LYNN SOUSA, FORMERLY KNOWN AS COLETTE LYNN WOODS, APPELLEE.

680 N.W.2d 190

Filed June 4, 2004. No. S-03-028.

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. **Subrogation: Words and Phrases.** Subrogation is the substitution of one person in the place of another with reference to a lawful claim so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim.
5. **Subrogation.** The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity.
6. **Contracts: Insurance: Subrogation: Tort-feasors.** In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.
7. **Insurance: Subrogation: Negligence.** An insurer cannot seek to subrogate against its own insured, even if the insured was negligent in causing the loss.

8. **Contracts: Insurance: Subrogation: Landlord and Tenant: Negligence.** Absent an express agreement to the contrary in a lease, a tenant and his or her landlord are implied coinsureds under the landlord's fire insurance policy, and the landlord's liability insurer is precluded from bringing a subrogation action against the negligent tenant.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas A. Grennan and Donald P. Dworak, of Gross & Welch, P.C., for appellant.

Betty L. Egan and Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

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

GERRARD, J.

Tri-Par Investments, L.L.C. (Tri-Par), sued Colette Lynn Sousa, formerly known as Colette Lynn Woods, for negligence and breach of their lease agreement after a house Sousa rented from Tri-Par was damaged by fire. On appeal, we must determine whether the district court erred in concluding that Sousa and Tri-Par were coinsured under Tri-Par's insurance policy and that therefore, Tri-Par's insurer could not maintain a subrogation action against Sousa.

FACTUAL AND PROCEDURAL BACKGROUND

On April 17, 1996, a fire damaged the house Sousa was renting from Tri-Par. At the time of the fire, Tri-Par maintained a homeowner's policy of insurance on the house through its insurer, Auto-Owners Insurance (Auto-Owners). After Tri-Par made a claim for coverage, Auto-Owners paid Tri-Par for most of the damage done to the home. Shortly thereafter, Auto-Owners initiated a subrogation action in the name of Tri-Par against Sousa. Tri-Par sought $54,020 in relief for the fire damage and loss of rent based on two theories of recovery: (1) negligence and (2) breach of the lease agreement.

In its petition, Tri-Par alleged that Sousa's negligence caused the fire. Specifically, Tri-Par alleged that Sousa was negligent in failing to (1) properly and adequately supervise the minor children; (2) keep one of the minor children from playing with

or otherwise using matches or a lighter; and (3) keep matches, lighters, and other ignition sources in a secure place which would be inaccessible to the minor children. Tri-Par also alleged that Sousa breached the lease agreement by failing to (1) pay for or repair the damage done to the premises and (2) take care of the buildings and premises and keep them safe from danger of fire.

Both parties filed motions for summary judgment. On June 30, 2000, the district court determined that for subrogation purposes, Sousa and Tri-Par were coinsured under Tri-Par's homeowner's policy. Therefore, because an insurer has no subrogation rights against its own insured, the court granted Sousa's motion for summary judgment to the extent that Tri-Par's case was one of subrogation. To the extent Tri-Par asserted a claim for damages outside of its subrogated interests, the court overruled Sousa's motion for summary judgment. Tri-Par's motion for summary judgment was overruled.

Tri-Par appealed the order, and the Nebraska Court of Appeals dismissed for lack of jurisdiction because the district court's order did not adjudicate all the claims of all the parties and, therefore, was not a final, appealable order under Neb. Rev. Stat. § 25-705(6) (Supp. 1999) (now codified at Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002)). See *Tri-Par Investments v. Woods*, 9 Neb. App. liii (No. A-00-785, Sept. 1, 2000). Tri-Par then filed a motion asking the district court to enter an order of final judgment. On October 12, 2000, the district court entered an order, pursuant to § 25-705(6), granting Tri-Par's motion and incorporating its findings of June 30. Tri-Par then moved to appeal the court's order of June 30, 2000. On appeal, we determined that the district court's order of June 30 was not a final, appealable order and that the court's order of October 12 did not cure the defects of the first order because the record established the existence of a nonsubrogated interest in the case. *Tri-Par Investments v. Sousa*, 263 Neb. 209, 640 N.W.2d 371 (2002). Therefore, we dismissed Tri-Par's appeal for lack of jurisdiction. *Id.*

In order to make the district court's June 30, 2000, order a final, appealable order, Tri-Par went back to the district court and moved to withdraw the "non-subrogated interest and/or claims"

in the case. The court granted Tri-Par's motion and stated that because the entirety of the "non-subrogated interest and/or claims" in the case had been withdrawn and terminated, all of the claims, rights, and liabilities in the case had been fully and finally adjudicated. Thereafter, Tri-Par timely appealed.

We moved this case to our docket pursuant to our power to regulate the Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Tri-Par asserts, restated, that the district court erred in granting summary judgment to Sousa because (1) the court's decision is premised on the legal fiction that under a landlord-tenant relationship, the tenant is always constructively presumed to be an implied coinsured under the landlord's insurance policy, and (2) the facts preclude a finding that Sousa constitutes a coinsured under Tri-Par's insurance policy.

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. *Misle v. HJA, Inc.*, 267 Neb. 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.*

[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Today, we are asked to weigh in on a dispute that has raged in subrogation jurisprudence for the last 30 years. Specifically, we are asked to decide whether, for subrogation purposes, the law presumes that a tenant is coinsured under his or her landlord's insurance policy absent an express provision in the parties' lease to the contrary. Because the right of subrogation cannot arise in

favor of an insurer against its own insured, see *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995), such a presumption would bar insurers from bringing a subrogation action against tenants who cause damage to their landlords' insured premises. In the instant case, the district court, relying on our opinions in *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984), and *Jindra, supra*, determined that such a presumption applied. Stated otherwise, the district court determined that because there was no express agreement to the contrary in the lease, Sousa was an implied coinsured under Tri-Par's insurance policy with Auto-Owners and that therefore, Tri-Par was prohibited from bringing a subrogation action on behalf of Auto-Owners against Sousa. We affirm.

[4-6] Before delving into the substance of the appeal, we begin by setting forth some of the guiding principles of subrogation law. Generally speaking, subrogation is the substitution of one person in the place of another with reference to a lawful claim so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim. *Jindra, supra*. The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity. *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977). In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor. *Allstate Ins. Co. v. LaRandeau*, 261 Neb. 242, 622 N.W.2d 646 (2001).

[7] Simply put, in the context of liability insurance, when a "liability insurer pays an insured's claim for damages caused by the . . . wrongdoing of a third party, the insurer is entitled to be subrogated to the rights of the insured against that third party." 22 Eric Mills Holmes, Holmes' Appleman on Insurance 2d § 141 at 417 (2003). An insurer, however, cannot seek to subrogate against its own insured, even if the insured was negligent in causing the loss. See, *Jindra, supra*; *Control Specialists v. State Farm Mut. Auto. Ins.*, 228 Neb. 642, 423 N.W.2d 775 (1988); *Reeder, supra*. Relying on this proposition, Sousa contends that she is an implied coinsured under Tri-Par's homeowner's policy and that

therefore, Auto-Owners cannot maintain a subrogation action against her.

Tri-Par, on the other hand, alleges that Sousa is a wrongdoer and should reimburse Auto-Owners for the payments Auto-Owners made to Tri-Par. Moreover, Tri-Par argues that the district court's decision is incorrect because it is premised on the legal fiction that under a landlord-tenant relationship, the tenant is presumed to be an implied coinsured under the landlord's insurance policy. Tri-Par contends that under Nebraska law, the availability of a subrogation claim is to be determined by examining the facts and circumstances of each case, and if there is no evidence that the landlord has agreed to maintain insurance for the benefit of the tenant, a court cannot presume that the tenant is an implied coinsured under the landlord's policy for the purpose of defeating subrogation.

As mentioned previously, the question whether the law presumes that a tenant is coinsured under his or her landlord's insurance policy for the purpose of subrogation has been heavily litigated and hotly debated. The debate began with *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975), where the Oklahoma Court of Appeals held that absent an agreement to the contrary, the law presumes that a tenant is coinsured under a landlord's fire insurance policy and that therefore, a landlord's insurer cannot maintain a subrogation action against a tenant for damage to the insured property that is caused by the tenant's negligence. *Id.* Generally speaking, the *Sutton* rule is the majority position and the modern trend in the law. See, e.g., *North River Ins. Co. v. Snyder*, 804 A.2d 399 (Me. 2002); *DiLullo v. Joseph*, 259 Conn. 847, 792 A.2d 819 (2002); *Peterson v. Silva*, 428 Mass. 751, 704 N.E.2d 1163 (1999); *Community Credit Union v. Homelvig*, 487 N.W.2d 602 (N.D. 1992); *Alaska Ins. Co. v. RCA Alaska Commun.*, 623 P.2d 1216 (Alaska 1981); *GNS Partnership v. Fullmer*, 873 P.2d 1157 (Utah App. 1994); *United Fire & Cas. Co. v. Bruggeman*, 505 N.W.2d 87 (Minn. App. 1993); *Cascade Trailer Court v. Beeson*, 50 Wash. App. 678, 749 P.2d 761 (1988); *New Hampshire Ins v Labombard*, 155 Mich. App. 369, 399 N.W.2d 527 (1986). See, generally, 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 224:6 (2000).

The court in *Sutton* espoused the following rationale for its rule:

> [S]ubrogation should not be available to the insurance carrier because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary, comparable to the permissive-user feature of automobile insurance. This principle is derived from a recognition of a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises—the former owns the fee and the latter has a possessory interest. Here the landlords . . . purchased the fire insurance from Central Mutual Insurance Company to protect such interests in the property against loss from fire. This is not uncommon. And as a matter of sound business practice the premium paid had to be considered in establishing the rent rate on the rental unit. Such premium was chargeable against the rent as an overhead or operating expense. And of course it follows then that the tenant actually paid the premium as part of the monthly rental.
>
> The landlords of course could have held out for an agreement that the tenant would furnish fire insurance on the premises. But they did not. They elected to themselves purchase the coverage. To suggest the fire insurance does not extend to the insurable interest of an occupying tenant is to ignore the realities of urban apartment and single-family dwelling renting. Prospective tenants ordinarily rely upon the owner of the dwelling to provide fire protection for the realty (as distinguished from personal property) absent an express agreement otherwise. Certainly it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and that he would need to take out another fire policy to protect himself from any loss during his occupancy. Perhaps this comes about because the companies themselves have accepted coverage of a tenant as a natural thing. Otherwise their insurance salesmen would have long ago made such need a matter of common knowledge by promoting the sale to tenants of a second fire insurance policy to cover the real estate.

> Basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary. The company affording such coverage should not be allowed to shift a fire loss to an occupying tenant even if the latter negligently caused it. . . . For to conclude otherwise is to shift the insurable risk assumed by the insurance company from it to the tenant—a party occupying a substantially different position from that of a fire-causing third party not in privity with the insured landlord.

(Citations omitted.) *Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. App. 1975).

Over the years, numerous courts have agreed with the rationale of *Sutton*. See, generally, *American Nat. Fire Ins. Co. v. Hughes*, 658 N.W.2d 330 (N.D. 2003) (primary rationale for concluding that landlords and tenants are coinsureds is their insurable interests in property and commercial realities under which lessors insure leased premises and pass on premium cost in rent); *Safeco Ins. Co. v. Capri*, 705 P.2d 659 (Nev. 1985) (noting insurance premium is likely passed along to tenant in form of higher rent); *Alaska Ins. Co. v. RCA Alaska Commun.*, 623 P.2d 1216 (Alaska 1981).

Moreover, other courts, while agreeing with the rule announced in *Sutton*, have expanded upon the rationale for the rule. For example, the Connecticut Supreme Court based its support of *Sutton* on its public policy of disfavoring economic waste. See *DiLullo v. Joseph*, 259 Conn. 847, 792 A.2d 819 (2002). The court stated that a rule which allocated to the tenant the responsibility of maintaining sufficient insurance to cover a claim for subrogation by the landlord's insurer would create a strong incentive for tenants to carry liability insurance for the value or replacement cost of the entire building, irrespective of the portion of the building they occupied. *Id.* Such insurance would duplicate that taken out by the landlord under the landlord's insurance policy. "Thus, although the two forms of insurance would be different, the economic interest insured would be the same," and economic waste would ensue. *Id.* at 854, 792 A.2d at 823. See, also, *North River*

Ins. Co. v. Snyder, 804 A.2d 399 (Me. 2002); *Peterson v. Silva*, 428 Mass. 751, 754, 704 N.E.2d 1163, 1166 (1999) ("[i]t surely is not in the public interest to require all the tenants to insure the building which they share, thus causing the building to be fully insured by each tenancy"); *United Fire & Cas. Co. v. Bruggeman*, 505 N.W.2d 87 (Minn. App. 1993).

In siding with *Sutton*, courts also point to the reasonable expectations of the tenant.

> We are persuaded that a tenant may reasonably expect that his or her rental payments will be used to cover the lessor's ordinary and necessary expenses, including fire insurance premiums. Tenants reasonably expect that, by effectively contributing to the premium payments, they will occupy a position akin to the insured and will be free from tort liability for negligently caused fire damage to the premises.

New Hampshire Ins v Labombard, 155 Mich. App. 369, 376-77, 399 N.W.2d 527, 531 (1986). See, also, *Bruggeman, supra*; *Cascade Trailer Court v. Beeson*, 50 Wash. App. 678, 749 P.2d 761 (1988). Lastly, courts have noted that insurers understand the risk associated with insuring rental property and have undoubtedly adjusted their rates to reflect the increased risk. See, *GNS Partnership v. Fullmer*, 873 P.2d 1157 (Utah App. 1994); *Bruggeman, supra*.

A number of courts, however, have rejected the *Sutton* rule, positing several reasons for doing so. For example, the Arkansas Supreme Court stated that *Sutton* is premised on a legal fiction.

> The fiction that by paying the rent, the lessee paid the insurance premium is not appropriate. There is no evidence that appellee paid any greater rent because of the insurance than he would have paid had appellant not taken insurance. If the tenant paid the insurance premium, he also paid the taxes on the property and the cost of construction or purchase of the house, not to mention cost of repairs and maintenance. Such a fiction ignores the fact that more often than not the market, i.e., supply and demand, is the controlling factor in fixing and negotiating rents.

Page v. Scott, 263 Ark. 684, 687-88, 567 S.W.2d 101, 103-04 (1978). See, also, *Neubauer v. Hostetter*, 485 N.W.2d 87 (Iowa

1992); *Zoppi v. Traurig*, 251 N.J. Super. 283, 598 A.2d 19 (1990). Similarly, the Iowa Supreme Court stated that *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975), disregards the fact that landlords and tenants have different interests in a dwelling and that these "separate estates [are] capable of being separately valued and separately insured." *Neubauer*, 485 N.W.2d at 90.

The *Sutton* rule has also been criticized for encroaching upon the contractual relationship between a landlord and its insurer. See *56 Associates ex rel. Paolino v. Frieband*, 89 F. Supp. 2d 189 (D.R.I. 2000). It has also been suggested that the common-law rule which requires that the burden of the loss be placed on the negligent party should weigh heavily against barring subrogation by the landlord's insurer. See *Regent Ins. Co. v. Economy Preferred Ins. Co.*, 749 F. Supp. 191 (C.D. Ill. 1990).

Of the courts that have rejected *Sutton,* a number hold to an opposite rule, i.e., that a landlord's insurer is allowed to bring a subrogation action against a tenant absent an express agreement in the lease to the contrary. See, e.g., *Regent Ins. Co., supra*; *Neubauer, supra*; *Britton v. Wooten*, 817 S.W.2d 443 (Ky. 1991); *Page, supra*; *Zoppi, supra*. A greater number, however, reject the aforementioned categorical rule and favor a case-by-case approach. These courts hold that a trier of fact must focus on the terms of the lease agreement itself to determine what the reasonable expectations of the parties were as to who should bear the risk of loss for damage to the leased premises caused by the tenant's negligence. See, generally, *56 Associates ex rel. Paolino, supra*; *Union Mut. Fire Ins. Co. v. Joerg*, 824 A.2d 586 (Vt. 2003); *Bannock Bldg. Co. v. Sahlberg*, 126 Idaho 545, 887 P.2d 1052 (1994); *Dix Mutual Ins. Co. v. LaFramboise*, 149 Ill. 2d 314, 597 N.E.2d 622, 173 Ill. Dec. 648 (1992); *Fire Ins. Exchange v. Hammond*, 83 Cal. App. 4th 313, 99 Cal. Rptr. 2d 596 (2000). For example, in *Sahlberg*, the Idaho Supreme Court asserted that the *Sutton* approach painted with too broad of a stroke and that the proper analysis should "look to the landlord's and tenant's intentions as shown by that particular lease agreement and the facts and surrounding circumstances to determine whether the risk of loss for damage by fire should fall on the landlord or the tenant." *Sahlberg*, 126 Idaho at 548, 887 P.2d at 1055.

In the instant case, Tri-Par asks us to adopt the case-by-case approach epitomized by *56 Associates ex rel. Paolino* and *Sahlberg*. Sousa, on the other hand, asks us to adopt the per se approach announced in *Sutton*. Because we believe *Sutton* and its progeny are in line with our prior cases and represent the better rule, we explicitly adopt that rule for Nebraska.

Although we have not had occasion to formally adopt the *Sutton* rule before today, we have implicitly done so in two of our past decisions discussing different, but highly related, factual circumstances. In *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984), the guest of an insured homeowner negligently caused fire damage to his host's home. After paying the insured homeowner for the damage, the insurer sought to subrogate against the guest. On appeal, we began by noting the rule that an insurer cannot recover against its own insured. *Id.* We then went on to compare the host-guest relationship to a landlord-tenant relationship, noting:

> "Absent an express provision in the lease establishing the tenant's liability for loss from negligently started fires, the trend has been to find that the insurance obtained was for the mutual benefit of both parties, and that the tenant 'stands in the shoes of the insured landlord for the limited purpose of defeating a subrogation claim.' . . ."

Id. at 128, 348 N.W.2d at 836, quoting *Alaska Ins. Co. v. RCA Alaska Commun.*, 623 P.2d 1216 (Alaska 1981). We then stated the rationale behind the modern trend:

> "[I]nsurance companies expect to pay their insureds for negligently caused fire, and they adjust their rates accordingly. In this context, an insurer should not be allowed to treat a tenant, who is in privity with the insured landlord, as a negligent third party when it could not collect against its own insured had the insured negligently caused the fire. In effect, a tenant stands in the shoes of the insured landlord for the limited purpose of defeating a subrogation claim."

Reeder, 217 Neb. at 129, 348 N.W.2d at 837, quoting *Rizzuto v. Morris*, 22 Wash. App. 951, 592 P.2d 688 (1979). Concluding that the reasoning underlying the denial of a subrogation claim between a landlord and a tenant was even more compelling when the relationship was between a host and a guest, we determined

that a guest who negligently caused damage to his host's home could not be sued by the owner's insurance carrier under a right of subrogation as a matter of law. *Reeder, supra.*

Expanding on *Reeder*, in *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995), we determined that joint tenants with a close family relationship were coinsureds under a policy of insurance held by one joint tenant and that therefore, the insurer could not seek to subrogate against the uninsured joint tenant who negligently caused extensive damage to the jointly held property. In reaching this conclusion, we noted that the "modern trend is that a lessor's insurer cannot maintain a subrogation action against a lessee in the absence of an express agreement or lease provision." *Id.* at 604, 529 N.W.2d at 527. Moreover, echoing the policy rationale espoused in *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975), we stated that landlords and tenants are coinsureds for subrogation purposes

> "because of the reasonable expectations they derive from their privity under the lease, their insurable interests in the property, and the commercial realities under which lessors insure leased premises and pass on the premium cost in rent and under which insurers make reimbursement for fires negligently caused by their insureds' negligence."

Jindra, 247 Neb. at 604, 529 N.W.2d at 527. Accord 6A John Alan Appleman & Jean Appleman, Insurance Law and Practice § 4055 (Supp. 2004).

In sum, although neither case turned on the relationship between a landlord and his or her tenant, both decisions were premised on our assumptions that (1) landlords and tenants are considered coinsureds for subrogation purposes and (2) a landlord's insurer cannot maintain a subrogation action against a tenant in the absence of an express provision in the lease agreement. Thus, principled adherence to *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984), and *Jindra, supra*, compels us to formally recognize that *Sutton* and its progeny represent the law of Nebraska, i.e., that landlords and tenants are implied coinsureds for subrogation purposes and that a landlord's insurer cannot maintain a subrogation action against a tenant in the absence of an express lease agreement to the contrary.

Moreover, even if we had reason to answer the issue anew, we would adopt the *Sutton* rule because it represents the better public policy. As an initial matter, a pure *Sutton* approach has the benefit of providing legal certainty. For example, the *Sutton* rule prevents landlords from engaging in gamesmanship when drafting leases by providing the necessary incentive for them, if they so desire, to place express subrogation provisions in their leases. If such a provision is placed in their lease, tenants will be on notice that they need to purchase liability insurance. If such a provision is not included in their lease, insurers will pass the increased risk along to landlords in the form of higher premiums, and landlords, in turn, will pass along the higher premiums to tenants in the form of increased rent. As the court in *Sutton* did 30 years ago, we acknowledge that this is almost certainly the current commercial reality.

[8] In addition, we continue to believe that absent an express agreement alerting them otherwise, the *Sutton* rule comports with the reasonable expectations of tenants. Moreover, the *Sutton* rule accounts for modern commercial realities by preventing the economic waste that will undoubtedly occur if each tenant in a multiunit dwelling or multiunit rental complex is required to insure the entire building against his or her own negligence. In sum, *Sutton* and its progeny represent the better reasoned rule. Therefore, we hold that absent an express agreement to the contrary in a lease, a tenant and his or her landlord are implied coinsureds under the landlord's fire insurance policy, and the landlord's liability insurer is precluded from bringing a subrogation action against the negligent tenant.

In the instant case, although the lease required Sousa to (1) repair all damages done to the premises or pay for the same, (2) keep the building free from danger of fire, and (3) return the property in as good of condition as it was received, there is no express provision in the lease that provides for the right of subrogation on behalf of Tri-Par's insurer. Therefore, for subrogation purposes, Sousa and Tri-Par are implied coinsureds and Tri-Par cannot maintain this subrogation action on behalf of Auto-Owners against Sousa.

CONCLUSION

For the foregoing reasons, Tri-Par is precluded, as a matter of law, from bringing a subrogation action on behalf of Auto-Owners against Sousa. The district court's order granting summary judgment in favor of Sousa and against Tri-Par was correct and is hereby affirmed.

AFFIRMED.

LARRY R. DEMERATH, APPELLANT, V. KNIGHTS OF COLUMBUS, A FOREIGN INSURANCE COMPANY, APPELLEE.

680 N.W.2d 200

Filed June 4, 2004. No. S-03-377.

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.** 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. **Contracts: Insurance: Fraud.** Whether an insurance company has a duty to investigate the propriety of an attorney in fact's change in beneficiary designation under an insurance policy depends on whether the insurance company had knowledge of facts reasonably suggesting the change was improper.
5. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Larry R. Demerath, of Demerath Law Offices, pro se.

Andrew M. Loudon, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

McCormack, J.

NATURE OF CASE

This is an appeal from a declaratory judgment action in which Larry R. Demerath claimed that the Knights of Columbus (the Knights) had a duty to investigate a change of beneficiary form that was executed by his father's appointed attorney in fact. The district court for Douglas County, Nebraska, granted summary judgment in favor of the Knights, and Demerath appeals.

BACKGROUND

The facts relevant to this appeal are not in dispute. Demerath's parents, Raymond J. Demerath (Raymond) and Ruby A. Demerath (Ruby), had five children: Judith Rech, Demerath, Patricia Cerney, Phyllis Weber, and Lois Tiemann. Raymond purchased two insurance policies from the Knights, in 1941 and again in 1990. The 1941 policy designated Ruby as primary beneficiary and the couple's then living five children as secondary beneficiaries. The 1990 policy named only Ruby as beneficiary with no named contingent beneficiaries.

In 1993, Raymond executed a durable power of attorney, naming one of his daughters, Weber, as his attorney in fact. On August 24, 1999, acting in her capacity as Raymond's attorney in fact, Weber executed a change of beneficiary form provided by the Knights for both the 1941 and 1990 policies. The beneficiary designation forms purported to designate the Raymond J. Demerath Revocable Trust (Trust) as sole beneficiary under both policies. On that same day, a copy of Raymond's executed durable power of attorney was provided to the Knights' agent, Jeff Beller. Beller provided a copy of the durable power of attorney to the certificate service department of the Knights on September 1. On September 2, the Knights accepted and recorded the change of beneficiary for both policies. A copy of the Trust was not submitted to the Knights.

Raymond died in July 2000. Upon Raymond's death, the Trust was to be used for the health, maintenance, and support of Ruby during her lifetime and, upon her death, for the benefit of his four daughters. Demerath was not a named beneficiary under the Trust. The Knights paid the proceeds of the 1990 policy, in the amount of $26,798.57, and the 1941 policy, in the amount of

$1,171.44, to the Trust pursuant to the beneficiary designation. Ruby died in February 2001. Ruby's will was admitted to probate and named all five children, including Demerath, as beneficiaries.

Demerath subsequently filed a declaratory judgment action. The trial court, in its order granting the Knights' motion for summary judgment, described the issue, quoting the petition, as stating that the Knights " 'in some way neglected its obligations to Raymond . . . in allowing a third party to change beneficiaries on two life insurance policies, with only a Power of Attorney — and no direct actual authority from [Raymond] himself.' "

The parties filed cross-motions for summary judgment. The trial court denied Demerath's motion and granted the Knights' motion, dismissing the petition. The trial court found that the Knights "had no separate duty to investigate the change of beneficiary that lead [sic] to the payment at issue in this case. The Knights . . . have, beyond factual dispute, acted in compliance with their contractual undertaking to Raymond . . . ."

Demerath filed a motion for new trial and for rehearing, which the trial court overruled. The court found that Demerath failed to cite any authority for the proposition that an insurer has some duty beyond its own contract with an insured to investigate into the insured's relationships and to determine that a distribution under the policy would be in all respects appropriate. Demerath timely filed this appeal, and we moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Demerath assigns that the trial court erred in (1) holding that use of a power of attorney to benefit oneself under a life insurance beneficiary is proper, (2) holding that an insurance company has no duty to pay death benefits to the insured's legal appointed beneficiaries, and (3) holding that an insurance company has no duty to determine proper beneficiaries.

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. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004); *First Colony Life Ins. Co. v. Gerdes*, 267 Neb. 632, 676 N.W.2d 58 (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. *First Colony Life Ins. Co. v. Gerdes, supra*; *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004).

[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

ANALYSIS

This case presents the following single issue for our determination: Whether the Knights had a contractual or fiduciary duty to investigate whether the change of beneficiary form presented by the attorney in fact under a general power of attorney was the actual intention of the insured, Raymond.

Demerath's first assignment of error mischaracterizes the trial court's holding in that the trial court did not hold that use of a power of attorney to benefit oneself under a life insurance beneficiary is proper. We agree with the trial court, as set forth in its order overruling Demerath's motion for new trial, that such an argument is more properly directed in a suit against the attorney in fact and has no direct relevance in a suit against the insurance company. See *Mischke v. Mischke*, 247 Neb. 752, 530 N.W.2d 235 (1995) (holding, in action by personal representative of decedent's estate against decedent's brothers, brother exceeded authority under durable power of attorney by transferring assets to himself and two other brothers without consideration while decedent was in coma). Accordingly, we will not separately address this assignment of error.

Demerath does not dispute that Raymond had the right to change the beneficiary under either policy. The executed beneficiary designation forms in the record reflect that Raymond did

indeed have authority under both policies to change the beneficiary designation. We conclude that Raymond reserved the right under both policies to change beneficiaries.

We must next determine whether the Knights had a duty to investigate the propriety of that change in beneficiary.

> Where an insurer, acting in good faith without any actual knowledge of the insured's mental incompetency, has recognized an apparently duly executed change of beneficiary and has paid the proceeds of the insurance to the substituted beneficiary, it is not liable to the original beneficiary when sued by him or her even though it is established that the insured was, in fact, incompetent and lacked the capacity to make the change of beneficiary. That is, the insurer is not under any duty to investigate the mental competency of the insured to change the beneficiary unless it knows of circumstances reasonably suggesting the probability of his or her mental incompetency.
>
> Similarly, an insurer is not required to investigate to determine whether a change of beneficiary had been procured by undue influence in the absence of knowledge of facts which would indicate that the change might have been so procured.

4 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 60:77 at 60-141 to 60-142 (1997).

In *McNabb v. Kentucky Central Life Ins. Co.*, 631 S.W.2d 253 (Tex. App. 1982), the mother of a deceased insured brought an action for damages against the insurance company. She alleged that the proceeds of several life insurance policies insuring her daughter's life were wrongfully paid to a third party as the result of a forged change of beneficiary form signed by the insured's father. The policies originally named the mother and the insured's estate as beneficiary. The change of beneficiary forms were dated 6 days before an automobile accident resulting in the insured's death and were received by the insurance company 2 days after the accident. The mother contended that the change of beneficiary was not valid because the forms were acted upon after the insured's death. The court concluded that the insurance company had no knowledge of any irregularity in the change of beneficiary forms and had no proof that the forms were signed after the

insured's death. Thus, the court concluded, the insurance company was under no duty to determine whether the change of beneficiary was procured or induced by improper means where it had no reason to believe or know that such was the case.

In *Bosworth v. Wolfe*, 146 Wash. 615, 264 P. 413 (1928), the Washington Supreme Court upheld the trial court's finding that a change of beneficiary form had been fraudulently executed. In so holding, the court held that the insurance company did not have a duty to inquire into the mental incompetency of the insured or to investigate whether undue influence had been exerted upon him to procure the order to change the beneficiary.

[4] Thus, whether an insurance company has a duty to investigate the propriety of an attorney in fact's change in beneficiary designation under an insurance policy depends on whether the insurance company had knowledge of facts reasonably suggesting the change was improper. The record discloses no such knowledge.

We conclude that the Knights did not, in this case, have any contractual or fiduciary duty to make inquiry as to the propriety of the change in beneficiary forms submitted to it and signed and executed by the attorney in fact.

[5] Demerath also contends in his brief that certain portions of deposition testimony given by the attorney in fact relating to conversations she had had with Raymond constitute inadmissible hearsay. Demerath fails, however, to assign this argument as error, and therefore, we do not address 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).

CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court.

AFFIRMED.

JOHN SCHAFERSMAN AND EILEEN SCHAFERSMAN, HUSBAND AND WIFE, APPELLANTS, V. AGLAND COOP, A NEBRASKA COOPERATIVE CORPORATION, APPELLEE.

681 N.W.2d 47

Filed June 10, 2004. No. S-02-1267.

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 refrains 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. **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.
4. **Trial: Rules of Evidence: Expert Witnesses.** Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), requires that trial courts act as gatekeepers to ensure the evidentiary relevance and reliability of an expert's opinion. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
5. ____: ____: ____. In performing its gatekeeping duty, 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 applied the methodology in a reliable manner. See Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995).
6. ____: ____: ____. The objective of the trial court's gatekeeping responsibility is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. See Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995).
7. **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.
8. **Summary Judgment: Proof.** Because the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted.
9. ____: ____. Once the party moving for summary judgment produces enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted, the burden of producing contrary evidence shifts to the party opposing the motion.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Affirmed.

James F. Cann and David A. Domina, of Domina Law, P.C., L.L.O., and John M. Thor for appellants.

Dan H. Ketcham and Jason R. Yungtum, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

CONNOLLY, J.

The appellants, John Schafersman and Eileen Schafersman, allege that contaminated oats delivered to them by the appellee, Agland Coop (Agland), caused their dairy cows to become ill. To prove this allegation, the Schafersmans relied upon expert testimony. In *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (*Schafersman I*), we reversed a jury award for the Schafersmans, holding that the expert opinion testimony of their expert, Dr. Wallace Wass, failed to meet the *Frye* general acceptance test. But in *Schafersman I*, we also concluded that we would no longer employ the *Frye* test for determining the admissibility of expert opinion testimony. Instead, we adopted the standards that the U.S. Supreme Court first set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

We must decide whether the trial court erred in (1) determining that the opinion testimony of the Schafersmans' experts failed to meet the *Daubert* standards and (2) entering summary judgment for Agland. We affirm.

I. FACTUAL BACKGROUND

The Schafersmans operate a commercial dairy farm. In June 1994, they ordered 40 bushels of unadulterated commercial grade oats from Agland, a cooperative that sells grain and feed. Agland delivered 3,260 pounds to the Schafersmans on June 22. It is undisputed that the oats delivered to the Schafersmans on June 22 were contaminated with "Envirolean 2.5L Swine Concentrate" (Envirolean), a premix concentrate for hogs

containing high-protein minerals, vitamins, and other micronutrients. Upon delivery, the contaminated oats were dumped into the Schafersmans' grinder-mixer so it could be mixed with other ingredients for the Schafersmans' dairy herd. This mix was then given to the cows.

When the mix was delivered, the Schafersmans owned 75 cows. Fifty-four of these cows were lactating. The 21 cows that were not lactating were located in a separate "dry lot." The Schafersmans claim that the contaminated oats were given to only the 54 lactating cows.

According to the Schafersmans, their cows went "off their feed" within days after the delivery. In other words, the cows were refusing their normal feed intake and were not milking efficiently. The Schafersmans also claim that several cows developed diarrhea within a few days of eating the contaminated oats.

Roughly 2 weeks after Agland had made the delivery, the Schafersmans stopped giving the cows the contaminated oats. However, according to John Schafersman, by July 1994, 23 cows that had consumed the contaminated oats had dried up, i.e., stopped lactating.

At the end of July 1994, the Schafersmans noticed that some cows were getting "yellow under the belly" and in the eyes. John Schafersman called Dr. James Grassmeyer, a local veterinarian. Grassmeyer conducted basic physical examinations on two or three cows and determined that at least one cow showed signs of jaundice. He did not, however, perform a liver biopsy on any cows. Grassmeyer suggested that the Schafersmans have the contaminated oats tested. However, at the original trial, he also testified that there were several possible causes for the cows' symptoms and that he had not attempted to ascertain the actual cause.

According to the Schafersmans, all the cows that had eaten the contaminated oats dried up within 6 months, none returned to normal milk production, and 10 died within 18 months of the time the contaminated oats were delivered. Others had difficulty breeding, and the following year, there was a high rate of aborted calves among those cows that had eaten the contaminated oats. By the end of 1995, all the cows that had eaten the contaminated oats had either died or been culled from the herd.

According to the Schafersmans, the 21 cows that had not eaten the contaminated oats remained healthy.

1. First Trial and *Schafersman I*

The Schafersmans filed a petition in which they alleged that Agland was negligent in delivering the contaminated oats. They sought damages for lost milk production, cows lost to death or slaughter, increased labor costs, and veterinary costs.

To establish that the contaminated oats had caused their cows to become ill, the Schafersmans relied on Wass' testimony, who at the time of the first trial was a professor in the department of diagnostic and production animal medicine at Iowa State University. Wass' testimony focused on the minerals that were present in the contaminated oats. For a dairy cow, a healthy diet includes the presence of several minerals, but too much of one mineral can be toxic. Several minerals were present in the contaminated oats above recommended levels. However, these levels were not above what dairy cows can tolerate. According to Wass, the aggregation of these minerals at above-normal quantities proved toxic to the cows and caused their symptoms. Wass labeled his theory "multiple mineral toxicity."

The trial court overruled Agland's objections to Wass' testimony, and the jury returned a $120,000 verdict for the Schafersmans. In an unpublished opinion, the Nebraska Court of Appeals affirmed. See *Schafersman v. Agland Coop*, No. A-98-623, 2000 WL 704984 (Neb. App. May 30, 2000) (not designated for permanent publication). We then granted Agland's petition for further review. We reversed, and remanded for a new trial, concluding that Wass' expert opinion testimony was not admissible. In so ruling, we applied the *Frye* test, which asks whether the scientific theory employed by the expert has " 'gained general acceptance in the particular field in which it belongs.' " *Schafersman I*, 262 Neb. at 222, 631 N.W.2d at 870 (quoting *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). We determined that Wass' multiple mineral toxicity theory had not gained general acceptance within the field in which it belongs. We also concluded that the record did not provide any other basis to support Wass' opinion. Specifically, we noted Wass admitted that he had not performed a differential diagnosis, which we

described as "a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Schafersman I*, 262 Neb. at 223, 631 N.W.2d at 871.

But our conclusion that the court had erred in admitting Wass' expert opinion testimony did not end our analysis in *Schafersman I*. We went on to hold that the *Frye* test would no longer provide the means for determining the admissibility of expert opinion testimony in Nebraska. In its place, we adopted the test set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny. 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 I, 262 Neb. at 232, 631 N.W.2d at 876-77. We went on to state that "although Wass' testimony did not meet the requirements of the *Frye* test at the first trial, this does not necessarily preclude the Schafersmans from offering such testimony at a second trial." 262 Neb. at 232-33, 631 N.W.2d at 877.

2. Proceedings Following Remand

On remand, the Schafersmans once again relied on Wass' expert opinion testimony to prove that the contaminated oats had caused their cows to become ill. In addition, they retained two other experts, Dr. Raymond Gene White and Professor Vernon Oraskovich, who sought to testify that Wass employed a reliable methodology in reaching his conclusion. Because the primary issue on appeal is whether on remand the court abused its discretion in excluding the expert opinion testimony of Wass, White, and Oraskovich, we set out in detail their respective opinions, as well as the opinions of Agland's experts.

(a) Wass

Wass continues to claim that the cows developed multiple mineral toxicity from the contaminated oats. In Wass' postremand deposition, he testified that he was unaware of any studies or peer-reviewed articles supporting his theory. But he also stated that it was unlikely that dairy cows had previously been fed the same combination of minerals at the same levels received by the Schafersmans' cows either in a controlled experimental setting or at another dairy operation. He also suggested that the clinical situation presented at the Schafersmans' operation was similar to a scientific experiment, because the dry herd, which did not receive the contaminated oats, acted like a control group.

In addition, in his postremand deposition, Wass seems to have made a subtle change to his multiple mineral toxicity theory. In *Schafersman I*, we noted that Wass had testified that no single mineral was present in the contaminated oats at a level scientifically accepted to be toxic, although several minerals were present at above-normal levels. We further explained that by using the term "multiple mineral toxicity," Wass had meant that the combined effect of those minerals that were present in the contaminated oats at above-normal levels had made the cows ill. See *Schafersman I*. Wass now claims that some minerals were present in the contaminated oats at levels high enough that they alone could have caused the symptoms. Specifically, he claims that the contaminated oats contained enough copper to cause some symptoms that occurred in the Schafersmans' herd, including jaundice and death.

At the time of the original trial, the National Research Council had set the maximum tolerable level of copper for dairy cows at 100 parts per million (ppm). But Wass testified that a colleague at Iowa State University told him about a case where dairy cows had developed copper toxicity after receiving copper at a level of 40 ppm. Here, testing showed that copper was present at 58 ppm in the contaminated oats. Wass further testified that it is well accepted that dairy cows are more susceptible to copper toxicity if the ratio of copper to molybdenum in their diet is greater than 10:1. The ratio in the contaminated oats was 22:1.

Wass conceded, however, that the contaminated oats were not the only ingredient in the cows' diet. When the oats were delivered, they were mixed with corn and a mineral premix for dairy cows. In addition, the cows were also fed alfalfa and supplied with mineral blocks that they could lick. As we noted in *Schafersman I*, although Wass had the contaminated oats tested to determine their mineral makeup, he did not attempt to estimate the mineral makeup of the cows' complete diet.

In addition to the changes Wass made in his multiple mineral toxicity theory, he also took issue with our holding in *Schafersman I* that his clinical analysis had been inadequate because he had not ruled out other potential causes for the symptoms exhibited by the Schafersmans' cows. Wass conceded that there were other possible causes for the cows' symptoms and that he had not conducted testing to rule out those other causes. He testified, however, that some causes could be dismissed without testing because they rarely, if ever, occur in Nebraska. In addition, he repeatedly suggested that the clinical picture, i.e., the almost immediate onset of symptoms after the cows had eaten the contaminated oats and the lack of symptoms in the cows that did not eat the contaminated oats, made extensive testing for other causes unnecessary.

(b) White

White currently is an animal production consultant. He holds a doctorate of veterinary medicine from Oklahoma State University and a master's degree in animal nutrition from the University of Nebraska. Until his retirement in 1998, he was a professor at the University of Nebraska, where he served as the director of research compliance services.

White did not become involved until after *Schafersman I*. Thus, he did not have the opportunity to physically examine the cows that ate the contaminated oats. He reviewed most of the trial record and spoke with Wass and John Schafersman. He also reviewed material addressing toxicology.

White opines that the methodology employed by Wass was reliable and consistent with that which is ordinarily employed by clinical veterinarians. He agrees with Wass that the cumulative effect of the minerals in the contaminated oats could have

caused the cows' symptoms, and he believes that Wass conducted a reliable clinical analysis.

(c) Oraskovich

Oraskovich has a master's degree in education with an emphasis in dairy management and nutrition from the University of Minnesota. He is employed as an extension educator at the University of Minnesota, where he is responsible for the development of educational programs and working one-on-one with individual dairy producers and the agribusiness community. He is not a veterinarian.

Like White, Oraskovich did not become involved in the litigation until after *Schafersman I* and thus never had the opportunity to personally examine or conduct tests on the cows that ate the contaminated oats. In forming his opinion, he reviewed literature addressing mineral toxicity and the trial testimony.

Based on his professional experience, Oraskovich believes Wass employed reliable techniques in determining that the contaminated oats had caused the cows to become ill. Oraskovich agreed with Wass that the aggregation of minerals in the oats at above-normal levels could have caused the cows to become ill, although he was hesitant to label the theory "multiple mineral toxicity." He also agreed with Wass' revised theory that the amount of copper in the oats was sufficient to cause some of the cows' symptoms. To support this contention, he points to a chapter in a textbook on minerals, which cites recent research showing that copper toxicity can result when cows receive copper in their diet at a level of 40 ppm.

(d) Agland's Experts

To counter the testimony of Wass, White, and Oraskovich, Agland relied on the expert testimony of three veterinarians, with one veterinarian specializing in epidemiology and one veterinarian specializing in toxicology. Each generally opined that (1) the Schafersmans' experts had not used reliable methodologies, (2) "multiple mineral toxicity" is not generally accepted and has not been subject to peer-reviewed scientific research, (3) the amount of copper in the contaminated oats was not capable of causing the cows' symptoms, and (4) Wass had failed to perform a reliable clinical analysis.

(e) Trial Court's Decision

After discovery, Agland moved for a hearing under Neb. Evid. R. 104, Neb. Rev. Stat. § 27-104 (Reissue 1995), i.e., a *Daubert* hearing, requesting that the court determine whether the expert opinion testimony of Wass, White, and Oraskovich would be admissible at the second trial. After receiving evidence at the *Daubert* hearing, the court concluded that the expert opinion testimony of Wass, White, and Oraskovich was not admissible. Concerning the "multiple mineral toxicity" theory, the court ruled (1) it had not been peer reviewed, (2) it had not been tested, (3) it had no known or potential error rate, (4) it had not been generally accepted within the scientific community, and (5) no standard exists for determining what levels of any given mineral could result in a toxic effect. In addition, the court ruled that none of the Schafersmans' experts had performed a reliable differential diagnosis and that they had failed to employ sound epidemiological principles.

Agland then moved for summary judgment. In the motion, it contended that because the court had ruled that the Schafersmans' experts could not testify, there was no genuine issue of material fact concerning causation. The court granted the motion, and the Schafersmans appealed.

II. ASSIGNMENTS OF ERROR

The Schafersmans assign, restated and consolidated, that the court erred in (1) ruling that the expert opinion testimony of their experts was inadmissible under the *Schafersman I/Daubert* standard and (2) granting summary judgment to Agland.

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. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *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 refrains 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. *Carlson v. Okerstrom, supra.*

[3] 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. *Francis v. City of Columbus*, 267 Neb. 553, 676 N.W.2d 346 (2004).

IV. ANALYSIS

1. Admissibility of Expert Opinion Testimony

(a) *Schafersman I/Daubert* Framework

[4] Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), governs the admissibility of expert opinion 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." Section 702 requires that trial courts act as gatekeepers to ensure the evidentiary relevance and reliability of an expert's opinion. *Carlson v. Okerstrom, supra.* 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. *Carlson v. Okerstrom, supra*; *Schafersman I.*

In *Schafersman I*, we noted several factors that might bear on a judge's gatekeeping determination: whether a theory or technique can be (and has been) tested; whether, regarding 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." *Id.* at 233, 631 N.W.2d at 877.

[5] Since *Schafersman I*, we have ruled that in performing its gatekeeping duty, 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 applied the methodology in a reliable manner. *Carlson v. Okerstrom, supra.*

[6] However, " 'the trial court's role as gatekeeper . . . is not intended to serve as a replacement for the adversary system.' " *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250 (5th Cir. 2002) (quoting Fed. R. Evid. 702, advisory committee's note). Rather, the objective of the trial court's gatekeeping responsibility is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). See, also, *Rosen v. Ciby-Geigy Corp.*, 78 F.3d 316, 318-19 (7th Cir. 1996) (noting that object of *Daubert* standard "was to make sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work. . . . If they do, their evidence (provided of course that it is relevant to some issue in the case) is admissible even if the particular methods they have used in arriving at their opinion are not yet accepted as canonical in their branch of the scientific community. If they do not, their evidence is inadmissible no matter how imposing their credentials").

(b) Application of *Schafersman I/Daubert* Framework

In *Schafersman I*, we stated that Wass' opinion that the contaminated oats caused the cows to become ill was "dependent upon the underlying theory of multiple mineral toxicity." 262 Neb. at 222, 631 N.W.2d at 871. Following remand, the court ruled that (1) the multiple mineral toxicity theory had not been peer reviewed, (2) it had not been tested, (3) it had no known or potential error rate, (4) it had not been generally accepted within the scientific community, and (5) no standard exists for determining what levels of any given mineral could result in a toxic effect. However, as we noted above, Wass altered his multiple mineral toxicity theory following remand. He now contends that the amount of copper in the contaminated oats could have caused the cows' symptoms. It is not clear from the trial court's order whether it detected this change in Wass' theory.

But it is unnecessary for us to consider whether Wass' revised theory of multiple mineral toxicity was reliable under

Schafersman I/Daubert. The lack of independent hard scientific support for multiple mineral toxicity was not the only reason the court gave for excluding the testimony of the Schafersmans' experts. It also ruled that they could not testify because they had failed to perform a reliable clinical analysis, specifically noting that none of the experts had conducted a differential diagnosis.

In *Schafersman I*, we gave the following critical description of Wass' clinical analysis:

> Wass testified that in preparing his opinion, he physically went to the Schafersman farm, but only examined the Schafersmans' records relating to the cows. Wass admitted that he did not perform a clinical examination of any of the cows and did not treat the cows. Wass did not perform any tests on the cows to rule out other causes of the jaundice that had been observed in the cows by the Schafersmans' veterinarian, nor did he test for copper toxicity, which Wass opined was a contributing factor to the illness afflicting the cows. Wass performed no tests to rule out other potential causes for the alleged drop in milk production. Wass acknowledged that he should have tested for copper toxicity and performed other tests on the cows. Wass further testified that while he tested a sample of the mixture delivered to the Schafersmans by Agland, he did not test the composition of the total ration actually fed to the cows after it was combined by the Schafersmans with corn and other nutrients.

262 Neb. at 220, 631 N.W.2d at 869. Later in our opinion, we pointed out that Wass admittedly had failed to perform a differential diagnosis, which we described as "a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Id.* at 223, 631 N.W.2d at 871. See, also, *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004) (discussing at length when differential diagnosis provides reliable basis for expert opinion testimony).

Nothing has changed on remand. Neither Wass, nor White, nor Oraskovich took any substantive steps to shore up the weaknesses we identified in Wass' clinical analysis. We do not hold that an expert must perform every step we identified in *Schafersman I* for

his or her clinical analysis to be reliable. But, given that the Schafersmans' experts did not perform any of those steps, the trial court did not abuse its discretion in refusing to admit their expert opinion testimony.

2. Summary Judgment

[7-9] Next, the Schafersmans argue that the court erred in granting summary judgment for Agland. 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. *Francis v. City of Columbus*, 267 Neb. 553, 676 N.W.2d 346 (2004). Because the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted. *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002). Once the movant has made this showing, the burden of producing contrary evidence shifts to the party opposing the motion. *Id.*

Agland supported its motion for summary judgment with, among other items, affidavits from its experts, each of whom testified that there was no scientific basis to claim that a causative link existed between the contaminated oats and the cows' illnesses. This was sufficient for Agland to meet its burden of production. The only contrary evidence the Schafersmans had was the expert testimony of Wass, White, and Oraskovich. But, as we have already determined, this evidence failed to meet the *Schafersman I/Daubert* standard. Thus, the Schafersmans could not rebut Agland's prima facie showing and the court correctly entered summary judgment for Agland.

V. CONCLUSION

The court acted within its discretion in ruling that the opinions of the Schafersmans' experts were inadmissible, and it did not err in entering summary judgment for Agland.

Affirmed.

STATE OF NEBRASKA, APPELLEE, V. ELMORE HUDSON, JR., APPELLANT.

680 N.W.2d 603

Filed June 10, 2004. No. S-03-056.

1. **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.
2. **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.
3. **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.
4. **Motions for New Trial.** In order for a new trial to be granted, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby.
5. **Trial: Motions for Mistrial: Waiver: Appeal and Error.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
6. **Convictions: Appeal and Error.** On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
7. **Criminal Law: Death: Proximate Cause: Words and Phrases.** Proximate cause of death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death.
8. **Criminal Law: Proximate Cause: Words and Phrases.** An efficient intervening cause is a new and independent cause, itself a proximate cause of a death, which breaks the causal connection between the original illegal act and the death.
9. **Rules of Evidence: Expert Witnesses: Hearsay.** Under Neb. Evid. R. 703, an expert may rely on hearsay facts or data reasonably relied upon by experts in that field.
10. **Expert Witnesses: Physicians and Surgeons: Records.** A medical expert may express opinion testimony in medical matters based, in part, on reports of others which are not in evidence but upon which the expert customarily relies in the practice of his or her profession.
11. **Expert Witnesses.** An expert must possess facts which enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

A. Michael Bianchi, of Bianchi & Vander Schaaf, L.L.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

After trial to a jury, Elmore Hudson, Jr., was convicted of first degree murder, attempted second degree murder, and two counts of use of a deadly weapon to commit a felony. Hudson was sentenced to life imprisonment for the first degree murder conviction, 30 years' imprisonment for the attempted second degree murder conviction, and 20 years' imprisonment for each of the two use of a deadly weapon to commit a felony convictions, the sentences to be served consecutively. Hudson appeals, claiming errors in the trial court's communication with the jury after deliberations had begun, the State's failure to prove proximate cause, and the admission of expert testimony regarding certain matters related to the deceased victim's treatment and prognosis.

II. BACKGROUND

On January 29, 2001, Hudson and Derreck Jones broke into the apartment of Victor Rodriguez and his girl friend, Margarite Salgado, located in Omaha, Nebraska, with the intent to steal money and drugs. Jones testified that upon kicking down the door to the apartment, Hudson began repeatedly striking Rodriguez in the back of the head with a wooden softball bat he had brought with him. After punching Salgado in the face several times, Jones began searching the apartment for money and marijuana while Hudson began hitting Salgado with the bat. When Hudson and Jones left the apartment, Rodriguez and Salgado were apparently unconscious. Testimony adduced at trial indicates that on January 31, Salgado apparently regained consciousness and was able to go

for help. Both Salgado and Rodriguez were taken by ambulance to St. Joseph Hospital. Rodriguez was transported to the hospital as a "Code 3," which meant he had life-threatening injuries and was determined to be near death.

Because Hudson argues that his assault upon Rodriguez did not cause Rodriguez' death, we will set out in detail the medical treatment rendered to Rodriguez. Upon admittance to St. Joseph Hospital, Rodriguez was diagnosed as having sustained a severe traumatic brain injury and was in a coma. Rodriguez sustained a large laceration to the left frontal part of his scalp, exposing the bone; a laceration just to the right top of his scalp; and a large entry to the back of his head. Rodriguez also sustained multiple fractures to the back section of his skull. Upon admission to St. Joseph Hospital, the record indicates Rodriguez had a 30-percent chance of death and was at risk of developing pneumonia, infection, abnormal bone formation, hydrocephalus (a buildup of pressure in the brain), and seizures. Moreover, due to the extent of Rodriguez' brain injury, Rodriguez was also at risk for impaired swallowing. A swallowing evaluation performed at St. Joseph Hospital showed that Rodriguez was in danger of having whatever he swallowed end up in his lungs, commonly referred to as "gastric aspiration." As a result, a feeding tube was placed through Rodriguez' abdominal wall to assist him with eating.

Dr. Jose Poblador, a licensed rehabilitation physician and director of brain injury rehabilitation at the Madonna Rehabilitation Hospital (Madonna Center) in Lincoln, Nebraska, testified on behalf of the State. Poblador's testimony revealed that he attended Ohio University, College of Osteopathic Medicine, in Athens, Ohio, and has specialized training in treating traumatic brain injuries. Upon Rodriguez' admittance into the Madonna Center on March 27, 2001, Poblador described Rodriguez as restless, incoherent, not able to follow or respond to simple commands, speaking only infrequently, not capable of symmetrical eye movement, unable to walk without substantial assistance, and pulling at his feeding tube even after the Madonna Center staff placed both of Rodriguez' hands in mittens. Rodriguez' condition while at the Madonna Center required that he receive constant, 24-hour-per-day, one-on-one care by nursing staff to prevent him from crawling out of bed or pulling on his feeding tube.

As a result of these apparent difficulties, Poblador ordered that nurses check Rodriguez' vital signs, blood pressure, and temperature at least every 8 hours. Poblador also followed up on orders from Rodriguez' gastroenterologist at St. Joseph Hospital that Rodriguez receive a new feeding tube. Poblador testified that replacement of the old feeding tube with a new one in a different location became necessary when the Madonna Center personnel began experiencing difficulty feeding Rodriguez and giving him fluids and medication through the original tube. The gastroenterologist discovered that the feeding tube was pulled from its hole through the abdominal wall. On April 12, 2001, the old feeding tube was pulled and a new tube placed in a different location. At that time, the gastroenterologist reinitiated the tube feeding at its previous rate of 95 cc per hour and water at 250 cc four times per day. At that time, Rodriguez was also placed on medication to improve the movement of residuals of the tube feeding from Rodriguez' stomach into the small intestine.

After the feeding tube was replaced, Madonna Center medical staff regularly checked the residuals of the tube feeding in Rodriguez' stomach at designated times. Within a few days after the tube replacement, the Madonna Center nurses reported that Rodriguez was not tolerating the tube feeding. As a result, the Madonna Center physician assigned to Rodriguez at the time decreased the feeding rate to 50 cc, and then to 30 cc on April 14, 2001. Poblador testified that Rodriguez' demonstrated intolerance to tube feeding is a common complication of a traumatic brain injury. On April 17, the gastroenterologist gave an order to change the tube feeding from a continuous delivery to a bullous delivery, which, for Rodriguez, meant 250 cc delivered into the tube five times daily. Poblador testified that the primary reason for changing from continuous to bullous tube feeding is typically to allow the patient more mobility. However, Poblador testified that in Rodriguez' case,

> the more important reason for him [to change to bullous tube feeding] is that he is agitated, restless and has shown previously a tendency to pull tubes, catheters. So, this having been the second tube already, [the gastroenterologist] could have been trying to provide more protection to the patient so that he doesn't pull the tube again.

On that same date, the gastroenterologist ordered that he be notified if Rodriguez' residuals exceeded 150 cc and that the residuals plus tube feeding should equal 250 cc with each bullous feeding.

On April 19, 2001, shortly after 3 p.m., medical records indicate that Rodriguez vomited. At approximately 6 p.m. that same day, Rodriguez' medical records indicate that his residuals measured at 190 cc and that his bullous feeding was withheld. At 9:45 p.m., Rodriguez' residuals were approximately 200 cc and the Madonna Center nursing staff again withheld Rodriguez' bullous feeding. At midnight, Rodriguez' residuals measured at 240 cc. Shortly thereafter, Rodriguez vomited again and became unconscious. The Madonna Center personnel immediately began administering emergency assistance to Rodriguez, and he was subsequently taken to BryanLGH Medical Center, where he died. Poblador agreed that the Madonna Center nurses' records did not reflect whether the gastroenterologist was contacted at the time Rodriguez' residuals moved above 150 cc; Poblador testified, however, that Rodriguez' residuals plus bullous feeding levels never exceeded 250 cc.

Poblador further testified, over objection, that Rodriguez' severe traumatic brain injury put him at high risk for gastric aspiration. Poblador concluded that the cause of Rodriguez' death was gastric aspiration, secondary to severe traumatic brain injury.

Dr. Robert E. Bowen, a pathologist who conducted an autopsy of Rodriguez, also testified on behalf of the State. Bowen testified that Rodriguez' head injuries were consistent with being hit by a bat. Bowen also testified that other than the injuries to his head and a mild case of emphysema, Rodriguez was a fairly healthy individual. With respect to the cause of Rodriguez' death, Bowen's autopsy report states that "[t]he immediate cause of death of this individual is attributed to gastric aspiration with extensive bronchopneumonia. The proximate cause of death is attributed to blunt trauma to the head." At trial, Bowen confirmed the autopsy report, testifying to a reasonable degree of medical certainty that

> the immediate cause of death . . . was gastric aspiration. That is, food was removed — it was aspirated from his stomach into his lungs which triggered him to die. And this

> is a result of head injury, of blunt head injury, severe head injury, which made it so he wasn't able to swallow and protect his airway.

At the close of the State's case and again at the close of Hudson's case, Hudson moved to dismiss the charges against him, contending the State had failed to prove a prima facie case. Specifically, Hudson contended that the State failed to prove Hudson's assault was the proximate cause of Rodriguez' death. The trial court overruled both motions.

The jury convicted Hudson on all counts, and the trial court entered its order on the jury's verdict. Hudson subsequently filed a motion for new trial, alleging irregularities in the proceedings of the court and witnesses, that the verdict was not sustained by sufficient evidence and was contrary to law, and that several errors of law occurred at trial to which Hudson objected. In the motion for new trial, Hudson also raised all other motions and objections previously raised before the court. The trial court denied Hudson's motion for new trial, and Hudson appeals to this court.

III. ASSIGNMENTS OF ERROR

Hudson assigns, restated, that the trial court committed reversible error when it (1) denied Hudson's motion for new trial despite the court's improper directive to the jury after it retired to deliberate regarding the length of time required for jury deliberations; (2) denied Hudson's motion to dismiss at the end of the case for the reason that the State failed to prove, as a matter of law, that Hudson proximately caused the death of Rodriguez; and (3) allowed Poblador, Rodriguez' attending physician, to speculate regarding certain matters concerning Rodriguez' treatment and prognosis. Specifically, Hudson advances three separate contentions with respect to his third assignment of error. Hudson first contends that Poblador is a doctor of osteopathy, not a doctor of medicine or a surgeon, and therefore could only speculate regarding how Rodriguez' skull reformation procedure was performed. Second, Hudson contends that Poblador's testimony regarding Rodriguez' poor prognosis for recovery and ability to live on his own was complete conjecture. Third, Hudson contends Poblador was not qualified

to testify that Rodriguez was at a greater risk for gastric aspiration due to the severe traumatic brain injury he sustained and that Poblador failed to testify to the same to a reasonable degree of medical or osteopathic certainty.

IV. STANDARD OF REVIEW

[1] 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. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

[2] 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. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003); *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[3] 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. *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004).

V. ANALYSIS

1. Judicial Misconduct

[4] Hudson first contends that the trial court should have granted his motion for new trial due to alleged irregularity occurring during jury deliberations. Neb. Rev. Stat. § 29-2101 (Cum. Supp. 2002) provides:

> 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: (1) Irregularity in the proceedings of the court, of the prosecuting attorney, or of the witnesses for the state or in any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial . . . .

Moreover, in order for a new trial to be granted, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby. *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

Hudson contends that the trial court violated Neb. Rev. Stat. §§ 25-1115 and 25-1116 (Reissue 1995) when it communicated with the jury, albeit through its bailiff, after the jury retired to deliberate.

Section 25-1115 provides:

> No oral explanation of any instruction authorized by the preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein.

Section 25-1116 provides:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

Hudson contends that after 1 day of deliberations, one juror inquired of the court's bailiff regarding how long the jury would have to deliberate. The record on appeal indicates that prior to the jury rendering its verdict, counsel for Hudson inquired of the court regarding this communication as follows:

> [Hudson's counsel]: And the only other thing was, apparently, someone in passing suggested to your bailiff or inquired as to how long they had to deliberate or how long they were supposed to deliberate, and at some point the bailiff contacted the Court and went back and told them basically you deliberate as long as the case lasted; is that my understanding?

THE COURT: Well, what happened is the first questions that were posed by the jury included a question about what happens if the jury is hung, which I told you my comment was, I can't comment on that. When that question was delivered to my bailiff, they wondered how long if they were — they would have to deliberate if they couldn't reach a verdict, and I just told her that a rule of thumb is generally at least the length of time of the trial, but that's not necessarily the hard and fast rule. So that's what that is about.

[Hudson's counsel]: And I don't think that question was in writing, and that's the only reason I wanted to — that's all I wanted to make a record of. That's it.

THE COURT: No, it wasn't. So that did occur.

[5] At no time before the verdict was rendered did Hudson move for a mistrial. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Accordingly, this assignment of error is without merit.

2. Proximate Cause

[6] Hudson next contends that the State failed to prove that severe head trauma proximately caused Rodriguez' death. On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002). 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. *Id.* Moreover, in determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are

within the jury's province for disposition. *Id.*; *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[7,8] In *State v. Harris*, 194 Neb. 74, 80, 230 N.W.2d 203, 207 (1975), we enunciated the following general rule:

> "The act of accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of accused, as where the direct cause was a disease or infection resulting from the injury inflicted by accused. . . . It is not a defense to one whose act has contributed to the death that improper treatment on the part of physicians, nurses, or the victim also contributed thereto; but one who has inflicted an injury is not responsible for homicide where death results solely from erroneous treatment by another."

See, also, *State v. Meints*, 212 Neb. 410, 322 N.W.2d 809 (1982) (reaffirming this principle). Proximate cause of death is " 'that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death.' " *State v. Lytle*, 194 Neb. 353, 358, 231 N.W.2d 681, 685 (1975). An efficient intervening cause is a new and independent cause, itself a proximate cause of a death, which breaks the causal connection between the original illegal act and the death. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

Hudson contends that because Rodriguez' health was steadily improving, the Madonna Center medical staff, and not the brain injury, was the proximate cause of Rodriguez' death. Even if an improving condition were a dispositive factor, which it is not, the record does not support Hudson's contention that Rodriguez' condition had more than marginally improved, if at all. Poblador testified that while Rodriguez was speaking more intelligibly and seemed a little more alert toward the latter part of his stay at the Madonna Center, his condition in mid-April 2001 generally was not very different from what it was upon admittance to the Madonna Center on March 27. Hudson's expert, Dr. Gerald Langdon, a doctor specializing in internal medicine, testified that

> [d]uring the approximate three weeks [Rodriguez] was [at the Madonna Center], the staff made an excellent attempt at trying to begin some rehabilitation, without great success, but he was able to walk some, never had any meaningful ability to communicate and had a great deal of difficulty cooperating. And also didn't seem to recognize people around him and such. Although, there were rare instances when he seemed to make some sense.

Hudson further contends that the evidence clearly shows that had the Madonna Center staff followed the gastroenterologist's orders and properly notified him when Rodriguez' residuals reached 150 cc, Rodriguez would not have died. Hudson maintains that Rodriguez' level of improvement combined with Langdon's testimony that people who have feeding tubes can live for extended periods of time, breaks the causal chain. Hudson provides no citations to the record in support of his contention. Indeed, our review of the record points to a contrary conclusion.

None of the experts were expressly asked, and none testified, regarding the issue of whether Rodriguez would still be alive but for the alleged failure to contact the gastroenterologist when Rodriguez' residuals exceeded 150 cc. To the contrary, witness testimony indicates that Rodriguez was transported to St. Joseph Hospital as a "Code 3" with life-threatening injuries and was near death. Upon admittance to the hospital, Rodriguez had a 30-percent chance of death and was at risk of pneumonia, seizures, and impaired swallowing as a result of the head injury. A swallowing evaluation performed at the hospital confirmed impairment and that Rodriguez was at risk for gastric aspiration. Poblador's and Langdon's testimony confirmed that Rodriguez' condition put him at high risk for gastric aspiration.

Poblador concluded that the cause of Rodriguez' death was gastric aspiration, secondary to severe traumatic brain injury. While Hudson objected to Poblador's testimony on the ground that it was complete conjecture, as discussed later in this opinion, we find this objection to be unfounded. In addition, Bowen's autopsy report states that "[t]he proximate cause of death is attributed to blunt trauma to the head." At trial, Bowen confirmed the autopsy report, testifying to a reasonable degree of medical certainty that

> the immediate cause of death . . . was gastric aspiration. That is, food was removed — it was aspirated from his stomach into his lungs which triggered him to die. And this is a result of head injury, of blunt head injury, severe head injury, which made it so he wasn't able to swallow and protect his airway.

The only testimony in the record that in any way relates to Hudson's contention that the Madonna Center medical personnel were negligent comes from Hudson's expert, Langdon. Langdon testified on direct examination that the blunt head trauma is not what caused Rodriguez to die. Langdon explained that Rodriguez sustained the head injuries approximately 70 days prior to his death but died within a period of 10 minutes and that he died "of an acute — I don't want to really say failure of nursing care or anything like that, because I'm not going to cast stones at this facility. It's a very difficult job to care for a patient like this, but the fact is that he did have excessive feeding." However, Langdon further testified on direct examination that it was his opinion that Rodriguez' head injury was a secondary cause of death. Langdon testified as follows:

> Q. Do you have an opinion, Dr. Langdon, to a reasonable degree of medical certainty as to why or how Victor Rodriguez died in this case?
>
> A. Well —
>
> Q. Just yes or no.
>
> A. Yes, I do.
>
> Q. Can you tell me what that opinion is?
>
> A. The easiest way would be for me to describe how I would sign his death certificate. And, incidentally, I don't think we've yet seen a death certificate, if I may say that.
>
> Q. Okay.
>
> A. I would sign his death certificate in this manner: No. 1 is acute unexpected cardiopulmonary arrest, secondary to acute gastric aspiration, secondary to gastric retention of feeding material. And then we add after those acute episodes the longer things, the more persistent things and those would be persistent invalidism, secondary to blunt head trauma. In other words, it's self-evident that something caused him to be in this condition.

On cross-examination, Langdon again admitted a causal relationship between Rodriguez' death and the blunt head trauma. Langdon testified as follows:

> Q. If you would have signed this death certificate, you would have included secondary to blunt trauma to the head, correct?
>
> A. That would be the remote reason why he was even there, of course.
>
> Q. Wouldn't be having a [feeding] tube if it hadn't been for the blunt trauma to the head?
>
> A. I think that everyone could understand that.
>
> Q. He wouldn't have aspirated had he not had a head injury, correct?
>
> A. That's a different question, completely. He wouldn't have been there if he had not had the injury. The injury was not necessarily the reason for the aspiration. Those are two separate events.
>
> Q. Okay. The reason for the [feeding] tube is the head injury?
>
> A. No, the reason for the [feeding] tube is nutrition.
>
> Q. Because he can't do it on his own?
>
> A. Fine.
>
> Q. Correct?
>
> THE COURT: Yes or no?
>
> THE WITNESS: Yes.
>
> Q. . . . So you're not here telling the ladies and gentlemen of this jury that his cause of death had nothing to do with the blunt trauma to his head, are you?
>
> A. Not at all.

Hudson further contends that because Bowen testified that the necessity of feeding tubes is not exclusive to patients with blunt head trauma, that fact alone requires a finding that death resulting from complications associated with feeding tubes constitutes a supervening cause. Hudson appears to advance this conclusion notwithstanding the existence of a causal relationship between the event initially necessitating the feeding tube and the subsequent death. Our research reveals several factually similar cases that reach a contrary conclusion.

For example, in *State v. Baker*, 87 Or. App. 285, 742 P.2d 633 (1987), following a motorcycle accident, the victim was in a comatose state and had a tracheostomy tube in her throat for breathing. Two months after the accident, the victim was transferred from the hospital to a nursing home. Eight days after moving to the nursing home, medical personnel removed the victim's tracheostomy tube, and the next day she died. The court determined that "one who criminally inflicts an injury upon another is responsible for that other's death, notwithstanding later negligent medical treatment, unless the medical treatment was so grossly erroneous as to have been the sole cause of death." *Id.* at 289, 742 P.2d at 635-36. The court stated that when viewed most favorably to the defendant, the evidence showed that removal of the tube, negligently or otherwise, did not cause the victim's inability to breathe, the consequences of the head injury did. *Id.* As such, the court found the defendant criminally responsible for the victim's death. See, also, *Brackett v. Peters*, 11 F.3d 78 (7th Cir. 1993); *Davis v. State*, 520 N.W.2d 319 (Iowa App. 1994).

Based on our review of the record, we conclude that a reasonable jury could have concluded beyond a reasonable doubt that severe head injury inflicted by Hudson was a proximate cause of Rodriguez' death. Accordingly, Hudson's second assignment of error is without merit.

3. Testimony of Poblador

For his third assignment of error, Hudson contends that Poblador was permitted, over objection, to speculate regarding Rodriguez' skull repair surgery, the likelihood of gastric aspiration for an individual in Rodriguez' situation, and the likelihood that Rodriguez would eventually be able to live again on his own.

(a) Rodriguez' Surgery

Hudson first contends that the trial court erroneously overruled Hudson's foundation objection to Poblador's testimony describing how Rodriguez' skull reformation procedure was performed while Rodriguez was still at St. Joseph Hospital. Hudson contends that Poblador never qualified himself as a surgeon and that the record establishes that Poblador is only a doctor of osteopathy and not necessarily a doctor of medicine. Thus, Hudson contends,

Poblador was not familiar with skull reformation surgery and was to some degree "guessing" when he testified regarding the surgery performed at St. Joseph Hospital to repair Rodriguez' skull. Brief for appellant at 26.

[9,10] Under Neb. Evid. R. 703, an expert may rely on hearsay facts or data reasonably relied upon by experts in that field. *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002); *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001). See § 27-703. A medical expert may express opinion testimony in medical matters based, in part, on reports of others which are not in evidence but upon which the expert customarily relies in the practice of his or her profession. See, *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994); *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985).

In the instant case, according to Poblador's testimony, he was licensed as a doctor in 1997 and his specialty is in the area of treating brain injuries. He attended the osteopathic school at Ohio University, College of Osteopathic Medicine. Osteopathy is "[a] system of complete medical practice based on the maintenance of proper relationships among the various parts of the body. Osteopathic physicians, licensed in all 50 states, employ manipulative therapy, drugs, surgery, x-ray, and all other accepted therapeutic methods in the treatment of disease and injury." Black's Law Dictionary 1101 (6th ed. 1990). Poblador further testified that he performed his residency in rehabilitation medicine at the hospital of the University of Pennsylvania in Philadelphia, Pennsylvania, and that from 1996 to 1997, he participated in a 1-year brain injury fellowship at Baylor University in Houston, Texas. When asked to describe the brain injury fellowship, Poblador stated:

> In rehabilitation medicine, of course, it's sort of a general field, so we take care of different varieties of patients, including traumatic brain injuries. So I took an additional training just to take care of traumatic brain injured patients. That includes essentially patients who have had car accidents, falls, anything that has trauma to the head.

Poblador has been the director of brain injury rehabilitation and the mild traumatic brain injury clinic at the Madonna Center for 2 years. Before coming to the Madonna Center, Poblador was

the medical director of brain injury rehabilitation at Spalding Hospital in Aurora, Colorado, for 5 years.

Poblador testified that it is his normal procedure to review medical records from previous hospitals so as to gain a better understanding of a patient's case and history to provide the best possible care. Poblador further testified that prior to treating Rodriguez, he reviewed all of the documentation from St. Joseph Hospital. Moreover, on cross-examination, Poblador testified that in preparation for his testimony at trial, he reviewed all of the records generated by the Madonna Center relative to Rodriguez as well as a combination of records from St. Joseph Hospital. These included doctors' reports from their evaluations, procedure notes, *including surgeries*, speech therapy evaluations, progress notes, daily physician notes, CAT scan reports, and laboratory test reports.

The testimony in which Poblador describes the skull repair surgery was clearly taken from his review of St. Joseph Hospital's medical records. Poblador's review of Rodriguez' surgical records and any conclusions he drew from those records are activities that are consistent with his practice in the field of brain injury rehabilitation.

Based on our review of the record, Poblador properly qualified himself as a medical expert in the field of traumatic brain injuries. Moreover, we determine that Poblador reasonably relied upon the reports of medical professionals, including surgical reports of the kind at issue in this case. Poblador's testimony regarding the skull reformation procedure was based upon his review of the medical records from St. Joseph Hospital. As such, we find that the trial court did not abuse its discretion in admitting Poblador's testimony regarding the skull reformation procedure.

(b) Testimony Regarding Likelihood for Gastric Aspiration

Hudson next contends that the trial court erroneously overruled Hudson's foundation and form objections to Poblador's testimony that it was his opinion that Rodriguez was at greater risk for gastric aspiration due to the severe traumatic brain injury he sustained. Hudson contends Poblador was not qualified to give this testimony and did not do so to a reasonable degree of medical or osteopathic certainty.

The testimony at trial indicates that gastric aspiration is a common condition associated with traumatic brain injury. Moreover, Hudson's own expert, Langdon, conceded on cross-examination that without the severe traumatic head injury, Rodriguez would not have aspirated. Bowen testified, over objection, that has not been assigned as error in this appeal, that the gastric aspiration experienced by Rodriguez was a complication of the traumatic brain injury. Moreover, Poblador testified, without objection, that according to St. Joseph Hospital's medical records, upon admittance to the hospital, a swallowing evaluation was performed that confirmed Rodriguez was at risk for gastric aspiration. As an expert in brain injury rehabilitation, Poblador was familiar with and qualified to testify regarding Rodriguez' risk for gastric aspiration. Accordingly, we determine that it was not an abuse of discretion for the trial court to admit this testimony.

(c) Poblador's Testimony Regarding Rodriguez' Prognosis

Hudson's final contention is that the trial court erred in allowing Poblador to testify, over objection, that Rodriguez had a poor prognosis for a good recovery. Specifically, Hudson contends:

> While, admittedly, Dr. P[o]blador may be familiar with how other patients have responded after having suffered from blunt trauma injury — after all, he is the Director of the Madonna Rehabilitation Hospital — it is complete conjecture as to when, if, and how long Mr. Rodriguez would take in order to attain a certain level of recovery.

Brief for appellant at 27.

[11] An expert must possess facts which enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). Based on Poblador's qualifications enumerated above and the testimony underlying his prognosis for Rodriguez' recovery, we conclude that Poblador was qualified to and possessed sufficient facts to enable him to offer an opinion as to Rodriguez' prognosis for recovery. As such, this assignment of error is without merit.

VI. CONCLUSION

Because Hudson did not move for a mistrial based upon the alleged improper communication, he cannot now complain of an

unfavorable verdict. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Regarding his second assignment of error, we conclude that the evidence was sufficient to support Hudson's conviction. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the blunt head injury inflicted by Hudson proximately caused Rodriguez' death. Finally, with respect to Hudson's third assignment of error, we conclude that there was sufficient foundation for Poblador to testify about his review of the medical report regarding the skull reformation procedure. We further conclude that Poblador was qualified to testify regarding Rodriguez' prognosis and risk for gastric aspiration. For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

CORNHUSKER CASUALTY COMPANY, APPELLANT, V.
FARMERS MUTUAL INSURANCE COMPANY
OF NEBRASKA, APPELLEE.

680 N.W.2d 595

Filed June 10, 2004. No. S-03-336.

1. **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.
2. **Insurance: Contracts.** An insurance policy is a contract between the insurance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced.
3. **Insurance: Contracts: Claims.** Although a liability insurer is legally obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded with directions.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellant.

Thomas A. Grennan, Alison L. McGinn, and Thomas E. Morrow, Jr., of Gross & Welch, P.C., for appellee.

WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Cornhusker Casualty Company (Cornhusker) filed a petition in the district court for Douglas County against Farmers Mutual Insurance Company of Nebraska (Farmers). Pursuant to a garage policy issued to the estate of Leo J. Bongers (the Estate) by Cornhusker and a farm policy issued to the Estate by Farmers, Cornhusker and Farmers had each paid half of a judgment which had been entered against the Estate. Cornhusker claimed it was not liable under its policy, and it therefore sought reimbursement from Farmers for the half of the judgment Cornhusker had paid as well as for all the moneys Cornhusker had expended in defending the Estate. Farmers filed a counterclaim asserting that Cornhusker's coverage was primary and that therefore Cornhusker was liable for the entire judgment. Farmers sought reimbursement for the half of the judgment that it had paid.

The parties submitted the case to the district court on stipulated evidence. The court ruled against Cornhusker on its claim and dismissed Cornhusker's action. The court ruled in favor of Farmers on its counterclaim and entered a judgment against Cornhusker equal to the portion of the judgment against the Estate that Farmers had paid. Cornhusker appeals. We reverse, and remand to the district court with directions to enter judgment in Cornhusker's favor on its claim and to dismiss Farmers' counterclaim.

STATEMENT OF FACTS

The Estate was insured under a garage policy issued by Cornhusker and under a farm policy issued by Farmers. The Estate and other defendants were sued by Joseph A. Haag after

Haag was injured in an accident while attending an auction on farm property owned by the Estate. The trial court in Haag's action entered judgment on a jury verdict in the amount of $600,000 in favor of Haag and against the Estate and the other defendants. The judgment was affirmed by this court in *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999). The facts of Haag's action are set forth in greater detail in *Haag v. Bongers, supra*, and will be repeated here only to the extent necessary to resolve the issues in this appeal.

In the present case, Cornhusker and Farmers submitted into evidence stipulated facts including the following paragraphs regarding the underlying facts of Haag's action:

> 3. On or about January 30, 1993, an auction was conducted upon the premises owned by the Estate of Leo Bongers in David City, Butler County, Nebraska. The auction was held by Alfred M. Bongers and Delores D. Kuhl in their capacity as personal representatives of the Estate of Leo J. Bongers. The estate employed Dolan & Bauer-Moravec to conduct the auction for which admission was charged. The auction was for the purpose of selling off, among other things, approximately 120 automobiles owned by the Bongers' [sic] Estate.
>
> 4. The vehicles which were to be auctioned were driven or towed, if necessary, into a Quonset building on the property by volunteers or employees of Dolan & Bauer-Moravec. An alley way made of bales of hay were [sic] set up through the middle of the auction barn through which the vehicles were driven or towed. At one point during the auction, the auctioneers reminded the bidders and spectators to stay behind the hay bales because some of the bidders and spectators were not behind the hay bales. It is unknown whether Joseph A. Haag, was behind or in front of the hay bales at the time of the accident. There were no other barricades, ropes or fences which separated the bidders and spectators from the area where the vehicles were being auctioned. The auctioneers nationally advertised the auction and estimated that approximately 700 people would attend. However, as many as 1250 people actually attended the auction. It is unknown how many bidders and

spectators were actually in the Quonset at the time of the accident in question.

5. During the course of the auction, a 1950 Studebaker Truck was brought up to the Quonset building to be sold. The truck was towed into the Quonset building by a 1951 M International Farmall tractor with a rope that was attached to a ball hitch which was attached to the tow bar of the tractor. The threaded shaft of the ball hitch was inserted through in the tow bar and was tightened with a nut. Following the sale of the truck, the tractor attempted to tow the truck out of the building. As the tow rope tightened, the ball hitch came loose from the tow bar of the tractor. Joseph A. Haag was struck in the head by the ball hitch and suffered injuries.

6. The ball hitch and tow ropes were purchased by the auctioneers hired by the Bongers' [sic] Estate to conduct the auction. The ball hitch and tow rope were attached to the tractor and cars by volunteers that were assisting with the auction.

Haag sued the Estate and other defendants, including the auctioneers and the manufacturer of the ball hitch. The Estate tendered the defense of the lawsuit to both Cornhusker and Farmers. Farmers admitted its policy provided coverage for the claim and accepted coverage without reservation. However, Farmers declined to defend the Estate, claiming that the Cornhusker policy also provided coverage and was primary to the excess coverage provided under the Farmers policy.

Cornhusker undertook the defense of Haag's claim against the Estate but sent a letter with the title "Reservation of Rights" to the Estate. In the letter, Cornhusker stated:

> It would appear at this point that the vehicles being used in the towing operation which caused the injury are over 30 years old and would be excluded off of our policy. Any bodily injury resulting from the ownership, maintenance, or use of vehicles over 30 years old would not be covered.

Haag's lawsuit went to trial and was submitted to a jury on September 15, 1997. The jury was instructed, inter alia, that Haag claimed that the Estate was liable under the doctrine of respondeat superior and vicarious liability for the negligence of individuals who (1) failed to use the ball hitch in the manner for

which it was intended; (2) placed the shank or screw of the ball hitch in a drawbar hole which was too large, thus causing the hitch to tilt and place unreasonable stresses on the integrity of the hitch; (3) placed the hitch in a drawbar which was too thick for the hitch, thus preventing the lock washer and nut of the hitch to be fully engaged; (4) failed to fully engage the nut with the screw of the hitch assembly; and (5) attached a synthetic towrope to the hitch which created an unreasonable risk of harm to Haag and the occupants of the building because it stored energy and acted like a slingshot when the hitch failed. The jury was also instructed that Haag claimed that the Estate was independently negligent for (1) failing to correct the manner in which ball hitches were being used to tow vehicles into the crowded sale barn when it knew, or in the exercise of reasonable care should have known, that the manner in which ball hitches were being used was unreasonably dangerous and created an unreasonable risk of harm to Haag and other occupants of the sale barn; (2) failing to limit the number of people in the sale barn so that the bidders could be kept at a safe distance from the towing process; and (3) failing to warn Haag and the other business visitors in the sale barn that vehicles were being towed in an unreasonably dangerous manner, when it knew or should have known that vehicles were being towed in an unreasonably dangerous manner.

On September 16, 1997, the jury returned a general verdict in favor of Haag and against all the defendants, including the Estate, and assessed damages in the amount of $600,000. The verdict was accepted, and the trial court entered judgment against all defendants for $600,000 plus costs. The judgment was affirmed by this court in *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999).

In letters dated April 15, 1999, Cornhusker informed the personal representatives of the Estate that it was denying coverage for the Haag judgment because Cornhusker asserted that the accident "occurred as a result of a tractor over 30 years old towing another antique vehicle that was similarly over 30 years old." Cornhusker stated that coverage was excluded under an endorsement which read as follows:

> This insurance does not apply to Bodily Injury or Property Damage resulting from the ownership, maintenance, or use

> of tow trucks, vehicles over 30 years old, tank trucks, tank trailers and haulaways whether connected or not connected to non-owned or covered "autos" you own. Physical Damage Coverage does not apply to vehicles over 30 years old.

Cornhusker further asserted in the letter that Farmers had agreed that its policy covered the loss and that therefore "the estate's portion of the judgment should be paid by Farmers Mutual of Nebraska." Despite the denial of coverage, Cornhusker was obligated to pay the judgment to Haag under the terms of a supersedeas bond. Cornhusker and Farmers each paid $166,741.71 to Haag to satisfy the Estate's share of the judgment. Other defendants paid the rest of the judgment to Haag.

On September 3, 1999, Cornhusker filed a petition against Farmers seeking a judgment in the amount of $166,741.71 for the portion of the judgment Cornhusker paid to Haag and in the amount of $98,245.65 for costs Cornhusker incurred in defending the Estate against Haag's claims. Cornhusker alleged that the policy it issued to the Estate did not provide coverage for the claims asserted by Haag because Haag's injuries resulted from the Estate's ownership, maintenance, or use of two trucks or vehicles more than 30 years old. Cornhusker further alleged that the policy Farmers issued to the Estate did provide coverage and that therefore Farmers was liable for all of the Estate's share of the judgment as well as the entire costs of defending the Estate.

Farmers answered and in effect alleged that Cornhusker's policy provided coverage for Haag's claims against the Estate. Farmers further alleged that its coverage was excess to that of Cornhusker and that Cornhusker's coverage was primary. Farmers therefore filed a counterclaim seeking reimbursement of the amount it had paid on the judgment against the Estate.

The matter proceeded to a bench trial on April 16, 2001, and was tried on stipulated facts, the evidence from the *Haag v. Bongers* trial, and other evidence, including Cornhusker's correspondence with the Estate. On November 13, the district court entered an order dismissing Cornhusker's petition. The court found that "the cause of the accident was the faulty ball hitch." The court also stated that the use of the tractor and the ownership of the Studebaker truck were "only an incident of the accident," and the court therefore found that the exclusion in the Cornhusker policy

did not apply. The court also found that the sale of cars at the auction was part of "garage operations" as provided in the policy, thereby invoking coverage under the policy. The court entered judgment in favor of Farmers and dismissed Cornhusker's petition.

Cornhusker attempted to appeal the November 13, 2001, order. However, this court dismissed the appeal for lack of a final order because the district court had failed to rule on Farmers' counterclaim. *Cornhusker Casualty Co. v. Farmers Mutual Ins. Co.*, 263 Neb. xxii (No. S-01-1288 (Apr. 17, 2002)). The district court on March 17, 2003, entered an order granting judgment against Cornhusker in the amount it had paid plus costs on Farmers' counterclaim. Cornhusker appeals.

ASSIGNMENTS OF ERROR

Cornhusker asserts that the district court erred in (1) finding that the exclusion endorsement did not exclude coverage for Haag's claims against the Estate and that the endorsement did not apply to "garage operations"; (2) finding that Cornhusker's policy was primary and that Farmers' policy provided excess coverage; (3) finding that the cause of the accident was the faulty ball hitch and that the use of the tractor and the Studebaker truck, which were both over 30 years old, was only incidental to the accident; (4) failing to find that Farmers was liable for the judgment and defense costs and failing to enter judgment against Farmers on Cornhusker's claim; and (5) failing to enter judgment in Cornhusker's favor on Farmers' counterclaim and failing to dismiss Farmers' counterclaim.

STANDARD OF REVIEW

[1] 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

Applicability of Exclusion.

We first consider Cornhusker's argument that the district court erred in determining that the exclusion in the Cornhusker policy for damages resulting from the ownership, maintenance, or use of

vehicles over 30 years old did not exclude coverage for Haag's claims against the Estate. Our resolution of this argument controls the outcome of this appeal. Contrary to the district court's order, we conclude as a matter of law that the exclusion applied to Haag's claims. Accordingly, we determine that the district court erred in holding in Farmers' favor on both Cornhusker's claim and on Farmers' counterclaim.

On appeal, Farmers contends that the exclusion at issue applied only to certain types of coverage under the Cornhusker policy and that it did not apply to the garage operations coverage. We reject this contention. The exclusion at issue was contained in an endorsement to the policy and expressly stated that it modified the insurance provided under the garage coverage form. The heading on the exclusion alerted the insured to its scope by stating in a banner across the top of the page: "THIS ENDORSEMENT CHANGES THE POLICY." The endorsement was located on a separate page following the descriptions of all the various types of coverage provided under the policy. There is no language in the exclusion which would indicate that it might apply to only certain types of coverage. We further note that there is policy language within the descriptions of specific types of coverage which provides for certain types of exclusions which are unique to those specific coverages. The placement of the exclusion at issue in the policy and the language of the exclusion indicate that the exclusion applied to the coverage provided under the entire garage policy.

[2] In interpreting limitations and exclusions in an insurance policy, this court has stated:

> An insurance policy is a contract between the insurance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced.

Safeco Ins. Co. of America v. Husker Aviation, Inc., 211 Neb. 21, 27, 317 N.W.2d 745, 749 (1982). In *Safeco Ins. Co. of America*, we recognized that an insurance contract will be construed against the insurer when the policy is indefinite or ambiguous because the insurer drafted the contract; however, we also recognized that

"[w]e are not permitted to create an ambiguity simply to afford coverage where a clear reading of the policy would otherwise deny coverage." 211 Neb. at 26, 317 N.W.2d at 749.

The Cornhusker policy in this case excludes coverage for damages "resulting from the ownership, maintenance, or use of[, inter alia,] vehicles over 30 years old." This exclusion is not indefinite or ambiguous. We find the exclusion to be applicable to Haag's claims.

Haag's injuries were caused when a faulty ball hitch came loose while the hitch was being used to tow a vehicle which was owned by the Estate and was over 30 years old. The court specifically found that "the cause of the accident was the faulty ball hitch." In its order, the district court also noted that "the injuries sustained by Haag occurred as the tractor towing the Studebaker with the rope caused the ball hitch to come loose." The district court concluded that the exclusion did not apply and entered orders in favor of Farmers. Given the facts and the Cornhusker policy language, the district court's orders are in error.

In this case, the district court's finding that the faulty ball hitch caused the accident cannot be separated from the additional finding that the accident occurred while the ball hitch was being used to tow the 1950 Studebaker truck, a vehicle over 30 years old which was owned by the Estate. Even though the faulty ball hitch was the specific cause, the fact remains that the damages resulted from the towing of the 1950 Studebaker truck. A faulty ball hitch without an application is unlikely to cause harm. In this case, the towing was an incident of the Estate's ownership of the vehicle, and therefore, any liability the Estate had for the damages to Haag "resulted from" the Estate's ownership of a vehicle over 30 years old. Although it is possible that the faulty ball hitch could have been used to tow a vehicle that was not over 30 years old, in this particular accident, the Estate's liability resulted from its ownership of a vehicle that was in fact over 30 years old. In its policy, Cornhusker specifically excluded coverage for any damages resulting from the Estate's ownership of vehicles over 30 years old, and therefore the particular injuries to Haag in this case were within a set of risks that the policy excluded from coverage, and the district court's decision to the contrary was error. We note that because we conclude

that the exclusion applied, we need not consider whether Haag's claim would have been covered under the garage policy absent the exclusion.

Farmers argues that the present case should be analyzed pursuant to the "concurrent cause doctrine" used in other jurisdictions. This court has not specifically adopted the concurrent cause doctrine in this type of case. In cases where insurance policies cover losses caused by one risk while excluding losses caused by another risk, courts in other jurisdictions have alternatively used a "concurrent cause rule" or an "efficient proximate cause rule" to resolve coverage issues. See 7 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d §§ 101:55 to 101:57 at 101-148 to 101-153 (1997). The concurrent cause rule provides that "coverage should be allowed whenever two or more causes do appreciably contribute to the loss, and at least one of the causes is an included risk under the policy," while the efficient proximate cause rule allows recovery for a loss "caused by a combination of a covered and an excluded risk only if the covered risk was the efficient proximate cause of the loss, meaning that the covered risk set the other causes in motion which, in an unbroken sequence, produced the result for which recovery is sought." *Id.*, § 101:57 at 101-152 to 101-153.

We note that when applying both the concurrent cause rule and the efficient proximate cause rule, it is essential to recognize that "[t]he initial task . . . is determining whether there really are two causes, or merely one cause being given different labels." *Id.*, § 101:55 at 101-149. Although the concurrent cause rule or the efficient proximate cause rule may be applicable "where two or more distinct actions, events or forces combined to create the damage," such analysis has no application when "the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations." *Chadwick v. Fire Ins. Exchange*, 17 Cal. App. 4th 1112, 1117, 21 Cal. Rptr. 2d 871, 874 (1993). The court in *Chadwick* stated, "An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss." *Id.* See, also, *Austin Mut. Ins. Co. v. Klande*, 563 N.W.2d 282 (Minn. App. 1997) (for concurrent cause rule to apply, there must be divisible concurrent causes and question

is whether causes could have operated independently of one another to bring about loss).

Given the district court's finding of fact that the cause of Haag's injuries was the faulty ball hitch and in light of the fact that the use of the ball hitch was an inseparable part of the accident that resulted from the towing of the Estate's 1950 Studebaker truck, we determine that Haag's injuries occurred as the result of an accident that was one distinct action, event, or force rather than as a result of separate concurrent causes which could have operated independently of one another to bring about the loss. Because neither rule would apply, we need not consider in this case whether either the concurrent cause rule or the efficient proximate cause rule should be adopted in this state.

We conclude that the exclusion in the Cornhusker policy relating to the ownership of vehicles over 30 years old applied to Haag's claim against the Estate and that therefore Cornhusker was not liable under its garage policy. The district court erred in concluding that the exclusion did not apply and in entering judgment against Cornhusker on both its claim and on Farmers' counterclaim. Because Cornhusker was not liable under its policy, judgment should have been entered against Farmers in the amount of the $166,741.71 payment Cornhusker made toward Haag's judgment, and Farmers' counterclaim should have been dismissed.

Defense Costs.

In addition to the portion of the Haag judgment it paid, Cornhusker also sought recovery from Farmers for costs Cornhusker had incurred in defending the Estate against Haag's claim. The district court denied Cornhusker's claim for defense costs, and Cornhusker appeals this ruling.

[3] Although a liability insurer is legally obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. *City of Scottsbluff v. Employers Mut. Ins. Co.*, 265 Neb. 707, 658 N.W.2d 704 (2003). Because we concluded above that Haag's claim was outside the coverage of the Cornhusker garage policy, we further conclude that Cornhusker did not have a duty to defend the suit filed by Haag. Farmers conceded it was liable to the Estate under its policy, and therefore

Farmers had a duty to defend the Estate, and Farmers is liable to Cornhusker for the costs Cornhusker incurred defending against Haag's claim. Cornhusker and Farmers stipulated in this case that Cornhusker spent $98,245.65 in defense of Haag's claims against the Estate, and Farmers is therefore liable to Cornhusker for that amount.

CONCLUSION

We conclude that the exclusion for damages resulting from the ownership, maintenance, or use of vehicles over 30 years old applied to Haag's claims against the Estate and that therefore Cornhusker was not liable for coverage. Because Cornhusker was not liable for coverage of Haag's claim, Cornhusker consequently had no duty to defend the Estate. The district court therefore erred in finding in Farmers' favor on both Cornhusker's claim and on Farmers' counterclaim. We reverse the judgment of the district court, and we remand the cause to the district court with directions to enter judgment in Cornhusker's favor and against Farmers in the amount of $166,741.71 for the portion of the judgment Cornhusker paid to Haag and in the additional amount of $98,245.65 for costs Cornhusker incurred in defending the Estate against Haag's claims. We also direct the district court to dismiss Farmers' counterclaim.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., and STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RICK A. PERRY, APPELLANT.

681 N.W.2d 729

Filed June 18, 2004. No. S-03-174.

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: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary

training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

3. ____: ____: ____: ____. In order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own.
4. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
5. **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.
6. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
7. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Gregory C. Damman for appellant.

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

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

WRIGHT, J.

I. NATURE OF CASE

In 1994, Rick A. Perry was convicted of two counts of sexual assault of a child and one count of first degree sexual assault on a child. Perry appeals from the district court's denial of his motion for postconviction relief.

II. SCOPE 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. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

III. FACTS

In an amended information filed October 18, 1993, Perry was charged with two counts of sexual assault of a child and one count of first degree sexual assault on a child. On February 17, 1994, a Thayer County District Court jury found Perry guilty on all three counts.

On April 5, 1994, Perry was sentenced to a term of imprisonment of from 1 year to 366 days on count I, sexual assault of a child, and given credit for 148 days served. On count II, first degree sexual assault on a child, Perry was sentenced to 40 to 42 years' imprisonment. On count III, sexual assault of a child, Perry was sentenced to a term of imprisonment of from 1 year to 366 days. The sentences were to be served consecutively.

Following sentencing, Perry's counsel began the process for filing an appeal. In a letter to Perry dated April 27, 1994, counsel requested that Perry sign an enclosed poverty affidavit, have the affidavit notarized, and return it to counsel as quickly as possible. In a letter dated April 29, 1994, Perry was reminded to return the poverty affidavit. Perry signed the poverty affidavit and had it notarized on May 3, but it was not received by counsel until May 6. The Nebraska Court of Appeals subsequently dismissed Perry's appeal for lack of jurisdiction because the poverty affidavit was not timely filed. See *State v. Perry*, 3 Neb. App. xxiii (No. A-94-457, Aug. 8, 1994).

On August 17, 1994, Perry filed a motion for review of his sentence. On July 1, 1996, the trial court, upon its own motion, denied Perry's motion but ordered the clerk of the district court to issue an amended commitment with regard to Perry's conviction for first degree sexual assault on a child. Perry's sentence was amended to from 40 to 42 years' imprisonment to 200 months' to 42 years' imprisonment. There is no record that Perry appealed from this order to amend the commitment.

On August 24, 2001, Perry filed an amended motion for postconviction relief, seeking to have his convictions and sentences vacated. In this motion, Perry alleged that the amendment of his sentence on July 1, 1996, violated his due process right to be present and be given an opportunity for allocution. Perry also made the following claims regarding ineffective assistance of counsel: Counsel did not minimally prepare for trial, did not

subpoena witnesses he knew would be helpful to Perry's case, did not cross-examine witnesses called by the State, did not correct errors in the presentence investigation, failed to properly file a direct appeal, failed to elicit testimony from witnesses that would have disclosed they were biased toward Perry, failed to elicit testimony that would have disclosed that witnesses were under the influence of alcohol during events about which they testified, failed to investigate facts surrounding the issuance of a search warrant for Perry's business and residence, failed to file a motion to suppress evidence seized as a result of the unlawfully issued search warrant, and failed to present evidence in support of a motion to sever the counts. Perry further alleged that the trial court erred in telling the jury that the jurors were " 'free to tell [their] spouses and maybe [their] friends what ha[d] gone on' " during the 2 days of trial.

During an evidentiary hearing on Perry's motion for postconviction relief, the district court received exhibits and evidence in the form of testimony from four witnesses and took judicial notice of certain documents. In a journal entry filed on February 4, 2003, the district court found generally for the State and against Perry. The court specifically found that Perry's trial counsel was not negligent and that Perry was responsible for not providing the poverty affidavit needed to perfect his direct appeal. The court overruled Perry's motion for postconviction relief, and Perry timely appealed from this order.

IV. ASSIGNMENTS OF ERROR

Perry assigns the following restated errors regarding the order of the district court: (1) the court's overruling of his claims for ineffective assistance of counsel, (2) the court's overruling of his claim that the jury was improperly instructed during a break in the trial, and (3) the court's overruling of his claim that his constitutional rights were violated when he was "re-sentenced" without the opportunity to be present or to make allocution.

V. ANALYSIS

1. Ineffective Assistance of Counsel

Perry argues that he was denied effective assistance of counsel in three respects: counsel's failure to perfect the direct

appeal, counsel's failure to attempt to sever the counts at trial, and counsel's failure to file a motion to suppress certain evidence prior to trial.

(a) Failure to Perfect Appeal

[2] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.*

At the evidentiary hearing, conflicting evidence was presented with regard to whether counsel or Perry was to blame for the failure to file a poverty affidavit by the May 5, 1994, deadline for perfecting Perry's direct appeal. The result of this failure was that Perry's appeal was dismissed by the Court of Appeals. See *State v. Perry*, 3 Neb. App. xxiii (No. A-94-457, Aug. 8, 1994).

The district court found that Perry's counsel was not negligent on or about April 28 through May 6, 1994, and that Perry was responsible for not providing the poverty affidavit needed to perfect his direct appeal.

[3] 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. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004). In order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own. *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002); *State v. Hess, supra*. Thus, it was Perry's burden to show that he was denied his right to appeal due to the negligence or incompetence of counsel and through no fault of Perry's own.

We conclude that the district court was not clearly erroneous in finding that counsel was not negligent and that Perry was responsible for not providing the poverty affidavit required to perfect his appeal. Perry has failed to prove that his counsel's performance

was deficient, and his claim of ineffective assistance of counsel in failing to perfect his direct appeal is without merit.

(b) Failure to Attempt to Sever Counts

[4] We first note Perry's admission that he had no constitutional right to separate trials on the offenses charged in the information. See *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *Id.*

The question for our determination is whether Perry's counsel was ineffective when he failed to obtain separate trials as to the charges against Perry. Perry contends that if counsel had called witnesses and presented documentary evidence, he would have established that Perry was prejudiced by joining the three counts alleged in the information in a single trial. Perry also contends that because the dates of the offenses were different and the activities involved in the offenses were significantly different, he was prejudiced by the joinder of all three counts. He implies that trial counsel was ineffective by failing to present any evidence to support the motion to sever. We find this assignment of error to be without merit.

At the evidentiary hearing on his postconviction motion, Perry offered a number of exhibits, including the deposition of his trial counsel, the bill of exceptions from his trial, and the trial court's file concerning the trial. At this hearing, Perry was given an opportunity to present the evidence that he claims his trial counsel should have presented. However, the evidence offered at this hearing failed to establish that Perry's counsel was deficient in his handling of the severance issue, and this assignment of error is without merit.

(c) Failure to File Motion to Suppress

Perry claims that trial counsel was ineffective because he failed to file a motion to suppress evidence obtained as a result of the wrongful issuance of a search warrant. He asserts that the information contained in the search warrant was stale, that persons who reported the alleged criminal activity lacked credibility, and that the reasons for this lack of credibility were not presented to

the magistrate. Perry claims that he was prejudiced by this evidence because it led the jury to believe he was a " 'bad person.' " See brief for appellant at 17.

During the hearing on the motion for postconviction relief, Perry failed to produce evidence to establish that the search warrant was improperly issued. The evidence presented was mostly documentary in nature. This evidence did not establish that the search warrant should not have been issued because it was based on false information or testimony that lacked credibility. Without evidence that the search warrant was defective, Perry's claim that trial counsel should have moved to suppress the evidence obtained from the warrant has no merit.

Perry failed to sustain his burden of showing that counsel was ineffective for not moving to suppress the evidence that resulted from the search warrant. Accordingly, the district court did not err in its conclusion that Perry was not entitled to postconviction relief based upon this claim of ineffective assistance of counsel.

2. Amendment of Sentence

Perry claims that the district court erred in not granting him postconviction relief because he was "re-sentenced" without being offered an opportunity for allocution or to present evidence to the court. Perry was sentenced by the trial court on April 5, 1994. On August 17, after the Court of Appeals had dismissed his direct appeal, Perry filed a motion for review of his sentence. Perry argued in the motion that his sentence for first degree sexual assault on a child was unconstitutional because it was based on a sentencing guideline that became effective on September 9, 1993. Since the crimes Perry was convicted of occurred before that date and the new law required a more lengthy minimum sentence, Perry sought the benefit of being sentenced under the earlier law.

On July 1, 1996, the trial court denied Perry's motion but ordered the clerk of the court to issue an amended commitment. Perry's sentence for first degree sexual assault on a child was amended from 40 to 42 years' imprisonment to 200 months' to 42 years' imprisonment. The sentences Perry received for his convictions on two counts of sexual assault of a child were not affected by the trial court's order.

On appeal, Perry argues that the district court erred in failing to grant him postconviction relief based on the trial court's alleged error in issuing its July 1, 1996, order. We do not reach the merits of Perry's argument regarding the amendment of his sentence because this is an issue that could have been raised via a direct appeal.

[5] 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. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003). In the case at bar, judgment was rendered with the entry of sentence on April 5, 1994. Accordingly, the trial court's July 1, 1996, order was a final, appealable order, since it affected a substantial right made on summary application in an action after judgment was rendered. Perry did not file a direct appeal from this order.

[6] This assignment of error concerns an issue that could have been raised on direct appeal, and Perry is not entitled to postconviction relief on this issue. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

3. Statement to Jury

Perry claims that he should have received postconviction relief because the trial court erred when it told the jury: "[You are] 'free to tell your spouses and maybe your friends what has gone on these two days.' " Perry asserts that this statement was presumptively prejudicial in that the jurors were exposed to information about his case beyond the evidence presented and that, therefore, his due process rights, as guaranteed by the U.S. and Nebraska Constitutions, were violated.

We conclude that this argument is without merit because it concerns an issue that could have been raised on direct appeal. Since Perry was responsible for the failure to properly perfect a direct

appeal, he is procedurally barred from raising this issue by a motion for postconviction relief. A motion for postconviction relief cannot be used to secure the review of an issue which could have been litigated on direct appeal. See, *State v. Curtright, supra*; *State v. Hess, supra*.

4. Errors Assigned but Not Argued

[7] We decline to consider the remainder of Perry's claims of ineffective assistance of counsel because although the claims were assigned as error, they were not argued in his brief. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

VI. CONCLUSION

For the reasons set forth herein, the order of the district court denying Perry's motion for postconviction relief is affirmed.

AFFIRMED.

Roger Eugene Parker, appellee, v. Beverly Maxine Parker, now known as Beverly Maxine Washington, appellant, and Lisa Parker, intervenor-appellee.

681 N.W.2d 735

Filed June 25, 2004. No. S-02-739.

1. **Conveyances: Fraud: Equity: Appeal and Error.** An appeal of a district court's determination that a transfer of an asset was not in violation of the Uniform Fraudulent Transfer Act, Neb. Rev. Stat. § 36-701 et seq. (Reissue 1998), is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **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.
4. **Conveyances: Fraud: Words and Phrases.** The generally recognized badges of fraud are the lack of consideration for the conveyance, the transfer of the debtor's entire estate, the relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the

transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor.

5. **Debtors and Creditors: Conveyances: Fraud: Proof.** In an action seeking to set aside a fraudulent transfer, the burden of proof is on a creditor to prove, by clear and convincing evidence, that fraud existed in a questioned transaction.
6. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
7. **Parol Evidence: Contracts.** 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.
8. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
9. **Judgments: Liens: Property.** A lien of judgment does not attach to the mere legal title where the equitable and beneficial interest is in another.
10. **Trial: Evidence: Appeal and Error.** An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.

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

David L. Herzog, of Herzog & Herzog, P.C., for appellant.

Frank X. Haverkamp, of Penke & Haverkamp, for appellee Lisa Parker.

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

GERRARD, J.

NATURE OF CASE

In February 1977, Roger Eugene Parker and Beverly Maxine Parker, now known as Beverly Maxine Washington, were divorced. Pursuant to the divorce decree, Roger was ordered to pay $100 a month in child support. After 3 years, Roger stopped making child support payments to Beverly. In October 1977, Roger married Lisa Parker. In 1985, Roger and Lisa were divorced. In 1992, despite their divorce, Roger cosigned a loan with Lisa in order to enable her to build a house. Both Roger and Lisa appear on the warranty deed for the property as joint tenants. On January 28, 2000, Beverly filed a motion for judgment on unpaid child support and accrued interest against Roger. On February 2, per Lisa's request, Roger conveyed his interest in their jointly owned property to Lisa by quitclaim

deed. On February 7, Beverly filed the instant action seeking to set aside this conveyance as a fraudulent transfer designed to impair her interests as a creditor of Roger. The main question on appeal is whether Roger's conveyance to Lisa was a fraudulent transfer that should be set aside.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to 1977, Roger and Beverly were married. The parties lived in Minnesota, and their marriage produced three children. Roger and Beverly were divorced in Minnesota on February 3, 1977. Pursuant to the divorce decree, Roger was ordered to pay $100 a month in child support. On September 16, in an effort to enforce his visitation rights, Roger filed a petition for registration of a foreign judgment in the district court for Douglas County, Nebraska.

On October 8, 1977, Roger married Lisa. On February 20, 1980, Roger and Lisa's sole child was born. On September 30, 1985, Roger and Lisa were divorced in Minnesota. Neither child support nor alimony was awarded in the divorce decree. Despite their divorce, both Roger and Lisa believed that it was important to raise their child in a two-parent household. Therefore, they agreed to continue to live together until their child reached adulthood. Although they lived in the same house in their roles as father and mother, Roger and Lisa did not live as husband and wife. For example, they stayed in separate bedrooms, maintained separate bank accounts, and filed separate income tax returns.

In 1992, Lisa decided to build a house. Lisa applied for a loan to cover its costs, but was told by a mortgage broker that her income was too low to qualify for the loan. Lisa turned to Roger for help, and although he had not been involved in the decision to build the home, Roger agreed to cosign the loan. Thereafter, the loan was approved, Lisa made the downpayment, and Roger and Lisa closed on the property on June 8, 1992.

Both Roger's and Lisa's names appear on the warranty deed for the property as joint tenants with rights of survivorship. In addition, the warranty deed, deed of trust, and disclosure statement all refer to Roger and Lisa as husband and wife. Roger and Lisa, however, contend that throughout the process of purchasing the property, they never claimed to be married, and that no one

inquired about their marital status. Moreover, both Roger and Lisa testified that after they moved into their new home, their separate living arrangements continued.

Although Roger had cosigned the loan and the parties took title jointly, both Roger and Lisa considered the property to be Lisa's personal possession. To this end, Lisa made all of the mortgage payments and paid for needed repairs, improvements, and furnishings. Roger did, however, pay for utilities and do some household chores, including yardwork.

On October 16, 1999, Roger and Lisa's child moved out. Approximately 2 weeks later, per the parties' alleged agreement, Roger also moved out of the home.

On January 28, 2000, Beverly filed a motion for judgment on unpaid child support and accrued interest against Roger. At the time of her motion, Beverly estimated that Roger owed $15,700 in child support and an additional $22,240 in accrued interest. Shortly thereafter, Lisa asked Roger to sign a quitclaim deed to the property. At the time she made this request, Lisa was aware that Beverly was attempting to collect child support from Roger; however, Lisa testified that she did not know Beverly was seeking payment from the equity in the property. In any event, Roger agreed to Lisa's request, and on February 2, 2000, Roger signed a quitclaim deed granting his interest in the property to Lisa. Roger testified he did so because he believed that he had no interest in the property and he wanted to make sure it stayed with its rightful owner. Roger testified that he was not paid anything when he signed the quitclaim deed.

On February 7, 2000, Beverly filed a motion seeking to vacate and set aside the conveyance from Roger to Lisa. Essentially, Beverly alleged that the conveyance was an act to defraud her, a creditor of Roger, in violation of the Uniform Fraudulent Transfer Act (UFTA), Neb. Rev. Stat. § 36-701 et seq. (Reissue 1998). Fearing the impairment of her property, Lisa filed a motion to intervene on February 11. Lisa also requested that the child support lien that was attached to her property be released. On February 17, Lisa's motion to intervene was granted; however, the court did not rule on Lisa's request to have the child support lien on her property released.

On March 2, 2000, Beverly's motion for judgment on unpaid child support and accrued interest was granted, and a judgment was entered against Roger in the amount of $27,420.99. Thereafter, additional hearings were held in regard to Beverly's motion to vacate and set aside the quitclaim deed.

On June 7, 2000, the district court entered an order overruling Beverly's motion to set aside the conveyance. Essentially, the court concluded that there was not clear and convincing evidence that the execution of the quitclaim deed was fraudulent within the meaning of the UFTA. In addition, the court determined that Roger's interest in the property was mere legal title and that a judgment lien does not attach to mere legal title where the equitable and beneficial interests lie elsewhere. Therefore, because it found all the equitable and beneficial interests in the property were with Lisa, the court concluded that Beverly did not establish that the quitclaim deed should be set aside simply because Roger and Lisa purchased the property as joint tenants and a number of the loan documents listed them as husband and wife. Finally, the court determined that even if Roger's interest in the property was more than mere legal title, no lien against him existed at the time he executed the quitclaim deed to Lisa because he had yet to be served with the summons of the action seeking unpaid child support.

On June 9, 2000, Beverly filed a motion for new trial, alleging that the court committed 25 errors of fact and law. On June 16, the court overruled Beverly's motion, and on June 26, Beverly filed her notice of appeal. On appeal, the Court of Appeals determined that no final order had been entered because the district court's order failed to grant or deny the relief Lisa requested in her petition to intervene, i.e., to release the child support lien on her property. Accordingly, the Court of Appeals dismissed the appeal for lack of jurisdiction. *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

On remand, Beverly filed a motion requesting leave to amend her motion to vacate and set aside the conveyance. Beverly sought to allege that Roger and Lisa formed an association for the purpose of holding the property and took certain fraudulent actions to defeat Beverly's claim. After the court granted Beverly's motion to amend, Lisa filed an answer denying the

new allegations. Thereafter, a limited amount of additional evidence was adduced.

On May 6, 2002, the district court entered an order overruling Beverly's motion to set aside the conveyance. In its order, the court repeated its findings from the June 9, 2000, order. In addition, the court determined that because Beverly failed to establish fraud, her new association-based claim, which was premised on the allegedly fraudulent transfer, must fail. The court also stated its belief that the equities in the case simply did not support the relief Beverly was requesting because she had recently obtained a judgment against Roger for $27,420.99 and Roger's wages were being garnished in connection with that decision. Last, the court ordered that the child support lien on Lisa's property be released.

Thereafter, Beverly filed a motion for new trial, alleging that the court committed 28 errors of law and fact. Beverly's motion for new trial was overruled, and Beverly filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

On appeal, Beverly assigns, restated, that the district court erred in (1) failing to find that Roger fraudulently transferred his interest in the property to Lisa, (2) failing to set aside Roger's transfer of his interest in the property to Lisa, (3) failing to find that a lien existed on the property prior to the execution of the quitclaim deed, (4) failing to grant her motion for a new trial, (5) sustaining objections to evidence that she presented, (6) failing to find that Roger and Lisa engaged in an association with which Roger had a legal and equitable interest in the property, and (7) allowing Roger and Lisa to testify as to their agreement concerning the ownership and rights in the property.

STANDARD OF REVIEW

[1,2] An appeal of a district court's determination that a transfer of an asset was not in violation of the UFTA is equitable in nature. *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999). In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court

will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*; *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

[3] 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. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

ANALYSIS

UFTA

On appeal, Beverly contends that the district court erred in determining that Roger's conveyance to Lisa was not fraudulent under § 36-705, which provides, in relevant part:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor[.]

Under the UFTA, "transfer" means "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." § 36-702(12). A "creditor" is "a person who has a claim," and a "debtor" is "a person who is liable on a claim." § 36-702(4) and (6). A "claim" is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." § 36-702(3).

Pursuant to these definitions, it is obvious that Roger "transferred" property to Lisa when he signed the quitclaim deed. Likewise, it is clear that at the time of the transfer, Beverly had a "claim" against Roger for unpaid child support, and that therefore, Beverly was a "creditor" of Roger and, conversely, Roger was a "debtor" of Beverly. Neither party disputes these conclusions. Instead, the focus of this dispute is on Roger's intent at the

time of the conveyance, and the dispositive issue is whether Roger intended to defraud Beverly when he signed the quitclaim deed to Lisa.

In determining actual intent under the UFTA, § 36-705(b) instructs courts to consider whether:

> (1) the transfer or obligation was to an insider;
>
> (2) the debtor retained possession or control of the property transferred after the transfer;
>
> (3) the transfer or obligation was disclosed or concealed;
>
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) the transfer was of substantially all the debtor's assets;
>
> (6) the debtor absconded;
>
> (7) the debtor removed or concealed assets;
>
> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[4] Although long, the aforementioned list of factors is not exclusive; § 36-705(b) states that when determining actual intent, consideration may be given to additional factors. Noting this, we have remained mindful of those factors the common law considers to be indicia of fraud.

> " ' "The generally recognized badges of fraud are the lack of consideration for the conveyance, the transfer of the debtor's entire estate, relationship between transferor and the transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor. . . ." ' "

Eli's, Inc. v. Lemen, 256 Neb. 515, 533, 591 N.W.2d 543, 555 (1999), quoting *Schall v. Anderson's Implement*, 240 Neb. 658,

484 N.W.2d 86 (1992). See, also, *Brown v. Borland*, 230 Neb. 391, 432 N.W.2d 13 (1988).

[5,6] In an action seeking to set aside a fraudulent transfer, the burden of proof is on a creditor to prove, by clear and convincing evidence, that fraud existed in a questioned transaction. *Eli's, Inc., supra*; *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999). Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Fales v. Norine*, 263 Neb. 932, 644 N.W.2d 513 (2002).

Here, Beverly contends that she presented clear and convincing evidence that Roger's conveyance to Lisa was fraudulent. Specifically, Beverly argues that Roger's intent to defraud her was demonstrated by the following facts: (1) Before the transfer was made, Roger had been sued to collect unpaid child support; (2) Roger received nothing of value for the transfer; (3) outside of Roger's interest in the house, there were very limited assets from which Beverly could seek to enforce the judgment; and (4) the transfer was to an insider, Lisa.

As an initial matter, we agree that the evidence establishes that Roger was sued prior to signing the quitclaim deed. Likewise, it is clear that Roger received nothing of value in exchange for signing the quitclaim deed. We conclude that this fact, however, is of limited importance because both Roger and Lisa testified that Roger never made any financial contributions toward the property and did not believe he owned the property. Therefore, it would have been odd for Roger to have received more than a nominal payment for relinquishing his interest in property that he never contributed any assets toward and did not believe he owned.

Next, to some extent, we agree that the record establishes Roger was without other property from which Beverly could seek to enforce the judgment. For example, Roger testified that in addition to owning no other real property, he had not invested in stocks, bonds, or broker accounts. This badge of fraud is mitigated, however, by the fact that Roger was employed and, therefore, his wages could easily be garnished to satisfy the judgment.

Furthermore, we do not agree that Roger transferred his property to an "insider." Under the UFTA, an "insider" is "a relative of the debtor." § 36-702(7)(i)(A). Therefore, in order for Lisa to

be considered an insider, she must have been Roger's relative at the time of the transfer. Although the UFTA does not state who qualifies as a "relative," it is commonly understood that a relative is a person connected with another by blood or affinity. See, e.g., Black's Law Dictionary 1291 (7th ed. 1999) (relative is "[a] person connected with another by blood or affinity; a kinsman"); Webster's Third New International Dictionary, Unabridged 1916 (3d ed. 1993) (relative is "a person connected with another by blood or affinity").

Consequently, because Roger and Lisa are not connected by blood and were not married at the time Roger signed the quitclaim deed, Lisa was not Roger's relative at the time of the transfer. *Cf.*, *Ex Parte Wactor v. Wactor*, 245 Miss. 132, 146 So. 2d 540 (1962); *Robertson v. Aetna Cas. & Sur. Ins. Co.*, 629 So. 2d 445 (La. App. 1993) (ex-wife is not her ex-husband's relative under homeowner's insurance policy because she is not related by blood or marriage). Therefore, Roger did not transfer property to an insider, and this badge of fraud does not exist.

Moreover, as the district court found, a number of additional badges of fraud are noticeably absent from this case. For example, there was no evidence that (1) Roger was insolvent, (2) Roger transferred substantially all of his assets, or (3) Roger retained possession or control of the property after the transfer. Simply put, the evidence adduced at trial did not establish many of the statutory and common-law badges of fraud. Instead, the evidence indicates that Beverly's suit merely provided the impetus for Roger and Lisa to formalize their prior understanding concerning the true ownership of the property.

In sum, based on our de novo review of the record, we conclude that Beverly did not establish by clear and convincing evidence that Roger's conveyance to Lisa was fraudulent.

Parol Evidence

[7] On appeal, Beverly contends that any testimony by Roger or Lisa concerning their contention that Roger neither had, nor was intended to have, an actual ownership interest in the property should have been barred by the parol evidence rule. 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. *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004).

[8] As an initial matter, we note that Beverly did not make a single parol evidence objection during Roger's testimony. Therefore, with regard to Roger's testimony, Beverly waived her right to assert prejudicial error on appeal. See *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). Additionally, during Lisa's testimony, Beverly made only two parol evidence objections. Therefore, Beverly waived her right to contest the overwhelming majority of Lisa's testimony, including numerous statements concerning her contention that Roger did not, nor was he intended to, have an actual interest in the property. See *id.*

As to the objections Beverly did make, we conclude that the district court did not err in overruling them. Beverly first objected when Lisa's attorney asked Lisa if she signed the loan documents as an individual. The district court sustained Beverly's objection. The court did allow, however, limited inquiry concerning whether the loan documents contained certain notations that indicated that Roger and Lisa were signing the documents as husband and wife. It was in this regard that Beverly made a continuing parol evidence objection to Lisa's subsequent testimony that the signature lines in a number of the loan documents were not near notations that signified that Roger and Lisa were signing the documents as husband and wife. Beverly's other parol evidence objection was in regard to Lisa's testimony that her tax returns showed that she was the head of her household.

We note that in both instances, Lisa testified only to what the documents actually said. Consequently, Lisa's testimony did not alter, vary, or contradict the terms of the loan documents. Therefore, Lisa's testimony did not violate the parol evidence rule, and the district court did not err in overruling Beverly's objections on that basis.

MERE LEGAL TITLE

Next, Beverly argues that the district court erred in failing to find that a lien on the property existed prior to the time the quitclaim deed was executed. According to Beverly, under Neb. Rev. Stat. § 25-1504 (Reissue 1995), a judgment lien attaches to the land of a debtor the day the judgment is rendered. Therefore,

because Roger was in arrears on his child support obligation, Beverly contends that a judgment lien attached to Roger's interest in the property on June 12, 1992, the date the deed of trust was recorded in Douglas County.

[9] As the district court noted, however, a lien of judgment does not attach to the mere legal title where the equitable and beneficial interest is in another. *Action Realty Co., Inc. v. Miller*, 191 Neb. 381, 215 N.W.2d 629 (1974); *Knaak v. Brown*, 115 Neb. 260, 212 N.W. 431 (1927). In such a situation, equity allows a court to break free from the normal chains of legal title and disregard a lienholder's claim to the interest of a debtor who holds mere legal title.

In the instant case, based on our de novo review, we conclude that the record is replete with evidence which establishes that Roger's interest in the property was that of mere legal title and that all the equitable and beneficial interests in the property resided with Lisa. For example, both Roger and Lisa testified that it was Lisa who wished to construct the house and that it was only after Lisa was refused financing that she turned to Roger. Although Roger cosigned the loan, both parties agreed that Lisa made the downpayment for the property, as well as all of the subsequent mortgage payments. Lisa also paid for the needed repairs and improvements to the home, in addition to paying for the furnishings for the home. Furthermore, Lisa testified that she was the sole decisionmaker when it came to the property and believed she could have sold it without Roger's approval. Likewise, Roger testified that he did not believe that he owned the property.

Although Beverly makes much of the fact that the warranty deed and a few of the loan documents contain references to Roger and Lisa as husband and wife, both Roger and Lisa testified that (1) they never conveyed this information to their financing agent, (2) their financing agent never asked about their marital status, and (3) they signed the documents in a hurried manner without closely reading them. Furthermore, both Roger and Lisa testified that after their divorce, they continued to live together only because they believed it was in their child's best interests. By leaving Lisa's home shortly after his child's departure (and before the initiation of Beverly's suit), Roger demonstrated that he did not consider the property to be his own.

In sum, the evidence revealed that Roger's interest in the property was that of mere legal title and that all the equitable and beneficial interests in the property resided with Lisa. Therefore, the district court correctly concluded that Beverly's judgment lien did not attach to Roger's limited interest in the property.

Roger and Lisa as Association

Beverly also contends that the district court erred in failing to determine that Roger and Lisa formed an association for the purpose of holding property under Neb. Rev. Stat. § 25-313 (Reissue 1995) and then used that association to perpetrate a fraud upon her. The district court determined that because Beverly failed to establish that Roger's conveyance to Lisa was fraudulent under the UFTA, her association claim was without merit. We agree. As noted above, based on our de novo review of the record, Beverly failed to establish that Roger's conveyance to Lisa was fraudulent. Consequently, her association-based theory of recovery, which is premised on the allegedly fraudulent conveyance, must also fail.

Testimony of Lawyer

On remand from the Court of Appeals, Beverly called a local lawyer to testify about the significance that the police would attach to Roger and Lisa's living situation. Lisa objected on the ground that the police, and not a lawyer, should be called to testify as to what the police will do in a given situation. The objection was sustained, and Beverly made an offer of proof.

Essentially, the lawyer would have testified that when seeking to obtain a search warrant, the police will often submit utility and land title records to the judicial officer as evidence that the person has a legal interest in the property discussed in the records. Therefore, according to the lawyer, because Roger's name was on the warranty deed and Roger paid utilities for the home, the police would have concluded that Roger had a legal interest in the property.

[10] On appeal, Beverly contends that the district court erred in sustaining Lisa's objection to the lawyer's testimony. Without passing on the correctness of the district court's ruling, we conclude that Beverly was not prejudiced by the exclusion of this evidence because substantially similar evidence was admitted

without objection. See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002) (improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection).

The record illustrates that prior to Lisa's objection and Beverly's offer of proof, the lawyer was allowed to testify, without objection, that (1) in anticipation of getting a search warrant to search a home, the police look to see who has a legal interest in the property; (2) the police examine land records and utility records to determine who has a legal interest in the property; and (3) land records and utility records are often included in the affidavit upon which the application for a search warrant is based. In addition, evidence had already been presented that (1) Roger's name was on the warranty deed to the property and (2) Roger paid the utilities for the home in which he and Lisa lived.

Therefore, prior to Lisa's objection, the court had already been presented with evidence from which it could determine that if the police sought to search the house where Roger lived, they would conclude, based on title and utility records, that Roger had a legal interest in the home. Consequently, no prejudice has befallen Beverly because the lawyer, if he had been allowed to testify further, would have simply emphasized and restated what was already before the court.

CONCLUSION

For each of the foregoing reasons, Beverly's assignments of error are without merit. The judgment of the district court is affirmed.

AFFIRMED.

IN RE CONSERVATORSHIP OF H. COOPER HANSON III, DECEASED. MARGARET HANSON, CONSERVATOR, APPELLANT, V. AMY LOHRBERG PECK ET AL., APPELLEES.

682 N.W.2d 207

Filed June 25, 2004. No. S-02-1241.

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 a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Guardians and Conservators: Rules of the Supreme Court: Words and Phrases.** The word "compensation" in the context of letters of conservatorship and Neb. Ct. R. of Cty. Cts. 43 (rev. 2000) includes any form of payment or remuneration made to the conservator from assets of the protected person.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the County Court for Washington County, C. MATTHEW SAMUELSON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Gregory P. Drew for appellant.

Denise E. Frost, of Johnson & Mock, for appellees Amy Lohrberg Peck, John Lohrberg, and Jonathan Hanson.

James B. Respeliers, of Respeliers & Harmon, P.C., for appellee Great Western Bank.

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

STEPHAN, J.

This court has promulgated a general rule applicable to all county courts which requires letters of conservatorship to include the following language: " 'You shall not pay yourself or your attorney compensation from the assets or income of your ward . . . without first obtaining an order therefor . . . .' " Neb. Ct. R. of Cty. Cts. 43 (rev. 2000). Language to this effect was included in letters of conservatorship issued to Margaret Hanson when she was appointed conservator for the estate of her husband, H. Cooper Hanson III (Cooper), in April 2000.

From the date of her appointment until Cooper's death on January 19, 2001, Margaret transferred funds from Cooper's accounts to her personal account pursuant to an oral agreement with Cooper which antedated her appointment as conservator. These transfers were made without court approval. Objections

were filed by the guardians for Cooper's minor child and individually by Cooper's adult child (appellees). The personal representative of Cooper's estate also filed an objection. In response, the Washington County Court held that these payments were made in violation of the restriction imposed by the letters of conservatorship and ordered Margaret to pay $24,800 to the personal representative of Cooper's estate as reimbursement for the unauthorized payments to herself. Margaret appealed, and the Nebraska Court of Appeals reversed, based upon its determination that the challenged payments did not constitute "compensation" and did not violate the prudent person standard. *In re Conservatorship of Hanson*, 12 Neb. App. 202, 670 N.W.2d 460 (2003). We granted the appellees' petition for further review.

FACTS

Cooper and Margaret were married in 1995. It was the second marriage for both. Cooper's two children from his previous marriage, both minors at the time, were living with his former spouse. Margaret's daughter lived with her and Cooper in a house owned by Margaret.

In the fall of 1995, Cooper began having health problems which led to a diagnosis of amyotrophic lateral sclerosis, also known as ALS or Lou Gehrig's disease, in July 1996. In August of that year, Margaret's daughter left for college. In November, Cooper's former spouse died unexpectedly and his two minor children came to live with him and Margaret. Cooper's health worsened, and by March 2000, he was confined to his home.

Margaret was appointed temporary conservator of Cooper's estate on April 19, 2000, and conservator on June 22. The conservatorship was created in order to facilitate the receipt of Social Security benefits for which Cooper had become eligible. The letters of conservatorship issued to Margaret provided: "You shall not pay yourself or your attorney compensation from the assets or income of the Protected Person . . ." without prior order of the court.

Prior to their marriage, Margaret and Cooper entered into an oral agreement whereby Cooper would give Margaret money each month as reimbursement for the added expense of his living in her house. From the time of this agreement until January 2000,

Cooper transferred $1,950 per month to Margaret. After that date, the amount increased to approximately $2,500. As conservator of Cooper's estate, Margaret continued to have these funds transferred directly into her personal account each month. She did not seek or obtain court approval for the transfers.

After Cooper's death, Margaret petitioned for approval of her final accounting, termination of the conservatorship, and discharge as conservator. Objections were filed to the proposed accounting by the personal representative and the appellees. At the hearing on the objections, Margaret initially testified that the monthly payments she made to herself were reimbursement for the added expense of Cooper's living in the house. On cross-examination, however, Margaret testified that during the conservatorship, she and Cooper agreed that in addition to making the mortgage and utility payments, he would continue to pay her a monthly allowance to make up for her lost income. Margaret testified that the transfers were not payment for the care she gave Cooper.

ASSIGNMENTS OF ERROR

The appellees assign, restated and consolidated, that the Court of Appeals erred in (1) reversing the judgment of the county court ordering Margaret to reimburse the conservatorship $24,800, (2) applying an unduly narrow definition of the word "compensation," and (3) misapplying the standard of review applicable to appeals in probate matters by reweighing the evidence instead of deferring to the factual findings of the probate court.

STANDARD OF REVIEW

[1-3] 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 Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002). 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. 297, 664 N.W.2d 445 (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. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

ANALYSIS

The issue presented in this appeal is whether the payments which Margaret made to herself from Cooper's funds while serving as conservator constituted "compensation" as that term is used in the letters of conservatorship. The Court of Appeals adopted a narrow definition of this term, holding that "it is not just any payment, but money for a specific purpose—compensation, meaning in this case payment for services rendered as conservator or attorney—that was prohibited." *In re Conservatorship of Hanson*, 12 Neb. App. 202, 206, 670 N.W.2d 460, 463-64 (2003). The court concluded that the payments in question "were not for services Margaret rendered as conservator, but were merely a continuation of an agreement between husband and wife which Margaret continued effectuating until Cooper's death." *Id.* at 206, 670 N.W.2d at 464.

Informal financial arrangements between married persons are generally not subjected to judicial scrutiny. However, when a court appoints one spouse to serve as the conservator of the estate of the other, a new legal relationship is formed in which the conservator assumes obligations for which he or she is accountable to the court as well as to the protected spouse. In such protective proceedings, the appointment of a conservator is based upon a judicial determination that it is necessary to protect the property of one who is unable to manage his or her property and affairs effectively for various reasons, including "physical illness or disability," and that such person

> has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by him or her and that protection is necessary or desirable to obtain or provide funds.

Neb. Rev. Stat. § 30-2630(2) (Reissue 1995). When an individual is in need of physical or financial protection, the law must in many instances think and act for him or her. *In re Guardianship*

& Conservatorship of Donley, 262 Neb. 282, 631 N.W.2d 839 (2001). Statutory protective proceedings, such as conservatorships, are the means by which that task is accomplished.

The appointment of a conservator vests "title as trustee to all property of the protected person" in the conservator. Neb. Rev. Stat. § 30-2649 (Reissue 1995). "In the exercise of his or her powers, a conservator is to act as a fiduciary . . . ." Neb. Rev. Stat. § 30-2646 (Cum. Supp. 2002). Every conservator "must account to the court for his [or her] administration of the trust" upon resignation or removal. Neb. Rev. Stat. § 30-2648 (Reissue 1995).

Because a conservator holds property in trust, any transaction on behalf of the protected person which inures to the financial benefit of the conservator is especially subject to judicial oversight. Generally, such transactions are regarded with distrust by the courts.

> Since the relation is so intimate, the dependence so complete, and the influence so great, any transaction between the two parties or by the [conservator] alone through which the [conservator] obtains a benefit, entered into while the relation exists, is, in the highest sense, suspicious and presumptively fraudulent.

39 Am. Jur. 2d *Guardian and Ward* § 254 at 181 (1999).

[4] Thus, a transfer of funds or other assets from one spouse to another has a legal significance transcending the marital relationship when it is carried out by the transferee as the conservator for the estate of the transferor. In light of these considerations, we conclude that the Court of Appeals adopted an unduly narrow definition of the word "compensation" in the context of letters of conservatorship and county court rule 43 by restricting it to "payment for services rendered as conservator." See *In re Conservatorship of Hanson*, 12 Neb. App. at 206, 670 N.W.2d at 464. Given the risk of harm attendant to self-dealing by a fiduciary, we conclude that compensation in this context should include any form of payment or remuneration made to the conservator from assets of the protected person. This broader definition may well include many transactions which are perfectly legitimate and consistent with the conservator's fiduciary obligation; however, subjecting all such transactions to the filter of prior judicial approval affords a measure of protection against

those which are not. So construed, rule 43 embodies the concept that self-dealing by a conservator may be permissible, but only after a judicial finding that there is an adequate reason for the transaction. See *In re Guardianship of Jordan*, 616 N.W.2d 553 (Iowa 2000).

We therefore examine the record to determine whether the judgment of the county court conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. In her petition for approval of her final account, Margaret alleged that "[b]y agreement between Petitioner and the ward, entered into approximately January 1, 1999, Petitioner was to be compensated an amount for the care of the ward . . . ." At the hearing, however, Margaret testified that the transfers which she made to herself pursuant to this agreement were not in payment for care she gave to Cooper, but, rather, "[t]o make up for my lost income." Regardless of which of these statements we rely upon, by Margaret's own admission, the payments were a form of compensation.

Margaret argues that the monetary transfers to her personal bank account were not compensation but were "family financial management in the family's accustomed manner." Brief for appellant at 11. She further contends that "[t]he record is clear that all pooled funds were spent on persons legally dependent on the protected person or members of the protected person's household who are unable to support themselves and who were in need of support." Brief for appellant at 12. Based on our determination, however, that in this context compensation includes any form of payment, the purpose of the transfers is irrelevant.

We conclude that the county court's findings are supported by competent evidence, and are neither arbitrary, capricious, nor unreasonable. *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). We note, as did the county court, that the events which are the subject of this action occurred during a period of tremendous stress and anxiety occasioned by Cooper's illness and that there is no indication in the record that Margaret acted out of any sinister motive. However, the record does clearly establish that in contravention of her letters of conservatorship, Margaret paid compensation to herself from the assets of the protected person without prior approval of the

court. This limitation upon the powers of the conservator was required under a rule promulgated by this court which we are obligated to enforce uniformly. Accordingly, we conclude that the county court did not err in requiring Margaret to pay the personal representative of Cooper's estate $24,800.

CONCLUSION

On further review, we conclude that the Court of Appeals erred in reversing the judgment of the county court. We therefore reverse the judgment of the Court of Appeals and remand the cause to that court with directions to affirm the judgment of the Washington County Court.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

BIG RIVER CONSTRUCTION COMPANY, APPELLEE, V. L & H PROPERTIES, INC., APPELLANT.

681 N.W.2d 751

Filed June 25, 2004. No. S-02-1361.

1. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions 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. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.
4. ____: ____: ____. 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 such further proceedings as the court deems just.
5. **Summary Judgment.** The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to judgment as a matter of law.
6. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
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.

8. ____. A contract must be construed as a whole, and if possible, effect must be given to every part thereof.
9. **Parol Evidence: Contracts.** Unless a contract is ambiguous, parol evidence cannot be used to vary its terms. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
10. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.
11. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
12. **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.
13. **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.

Appeal from the District Court for Otoe County: RONALD E. REAGAN, Judge. Affirmed.

Timothy W. Nelsen, of Fankhauser, Nelsen & Werts, P.C., for appellant.

John J. Horan, of Brandt, Horan, Hallstrom, Sedlacek & Stilmock, for appellee.

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

MCCORMACK, J.

I. INTRODUCTION

Big River Construction Company (Big River) brought an action to recover for the value of improvements made to property it had leased from L & H Properties, Inc. (L & H), which filed a cross-petition alleging that Big River had committed waste to the property. The district court found in favor of Big River and dismissed L & H's cross-petition. L & H appeals.

II. BACKGROUND

Big River entered into a lease agreement to lease property located in Nebraska City, Nebraska, from L & H. The lease term ran from August 1, 1991, to July 31, 2001, with rent of $1,200 due annually on August 1.

The relevant provision of the lease is as follows:

> LESSOR'S RIGHT TO TERMINATE LEASE AND IMPROVEMENTS PURCHASE.
>
> If the [president of Big River] dies or becomes disabled during the term of this lease, or any extension thereof, the Lessee may assign this lease or sublet the property subject to the approval of the assignee or sublessee, by the Lessor. If the Lessor does not approve the assignee or sublessee designated by the Lessee, this lease shall be deemed terminated and the Lessor shall pay to the Lessee compensation for the improvements made upon the premises. The amount of compensation to be paid for the improvements shall be determined by an appraisal made of the property. From that appraisal shall be deducted the value of the ground and the depreciation of the improvements claimed by the Lessee in its accounting procedure and reported on its federal income tax return for each year. Any prepaid rent shall be repaid or credited to the Lessee upon the lease termination. It is understood that the Lessee intends to depreciate the cost of the shop building over a period of thirty years. Upon the termination of the lease term, the Lessor shall pay Lessee for the improvement at a cost determined by the formula set forth above.

The record indicates that initially, the parties were agreeable to renewing the lease at the end of the 10-year lease term. Ultimately, however, Big River decided to vacate the premises and did so on August 11, 2001. Cleon Popelka, president of Big River, testified that he notified Howard Bebout, president of L & H, that Big River had vacated the premises.

During the term of the lease, and pursuant to its authority under the lease, Big River erected a shop building on the leased property. Subsequent to Big River's vacating the property, Big River filed a petition alleging that L & H breached the lease agreement by failing to pay Big River for the value of that improvement. In its answer, L & H denied that it owed Big River for the improvement and filed a cross-petition alleging that Big River had committed waste to the property.

L & H moved for summary judgment. The district court denied that motion. Following a bench trial, the court found in favor of Big River, and explained its reasoning from the bench:

> [T]he attorney that drafts the lease is — if there is ambiguity, it's construed against his client. As it turns out, the law firm probably represented both sides at this time, and so it wouldn't be proper to construe any ambiguities against the — either side.
>
> Having said that — and I've looked back over that lease a number of times since the summary judgment, and I am not really certain that there is an ambiguity. . . .
>
> But Paragraph 9 can make a lot of sense if, instead of having one simple paragraph, you got two paragraphs with the last sentence being a second paragraph. And unless you read it that way, the lease doesn't make any sense at all.
>
> . . . .
>
> . . . [M]y conclusion is that it's clear enough for my purposes that the lease provided that there was going to be payment for the improvements if there was, under the first scenario, the death or disability of Mr. Popelka.
>
> Under the second scenario, there was going to be payment on termination of the lease term. And the termination of the lease term in the second scenario, it still goes back to a formula that's set forth in the — under the first scenario.

The district court then proceeded to value the improvements at $30,000. After deducting $6,169.82 for depreciation, the court awarded Big River $23,831.18 plus court costs. L & H appeals.

III. ASSIGNMENTS OF ERROR

L & H assigns, rephrased and renumbered, that the district court erred in (1) denying L & H's motion for summary judgment; (2) determining that the lease contract was ambiguous; (3) admitting parol evidence, including the testimony of both Popelka and the attorneys involved in the initial drafting and execution of the lease agreement, without first determining that the lease contract was ambiguous; (4) admitting the testimony of the attorneys involved in the initial drafting and execution of the lease agreement when such testimony was subject to the attorney-client privilege; (5) awarding Big River damages without sufficient proof; (6) accepting the opinion of Big River's appraiser with regard to the value of improvement without deducting the value of the ground and the depreciation of the improvement; and (7) denying L & H's motion for new trial.

IV. STANDARD OF REVIEW

[1,2] The meaning of a contract and whether a contract is ambiguous are questions of law. *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (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.*

V. ANALYSIS

1. Motion for Summary Judgment

In its first assignment of error, L & H argues that the district court erred in not granting its motion for summary judgment.

[3,4] We have repeatedly stated that a denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004). The only exception we have fashioned to this general rule is that 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 such further proceedings as the court deems just. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004).

[5] Absent the above-stated exception, the denial of a motion for summary judgment is neither appealable nor reviewable; thus we need not consider the district court's denial of L & H's motion for summary judgment. The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to judgment as a matter of law. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

L & H's first assignment of error is without merit.

2. Ambiguity of Contract

In its second assignment of error, L & H argues that the district court erred in determining that the lease contract was ambiguous.

L & H argues that the lease is unambiguous in providing that under the facts presented, Big River was not entitled to payment for improvements made to the leased property.

The district court, in its oral findings, stated that it was "not really certain that there [was] an ambiguity [in the lease]." However, L & H argues that the "district court clearly re-drew the Lease with Option," when it concluded that the last sentence of paragraph 9 of the lease should be read as its own separate paragraph. Brief for appellant at 14. As a result, L & H argues the district court must have concluded that the lease was ambiguous.

[6] The meaning of a contract, and whether a contract is ambiguous, are questions of law. *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (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.* The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Id.*

[7,8] 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. *Trimble v. Wescom*, 267 Neb. 224, 673 N.W.2d 864 (2004). A contract must be construed as a whole, and, if possible, effect must be given to every part thereof. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

Given the above-stated propositions of law, this court must independently review the lease agreement and make our own determination as to whether the agreement was ambiguous. The court did not, as alleged in the second assignment of error, find that the lease was ambiguous.

A plain and ordinary reading of paragraph 9 reveals that payment for improvements arises under two different sets of circumstances. In the first instance, Big River was entitled to payment for the improvements made to the leased property under the formula contained in paragraph 9 if (1) Popelka died or became disabled and (2) Big River leased or sublet the property to another party without L & H's approval of the assignee or sublessee. In the second instance, Big River was entitled to payment

for the improvements "[u]pon the termination of the lease term," as determined by the formula in paragraph 9.

Lending support to the conclusion reached by the district court that paragraph 9 provides for payment under two different sets of circumstances is the fact that L & H's reading makes several other lease provisions redundant and useless. L & H argues that Big River is entitled to payment for the improvements only in the event of Popelka's death or disability and L & H's subsequent disapproval of Big River's assignee or sublessee. L & H's interpretation renders the last sentence of paragraph 9 a mere restatement of the second sentence of the paragraph. If, however, the district court was correct in interpreting the last sentence as requiring L & H to pay for improvements upon "the termination of the lease term," that reading would give meaning and effect to the last sentence of paragraph 9.

L & H's interpretation also renders paragraph 13 of the lease unnecessary. Paragraph 13 provides that if Big River defaults, the "Lessee shall not be entitled to payment for the improvements placed upon said property." If the second sentence of paragraph 9 outlines the only circumstance under which Big River was entitled to payment for reimbursement, then additionally restricting Big River's right to payment for improvements as is done in paragraph 13 would not be necessary. If, however, the last sentence of paragraph 9 were read to mean that any termination of the lease provided for payment by L & H to Big River, paragraph 13 would simply qualify Big River's right to payment when Big River was in default of the agreement.

Upon our own independent review of this lease, we determine that it is unambiguous. We determine that the district court did not err in concluding that Big River was entitled to payment for improvements made to the leased property pursuant to paragraph 9 of the lease agreement. L & H's second assignment of error is without merit.

3. Admission of Parol Evidence

In its third assignment of error, L & H argues that the district court erred in admitting portions of Popelka's testimony, as well as portions of the testimony of the attorneys involved in the initial drafting and execution of the lease agreement as to their

interpretation of paragraph 9 of the lease. L & H argues that this testimony was inadmissible parol evidence.

[9] Unless a contract is ambiguous, parol evidence cannot be used to vary its terms. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

We have determined that the lease contract was unambiguous. As a result, parol evidence was inadmissible and the district court erred in admitting the portions of Popelka's testimony, as well as the portions of the testimony of the attorneys involved in the initial drafting and execution of the lease agreement. These witnesses each opined as to their interpretation of paragraph 9 of the lease contract.

[10,11] As a general rule, however, to constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). We determine that the admission of the parol evidence did not unfairly prejudice L & H since we determined, without reference to any of the disputed parol evidence, that the last sentence of paragraph 9 unambiguously provided for payment to Big River for improvements made to the property upon the termination of the lease. Error without prejudice provides no ground for appellate relief. *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003). We also note that in the district court's findings, it did not rely on this parol evidence.

L & H's third assignment of error is without merit.

4. Attorney-Client Privilege

In its fourth assignment of error, L & H argues that the district court erred in admitting testimony of the attorneys involved in the initial drafting and execution of the lease agreement because such testimony was subject to the attorney-client privilege.

Assuming without deciding that the testimony at issue was privileged and that it was error for the district court to allow such testimony, we nevertheless conclude that the admission of this parol evidence was not prejudicial to L & H. Such testimony

was unnecessary in our determination that the lease contract was unambiguous. See *Agri Affiliates, Inc. v. Bones, supra.*

L & H's fourth assignment of error is without merit.

5. Damages

In its fifth and sixth assignments of error, L & H argues that the district court erred in awarding damages despite the lack of sufficient proof and in accepting Big River's appraisal as the value of the property. The district court awarded Big River damages in the amount of $23,831.18.

[12] 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. *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002). On appeal, the fact finder's determination of damages is given great deference. *Id.*

(a) Date of Appraisal

In its fifth assignment of error, L & H argues that the $30,000 value testified to by Big River's appraiser, George Tesar, Jr., was not sufficient proof of the value of the building because the appraisal reflected the value on March 7, 2002, not July 31, 2001.

At trial, L & H objected to Tesar's appraisal on the basis of foundation and relevance. The district court overruled the foundation objection and overruled the relevancy objection "at the present time on relevancy, subject to a motion to strike if there is no relationship back to the appropriate date." Tesar then testified to his $30,000 appraisal of the leased property on March 7, 2002. In its oral findings, the district court stated:

> There is testimony in, and there is testimony in that the value of the improvements as of March 7th of 2002 w[as] $30,000.
>
> I received that testimony and indicated at the time that objections on foundation and relevancy were overruled subject to a motion to strike. There was never a motion to strike made. So I do have in front of me testimony that the value of the leasehold improvements — and that obviously means improvements after the deduction of the ground. The value of the ground was $30,000 as of March 7th.

> I think it's within my prerogative as a finder of fact to assume that they were at least that much as of July 31st of 2001. There was no testimony or evidence at all that there was any waste or — committed on the property that required any kind of substantial payment by . . . Bebout.

Although the district court did not expressly refer to Neb. Rev. Stat. § 27-104(2) (Reissue 1995), it appears its ruling with regard to Tesar's appraisal testimony was based on this statute. That statute provides "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." This court in *Reavis v. Slominski*, 250 Neb. 711, 724-25, 551 N.W.2d 528, 540 (1996), noted that

> "[t]he everyday method of handling the situation when the adversary objects to the relevancy or the competency of the offered fact is to permit it to come in conditionally, upon the assurance, express or implied, of the offering counsel that [he] will 'connect up' the tendered evidence by proving, in the later progress of his case, the missing facts. . . ."
>
> . . . The burden is on the objecting party to object if the offering counsel fails to connect up, and this is generally done with a motion to strike.

Following L & H's objection to Tesar's testimony, it was proper for the district court to overrule the objection and allow Big River to "connect up" the period of time between March 7, 2002, and the July 31, 2001, expiration of the lease. If L & H believed that Big River's counsel did not adequately show the relationship of the appraisal back to the expiration of the lease term, it should have made a motion to strike Tesar's testimony on that point. No such motion to strike was made. As a result, Tesar's appraisal was properly before the district court, and the district court did not err in relying on the appraisal in determining the value of Big River's improvement.

We determine that L & H's fifth assignment of error is without merit.

(b) Tesar's Testimony

In its sixth assignment of error, L & H argues that the district court also erred in accepting Tesar's appraisal because his

testimony indicated that he had not deducted from his appraisal the value of the ground or the depreciation taken by Big River on its federal tax return.

Paragraph 9 of the lease agreement provides the formula by which the value of improvements made to the leased property should be calculated. It provides in relevant part:

> The amount of compensation to be paid for the improvements shall be determined by an appraisal made of the property. From that appraisal shall be deducted the value of the ground and the depreciation of the improvements claimed by the Lessee in its accounting procedure and reported on its federal income tax return for each year.

To support its contention that Tesar did not deduct either the value of the land or depreciation in conducting his appraisal, L & H directs us to a portion of L & H's cross-examination of Tesar:

> [L & H's counsel:] [D]id you, when you did the appraisal of the property, deduct the value of the ground and depreciation of improvements claimed by the lessee in its accounting procedure and reported on its federal income tax return for each year?
>
> [Tesar:] Did I depreciate?
>
> Q. When you did this appraisal, did you deduct the value of the ground and the depreciation of the improvements claimed by the lessee in its accounting procedure and reported on its federal income tax return for each year?
>
> A. No.

L & H overlooks another portion of Tesar's testimony. On direct examination, Tesar testified:

> [Big River's counsel:] All right. When you did your appraisal, did you arrive at a figure, then, with respect to the improvements?
>
> [Tesar:] Yes.
>
> Q. The value? And at the time you did it, was — did you separate out the real estate that it was situated on? Is your appraisal based strictly on the value of the improvements, the building that you appraised?
>
> . . . .
>
> A. Yes.

> Q. Okay. And you do have an opinion with respect to the fair market value of that property, do you —
>
> A. Yes, I do.
>
> Q. — on March 7, 2002? And what is your opinion of the fair market value of that property on that date?
>
> . . . .
>
> A. $30,000.

Tesar's testimony on direct examination indicates that the value of the ground was deducted from the appraisal he conducted. Tesar's testimony on cross-examination shows that he did not deduct depreciation, but does not contradict his testimony on direct examination that the value of the ground was deducted. On cross-examination, Tesar was asked whether he deducted both the value of the ground and depreciation from his appraisal. In testifying, Tesar clarified L & H's question, stating "[d]id I depreciate?" before answering "[n]o." Given the phrasing of L & H's question to Tesar on cross-examination, as well as Tesar's attempt at clarification, Tesar's cross-examination testimony is consistent with his direct testimony, and it was proper for the district court to rely on Tesar's appraisal to establish the value of the improvement.

In addition, Big River established the depreciation of the improvement through Popelka's testimony: "[Big River's counsel:] . . . Is it true also that your CPA's had depreciated that on your income tax return and had taken $5,520.80 in depreciation? [Popelka:] I believe that's right. Q. Up to that period of time? A. I believe that's right." L & H also offered an asset depreciation form from Big River's tax return listing depreciation on the building at $6,169.82.

The lease provided, "From [the] appraisal shall be deducted the value of the ground and the depreciation of the improvements . . . ." Tesar's testimony was sufficient to establish that his appraisal was the value of the building alone. The terms of the lease did not preclude establishing depreciation separately from the appraisal of the improvement. Big River offered evidence of an appraisal which excluded the value of the land. Big River and L & H both offered evidence of the depreciation Big River had taken on the improvement. We conclude that the valuation formula of the lease

agreement was followed and that the district court did not err in the damages it awarded to Big River.

L & H's sixth assignment of error is without merit.

6. Motion for New Trial

In its seventh and final assignment of error, L & H argues that the district court erred in failing to grant its motion for a new trial.

[13] 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.*, 266 Neb. 517, 667 N.W.2d 194 (2003). The district court found that the lease agreement was unambiguous and that Big River was entitled to a judgment in the amount of $23,831.18. Upon our review of the record and the applicable law, we conclude that the district court did not abuse its discretion in not granting L & H's motion for a new trial.

L & H's seventh assignment of error is without merit.

VI. CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DARRIN J. McHENRY, APPELLANT.

682 N.W.2d 212

Filed June 25, 2004. No. S-03-217.

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: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. When such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.
3. **Postconviction.** An evidentiary hearing is not required when the motion alleges only conclusions of fact or law.

4. **Postconviction: Judges: Recusal.** There is no rule of law which automatically disqualifies a judge who has presided at trial from subsequently considering a postconviction action.
5. **Judges: Recusal: Waiver.** A defendant who is aware of a reason for recusal waives the issue of whether the judge should have recused himself or herself when the defendant fails to request the judge's recusal.
6. **Speedy Trial: Indictments and Informations: Complaints.** If an amendment to the complaint or information does not change the nature of the charge, time continues to run against the State for purposes of the speedy trial act.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by the same lawyers, generally speaking, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.
8. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden 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. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
9. **Effectiveness of Counsel: Proof.** In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
10. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
11. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
12. **Effectiveness of Counsel.** Defense counsel is not ineffective for failing to raise an argument that has no merit.
13. **Trial: Proof: Appeal and Error.** Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. However, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.
14. **Effectiveness of Counsel: Jury Instructions.** Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.
15. **Postconviction: Effectiveness of Counsel: Jury Instructions.** A postconviction court is not required to hold an evidentiary hearing on a claim that an attorney was ineffective for failing to propose an alternative instruction when the instruction given was a standard instruction which had consistently been found adequate and constitutional by this court.
16. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information,

unless the 6 months are extended by any period to be excluded in computing the time for trial.

17. **Speedy Trial: Attorney and Client.** Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 1995) excludes delays resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel.
18. **Speedy Trial.** The plain language of Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 1995) anticipates a request for a continuance made solely by counsel.
19. **Speedy Trial: Waiver.** Under Neb. Rev. Stat. § 29-1207 (Reissue 1995), a defendant has the right to waive a speedy trial and consent to a continuance as long as he or she was properly advised either by counsel or the court of his or her rights to a speedy trial.
20. **Speedy Trial: Effectiveness of Counsel: Motions to Dismiss.** When a delay in trial is attributable to a defense motion for a continuance filed within the statutory period, defense counsel is not ineffective for failing to file a motion to dismiss.
21. **Attorney and Client.** Except for such basic decisions as whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel.
22. **Speedy Trial: Waiver.** The statutory right to a speedy trial is not a personal right that can be waived only by a defendant.
23. **Speedy Trial: Waiver: Attorney and Client.** Defense counsel's request for a continuance in order to prepare for trial waives a defendant's statutory right to a speedy trial despite the defendant's objections to the continuance.
24. **Speedy Trial: Effectiveness of Counsel.** Where defense counsel's continuance is granted before the expiration of the statutory speedy trial time, the period of continuance is properly excludable under Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 1995) and defense counsel is not ineffective by failing to assert a defendant's right to a speedy trial or by failing to file a motion for discharge.
25. **Postconviction: Justiciable Issues: Right to Counsel.** A district court does not abuse its discretion by failing to appoint counsel when the assigned errors in a postconviction petition contain no justiciable issue of law or fact.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Darrin J. McHenry, pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MILLER-LERMAN, J.

I. INTRODUCTION

Darrin J. McHenry appeals from an order of the district court for Lincoln County denying his motion for postconviction relief

without an evidentiary hearing. We conclude that McHenry's claims on appeal are without merit. Accordingly, we affirm.

II. BACKGROUND

McHenry's initial conviction was reversed on appeal, and the cause was remanded for a new trial. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995) (*McHenry I*). The facts underlying the current case are summarized in our opinion affirming McHenry's convictions from his second trial, found at *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996) (*McHenry II*). They are repeated here only as necessary to our disposition of McHenry's postconviction claims.

An information was filed against McHenry on January 22, 1993, charging him with aiding and abetting first degree murder and aiding and abetting attempted robbery for his involvement in the death of Richard Sterkel. Sterkel was found dead in North Platte, Nebraska, and an autopsy revealed that the cause of death was manual strangulation, compression of the neck, and multiple blunt injuries to the head, neck, and chest. On August 4, an amended information was filed, adding charges of first degree sexual assault and aiding and abetting first degree sexual assault.

McHenry was living with three other men at a transient encampment near the place where Sterkel's body was found. The men had invited Sterkel to drink with them, and he stayed for a few days. Both of McHenry's codefendants testified that on July 28, 1992, the day of Sterkel's death, McHenry initiated an assault on Sterkel after the men had been drinking. McHenry and two others began beating Sterkel and forced him to show them where he had hidden his wallet in the woods. Sterkel was brutally beaten and strangled. His body was found 2 days later.

Following a jury trial, McHenry was acquitted of aiding and abetting first degree sexual assault but convicted of the remaining counts. See *McHenry I*. Because of the trial court's jury instruction on reasonable doubt, McHenry's convictions were reversed on direct appeal. *Id.*

McHenry was tried again, convicted of aiding and abetting first degree murder and aiding and abetting attempted robbery, and acquitted of sexual assault. See *McHenry II*. On his second direct appeal, McHenry's conviction for aiding and abetting

attempted robbery was reversed as violating the Double Jeopardy Clause's prohibition against multiple punishments for the same offense, because the Legislature had not affirmatively indicated an intent to punish defendants independently for felony murder and for the underlying felony. McHenry is currently serving a sentence of life imprisonment for aiding and abetting first degree murder. He was represented by the same two attorneys in both trials and in both appeals.

On February 12, 2003, McHenry filed a motion for postconviction relief. The district court determined that there was no denial of any constitutional right which would warrant granting the motion. The motion was denied without an evidentiary hearing. The court also overruled McHenry's motion for appointment of counsel. McHenry appeals.

III. ASSIGNMENTS OF ERROR

McHenry assigns, reordered and restated, that the district court judge erred in failing to recuse himself sua sponte from considering McHenry's postconviction motion because some of the postconviction allegations involved the judge's purported misconduct. McHenry further assigns that the district court erred in (1) failing to find that the prosecutor had engaged in misconduct by conspiring with McHenry's defense counsel to deny McHenry his right to a speedy trial; (2) failing to find that his trial counsel had provided ineffective assistance by (a) failing to investigate a substantial defense, (b) failing to object to the court's prejudicial remarks made during voir dire of his second trial, (c) failing to object to vague jury instructions; (d) failing to assert his right to a speedy trial or seek a discharge once that right had been violated; and (e) conspiring with the prosecutor for the purpose of denying him his right to a speedy trial; and (3) failing to grant him an evidentiary hearing and to appoint postconviction counsel.

IV. 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).

V. ANALYSIS

[2,3] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. When such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief. *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

1. Failure to Recuse

[4,5] McHenry initially claims that the district court judge erred in failing to recuse himself sua sponte from ruling on McHenry's postconviction motion because some of McHenry's allegations involved the judge's purported misconduct. However, "[t]here is no rule of law which automatically disqualifies a judge who has presided at trial from subsequently considering a postconviction action." *State v. Joubert*, 235 Neb. 230, 235, 455 N.W.2d 117, 122 (1990). We have reviewed McHenry's claims of judicial misconduct, and we see no indication that the purported "misconduct" was of the type that would have required the judge to recuse himself. Moreover, McHenry waived this issue by failing to request the judge's recusal when McHenry was aware of the court's actions of which he complains. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (refusing to consider on direct appeal whether trial judge should have recused himself when defendant was aware of judge's conduct and did not request recusal). This claim is without merit.

2. Prosecutorial Misconduct

McHenry alleged that the prosecutor engaged in prejudicial misconduct by filing an amended information in an effort to "cover up" the fact that the time for trial under the speedy trial statute had expired for the charges in the original information. The district court found this claim to be frivolous. The State charged McHenry with aiding and abetting first degree murder and aiding and abetting attempted robbery in the original information filed in January 1993. The amended information filed in

August added charges of first degree sexual assault and aiding and abetting first degree sexual assault. With respect to the charges in the amended information, McHenry was acquitted of aiding and abetting first degree sexual assault in his first trial, *McHenry I*, and acquitted of sexual assault in his second trial, *McHenry II*.

[6] The record shows that by the time McHenry was arraigned on the amended information on August 12, 1993, his trial on the original information had already been rescheduled for September 14. The trial in fact began on September 14. Further, the State's filing of an amended information would not have tolled the speedy trial time limit on the same charges included in the original information. See *State v. French*, 262 Neb. 664, 670, 633 N.W.2d 908, 914 (2001) (stating that "[i]f the amendment to the complaint or information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of the speedy trial act"). McHenry was acquitted of both charges contained in the amended information, and, to the extent that the amended information contained the same charges as the original information, it did not "cover up" or impact the trial deadline on those original charges. We agree with the district court that this claim is without merit.

3. Ineffective Assistance of Counsel

[7] When a defendant was represented both at trial and on direct appeal by the same lawyers, generally speaking, 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).

[8] In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden 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. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002).

[9-11] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient

performance, the result of the proceeding would have been different. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003). In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id.*

(a) Failure to Investigate

McHenry alleged that his trial counsel provided ineffective assistance by failing to investigate whether Sterkel could have died of alcohol poisoning. He alleged that counsel for a codefendant had given McHenry's trial counsel a letter from a private pathologist prior to McHenry's trial that cast doubt on the State's expert testimony regarding the cause of Sterkel's death. McHenry attached a copy of the pathologist's letter dated July 19, 1993, as an exhibit to his postconviction motion. The defense of alcohol poisoning, which McHenry now suggests, was not raised at either trial. The State's expert testified that the cause of death was strangulation, compression of the neck, and multiple blunt injuries to the head, neck, and chest.

McHenry alleged that testimony at trial showed that Sterkel had ingested large amounts of alcohol, that Sterkel had a known history of alcohol problems, and that a whiskey bottle was found under Sterkel's body. McHenry claims that these facts, coupled with the pathologist's letter, would have put a reasonable attorney on notice to investigate further the possibility of alcohol as the cause of Sterkel's death. He claims that a possible scenario of Sterkel's death is that after he was beaten, Sterkel then drank enough to cause his death.

The State's expert testified at both of McHenry's trials that he did not believe alcohol was a contributing factor to Sterkel's death and that Sterkel had extensive injuries sufficient to have caused his death. He recognized that the alcohol level in Sterkel's blood was high but explained that an elevated alcohol level is not unusual in post mortem examinations because alcohol forms in the body as it decomposes. He further opined that because of Sterkel's history of chronic alcoholism, he would have been able to tolerate high levels of blood alcohol.

In the private pathologist's letter attached to McHenry's motion, the pathologist opined that strangulation was a sufficient cause of death. He believed that the blunt force injuries alone would be insufficient to cause death in ordinary circumstances. However, he did indicate that blunt force injuries when combined with a high blood alcohol content, such as the autopsy revealed, could have resulted in death, although the death would have been more prolonged. He believed it was possible but not probable that Sterkel had died of a combination of strangulation and a beating. He did not endorse the scenario McHenry posits in his postconviction motion.

[12] The court found that the combination of causes contributing to Sterkel's death was irrelevant where McHenry's defense at trial was that he did not participate in the beating. Following the second trial, McHenry was again convicted of aiding and abetting first degree murder and did not claim in either of his direct appeals that the evidence was insufficient to convict him. The pathologist's letter does not suggest that Sterkel died of alcohol poisoning or that he would not have died as a result of the intentional injuries he sustained. McHenry has failed to allege the existence of any exculpatory fact which could have been discovered by his trial counsel. See *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). Defense counsel is not ineffective for failing to raise an argument that has no merit. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

(b) Failure to Object to Court's Comments

McHenry alleged that his trial counsel was ineffective for failing to object to the court's comments made to the jury during voir dire of his second trial concerning the O.J. Simpson trial, which was then ongoing. McHenry claims that such comments were prejudicial. He alleged that the Simpson trial had become a media circus by June 1995 and that the national consensus was to convict Simpson.

The record shows that the court admonished the jury to ignore the Simpson trial and stated that criticisms of the jury system resulting from that trial were overblown. The court reminded the jurors that "[y]ou're simply here to decide the issue of guilt or innocence based on the evidence adduced by the State of Nebraska." In his postconviction motion, McHenry

construes these comments as "a call to the jury to convict." He alleged that the last sentence was an attempt by the court to have the jury ignore evidence adduced by the defense.

[13] Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). However, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. *Id.*

The court's statements were made before the trial commenced, and it did not comment on the evidence presented. The court's statement that the jurors were to decide the issue of guilt or innocence based on evidence adduced by the State acknowledged that the State had the burden of proof, which burden was fully explained to the jurors at the same time that this statement was made. McHenry's claim that these comments, made during voir dire of the jury, were prejudicial is without merit, and his defense counsel's failure to object to the comments was not ineffective assistance of counsel.

(c) Failure to Object to Jury Instructions

McHenry alleged that his trial counsel was ineffective for failing to object to vague jury instructions. McHenry does not specify in which trial this failure purportedly occurred. We presume that he is referring to the jury instructions from his second trial.

Some of the jury instructions from McHenry's second trial were addressed in his direct appeal. See *McHenry II*. However, McHenry specifically refers to instruction No. 1 in his postconviction motion, and instruction No. 1 was not addressed in *McHenry II*. Thus, McHenry is not barred from claiming that his attorney should have objected to this instruction.

The transcript shows that instruction No. 1 is a preliminary instruction, which, in relevant part, read: "In determining what the facts are you must rely solely upon the evidence in this trial and that general knowledge that everyone has. You must disregard your personal knowledge of any other specific fact." McHenry claims that "general knowledge" is an example of confusing language because the term is too vague and requires the jury to

discern the difference between general and personal knowledge. In ruling on the postconviction motion, the district court found that neither phrase was a term of art beyond a juror's comprehension and that McHenry had not been prejudiced by the instruction.

[14,15] Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading. See *State v. Tucker*, 257 Neb. 496, 598 N.W.2d 742 (1999). This court has held that a postconviction court is not required to hold an evidentiary hearing on a claim that an attorney was ineffective for failing to propose an alternative instruction when the instruction given was a standard instruction which had consistently been found adequate and constitutional by this court. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

The first sentence which McHenry claims is confusing is identical to language in the standard instructions used in criminal trials, and the second sentence conveys the same meaning. See NJI2d Crim. 1.0(4). The second sentence of the standard instruction provides: "You must disregard anything else you may know about this case." *Id.* In the context of the instruction as a whole, we agree with the district court that the jury was unlikely to have been confused by the use of the expressions "general knowledge" and "personal knowledge" in the same instruction. McHenry has failed to show that the outcome of his trial would have been different if the court had used the exact language of the standard instruction instead of the variation which it used. This claim of ineffective assistance of counsel is without merit.

(d) Speedy Trial Violation

In his motion for postconviction relief, McHenry made several allegations related to his claim that his right to a statutory speedy trial was violated by his trial counsel's deficient performance prior to the commencement of his first trial. McHenry generally alleged that (1) the 6-month statutory limit for trying him on the charges in the original information had expired by the time of his first trial because, in part, McHenry had refused to consent to his trial counsel's request for a continuance, (2) trial counsel failed to assert McHenry's right to a speedy trial or seek a discharge on that ground, and (3) trial counsel colluded with the prosecutor for

the purpose of denying McHenry his right to a speedy trial. McHenry does not claim that he was denied his constitutional right to a speedy trial, and we do not consider such topic.

McHenry specifically alleged in his postconviction motion that in June 1993, his defense counsel approached him with a waiver of his speedy trial right, which he refused to sign. McHenry further alleged that he informed his counsel at the time his counsel approached him with the waiver that he wanted a speedy trial. He alleged that a week after this incident, he received a letter from his attorney stating that the court would grant the continuance even though McHenry had not personally waived his speedy trial right. McHenry alleged that he attempted to call his attorney and immediately wrote back to correct this "misunderstanding" but did not receive a response. The record indicates that after the motion for continuance was filed in June 1993, the court rescheduled trial from July 6 to September 14 because McHenry's counsel was not prepared for trial.

McHenry contends that where he refused to waive his right to a speedy trial, the postconviction court erred in determining that his claim of ineffective assistance of counsel was without merit.

[16-18] Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). Section 29-1207(4)(b) excludes delays "resulting from a continuance granted at the request or with the consent of the defendant *or* his counsel." (Emphasis supplied.) The plain language of § 29-1207(4)(b) anticipates a request for a continuance made solely by counsel, as occurred in this case. See *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002) (in reading statute, court must determine and give effect to purpose and intent of Legislature as ascertained from entire language of statute considered in its plain, ordinary, and popular sense).

[19,20] Under § 29-1207, this court has stated that a defendant has the "right to waive a speedy trial and consent to a continuance as long as he was properly advised either by counsel or the court of his rights to a speedy trial." *State v. Williams*, 211 Neb. 650, 654, 319 N.W.2d 748, 751 (1982). When a delay in trial is

attributable to a defense motion for a continuance filed within the statutory period, defense counsel is not ineffective for failing to file a motion to dismiss. See *State v. Turner, supra* (rejecting defendant's claim on direct appeal of ineffective assistance, based in part on his counsel's alleged failure to renew motion for speedy trial dismissal, when delays, including defense counsel's motions for continuance, were properly excludable under § 29-1207(4)). Although we have not addressed the specific issue of a defendant's refusal to consent to a continuance, we have recognized that defense counsel's reasonable strategic decisions could effectively waive a defendant's statutory right to speedy trial. See *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995) (rejecting defendant's postconviction allegations that defense counsel, in filing motion to suppress, provided ineffective assistance by failing to protect defendant's right to speedy trial). In *Russell*, we stated that "*defense counsel's decision* to toll the 6-month time period in order to move to suppress evidence was a competent decision." (Emphasis supplied.) 248 Neb. at 729, 539 N.W.2d at 14.

[21,22] This court has stated that " 'except for such basic decisions as . . . whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel.' " *State v. Nesbitt*, 264 Neb. 612, 623, 650 N.W.2d 766, 778-79 (2002). Given the language of § 29-1207(4)(b) and our case law, it is clear that the statutory right to a speedy trial is not a personal right that can be waived only by a defendant. This conclusion is in accord with cases decided elsewhere under similar statutory language.

Indeed, several courts in other jurisdictions have explicitly held in direct appeals that a defense counsel's request for a continuance in order to prepare for trial waived the defendant's statutory right to speedy trial over the defendant's objection to the continuance. See, *Townsend v. Superior Court*, 15 Cal. 3d 774, 543 P.2d 619, 126 Cal. Rptr. 251 (1975) (concluding that defendant was bound by counsel's continuances, requested because heavy caseload had impeded counsel's preparedness for trial, despite defendant's refusal to waive time on the record and demands to court to be tried); *State v. LeFlore*, 308 N.W.2d 39 (Iowa 1981) (determining that statutory right to speedy trial is not personal; upholding counsel's continuance and waiver of

defendant's statutory right to speedy trial on ground that counsel was unprepared for trial, despite defendant's refusal to sign waiver); *State v. Ward*, 227 Kan. 663, 608 P.2d 1351 (1980) (concluding that matter of trial preparation is strategic and tactical decision; defense counsel's continuances extended statutory period for trial despite defendant's objections); *State v. McBreen*, 54 Ohio St. 2d 315, 376 N.E.2d 593 (1978) (holding that defense counsel had authority to waive statutory time for trial for reasons of trial preparation and that defendant was bound by waiver even though waiver was executed without defendant's consent); *State v. Campbell*, 103 Wash. 2d 1, 691 P.2d 929 (1984) (concluding that defendant could not show prejudice because of defense counsel's continuance over his objections when continuance ensured more effective representation and fair trial). See, also, *State v. Sayers*, 211 Neb. 555, 319 N.W.2d 438 (1982) (citing *Townsend* as example of courts holding that defendant is bound by strategic decisions of defense counsel).

[23,24] It has been recognized that defense counsel's authority to waive a defendant's statutory right to speedy trial cannot extend to excuse " 'representation [that] is so ineffective that it can be described as a "farce and a sham." . . .' " See *Townsend*, 15 Cal. 3d at 781, 543 P.2d at 624, 126 Cal. Rptr. at 256. The instant case presents no such failure. The continuance extended the statutory period for approximately 2 months in a complex murder trial involving two codefendants. Indeed, McHenry may well have been denied effective assistance of counsel if counsel had proceeded to trial unprepared. See *People v. Carr*, 9 Ill. App. 3d 382, 384, 292 N.E.2d 492, 494 (1972) (stating that "[i]f the court had acceded to defendant's demands [for immediate trial], and had defendant been found guilty, the question would surely have arisen as to whether defendant had been denied the effective assistance of counsel who had stated that he was not prepared to defend"). We determine that defense counsel's request for a continuance in order to prepare for trial waived McHenry's statutory right to a speedy trial despite McHenry's objections to the continuance. Where, as here, the continuance was granted before the expiration of the statutory speedy trial time, the period of continuance was properly excludable under § 29-1207(4)(b), and defense counsel was not ineffective by

failing to assert McHenry's right to a speedy trial or by failing to file a motion for discharge. See *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). We conclude that this claim is without merit.

(e) Collusion With Prosecutor

McHenry also alleged that his counsel colluded with the prosecution to deny him his right to a speedy trial. However, the records and files show no evidence of collusion. An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. See *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). This assignment of error is without merit.

4. Denial of Evidentiary Hearing and Failure to Appoint Counsel

[25] Finally, because we have determined that the records and files show that all of McHenry's allegations are without merit, the court did not abuse its discretion by denying McHenry an evidentiary hearing, see *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003), nor did the court abuse its discretion by failing to appoint counsel when the assigned errors contained no justiciable issue of law or fact. *Id.*

VI. CONCLUSION

We conclude that McHenry's assignments of error are without merit and affirm the judgment of the district court denying postconviction relief.

Affirmed.

Jonathan Boutilier, Personal Representative of the Estate of Laura Diane Conway Boutilier, deceased, appellant, v. Lincoln Benefit Life Insurance Company, a Nebraska corporation, appellee.

681 N.W.2d 746

Filed June 25, 2004. No. S-03-429.

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: Appeal and Error.** The meaning of an insurance policy is a question of law, which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
3. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions when the contract was made.
4. ____: ____: ____. When the terms of an insurance contract are clear, the court may not resort to rules of construction, and the terms are to be 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 meaning of the policy.
5. **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 it against the preparer of the contract.
6. **Contracts: Evidence.** A court may consider extrinsic evidence to determine the meaning of an ambiguous contract.
7. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
8. **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.
9. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Maren Lynn Chaloupka and Robert Paul Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Gary J. Nedved, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

Jonathan Boutilier, as personal representative of the estate of Laura Diane Conway Boutilier, his deceased wife, appeals the district court's order granting the motion for summary judgment of appellee, Lincoln Benefit Life Insurance Company (LBL). The court determined that a temporary life insurance policy on

Laura had lapsed. The court also excluded parol evidence of statements made by the agent who sold the policy to show that the time the policy was in effect had been extended. We affirm because Laura died after the temporary insurance agreement terminated and thus there was no coverage.

BACKGROUND

On October 17, 2000, the Boutiliers applied for a life insurance policy through Theodore R. Ziegler, an agent for LBL. According to Jonathan, Ziegler told them that to have immediate coverage under a temporary policy, they needed to submit a check for $50 and complete an application. The Boutiliers gave Ziegler a check, which was cashed by LBL. Jonathan contends that Ziegler represented to them that the temporary coverage was in effect immediately.

Ziegler left a receipt and temporary insurance agreement (TIA) with the Boutiliers. The TIA stated:

> **When Temporary Insurance Starts**
>
> If a first modal premium payment has been accepted by us and if Part I of the application has been completed on or before the date of this Agreement, temporary insurance under the Agreement will start on the date of this Agreement on all persons proposed for insurance except that:
>
> If the answer to Question (G) Section VIII in the application is YES, insurance on all persons proposed for insurance through the application will start when all medical exams and lab tests on each person named in No. (G) in Section VIII are completed.
>
> **When Temporary Insurance Will Stop**
>
> Temporary insurance under this Agreement will stop on the first of the dates below:
>
> 1. The date we notify the Owner that we have stopped considering the application. We have an absolute right to so stop.
>
> 2. The date we notify the Proposed Insured that a medical exam and lab test is required (other than any exams and lab tests referred to in Question G, Section VIII), in which event insurance will stop with respect only to the person(s) required to have a medical exam and lab test . . . .

. . . .

5. Sixty days from the date of this Agreement . . . .
(Emphasis supplied.)

Question (G), section VIII, of the application asked, "Has anyone to be considered been advised they need to have an exam or lab test for this insurance?" The question was answered "Yes" on the application. Ziegler filled out the application after meeting with the Boutiliers and did not give them a copy, but did leave a copy of the TIA. According to Jonathan, Ziegler stated that to obtain a permanent policy, the Boutiliers had to undergo medical examinations and laboratory tests. However, according to Jonathan, Ziegler also represented that the temporary policy was in effect immediately and would be in effect until the examinations and permanent policy were completed. LBL received the results of Laura's medical examinations and laboratory tests on December 19, 2000; on December 21, Laura died. No results were submitted for Jonathan.

LBL sent a letter denying coverage under the TIA, stating: "Our records indicate that the first modal premium payment was $112.20. The amount of the premium submitted was $50.00. Therefore, the requirement of providing a first modal premium payment was not satisfied." The letter continued:

> The application for insurance was completed October 17, 2000. The tragic death of your wife occurred on December 21, 2000. At the time of your wife's death, 65 days had elapsed from the completion of the application for insurance. Therefore, under the provisions of the [TIA], any coverage provided under the [TIA] would end.

Jonathan filed a petition seeking a declaratory judgment. The district court granted LBL's motion for summary judgment, finding that there was no coverage under the policy and that Jonathan could not use parol evidence to show that Ziegler's representations changed the written policy language. Jonathan appeals. We granted Jonathan's motion to bypass.

ASSIGNMENT OF ERROR

Jonathan assigns that the district court erred by granting LBL's motion for summary judgment.

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. *City of Lincoln v. PMI Franchising*, 267 Neb. 562, 675 N.W.2d 660 (2004).

[2] The meaning of an insurance policy is a question of law, which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

ANALYSIS

Jonathan contends that the TIA was in effect when Laura died because the policy started when Laura turned in her medical results and the TIA continued for 60 days from that time. He also argues that the contract is ambiguous and that the agent's representation acted to extend the time the TIA would run.

[3,4] An insurance policy is to be construed as any other contract to give effect to the parties' intentions when the contract was made. When the terms of the contract are clear, the court may not resort to rules of construction, and the terms are to be 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 meaning of the policy. *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998).

[5-7] 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 it against the preparer of the contract. *Poulton v. State Farm Fire & Cas. Cos., supra*. Thus, we stated that a court may consider extrinsic evidence to determine the meaning of an ambiguous contract. *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). But a contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

Jonathan argues that the contract is ambiguous because it is not clear when the insurance started and whether the 60-day expiration period was tolled by the delay in receiving the medical examination results and laboratory tests.

[8,9] 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. However, the fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Poulton v. State Farm Fire & Cas. Cos., supra.*

Here, regardless of any ambiguity about when temporary coverage started, we do not find an ambiguity in the "date of this Agreement." The TIA unambiguously stated that coverage would end "sixty days from the date of this Agreement," and the TIA was dated and signed on October 17, 2000. Nothing in the TIA suggests that the 60-day time period may be tolled. Thus, even if coverage did not start until Laura submitted her medical examination results and laboratory tests, it nevertheless terminated 60 days after October 17, which was before her death. See, *Radunz v. Farm Bureau Life Ins. Co.*, 431 N.W.2d 562 (Minn. App. 1988); *Sample v. Penn Mut. Life Ins. Co.*, 67 Fed. Appx. 379 (8th Cir. 2003) (unpublished); *Branton v. Western Reserve Life of Ohio*, 41 Fed. Appx. 40 (9th Cir. 2002) (unpublished) (concluding that similar termination clause ended coverage regardless of any ambiguity about when coverage started).

CONCLUSION

We determine that the TIA terminated 60 days from October 17, 2000, the date of the agreement. Because Laura died after the TIA terminated, there was no insurance coverage.

AFFIRMED.

HENDRY, C.J., not participating.

IN RE GUARDIANSHIP OF D.J., A MINOR. CARLA R., APPELLANT, V. TIM H. AND SHERRY H., GUARDIANS, AND TORY J., APPELLEES.

682 N.W.2d 238

Filed July 2, 2004. No. S-02-129.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002), are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Child Custody: Parental Rights.** Under the principle of parental preference, a court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
4. **Parental Rights: Guardians and Conservators: Presumptions.** In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
5. **Child Custody: Parental Rights.** The right of a parent to maintain the custody of his or her child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child.
6. ____: ____. Under the parental preference principle, a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship and the preferences of the child.
7. ____: ____. In a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child.
8. **Constitutional Law: Child Custody: Parental Rights.** A biological or adoptive parent's superior right to custody of the parent's child is acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to constitutional protection from intrusion into that relationship.
9. **Child Custody: Parental Rights.** The parental superior right to child custody protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent.
10. ____: ____. Where the custody of a minor child is involved, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.
11. **Constitutional Law: Parent and Child.** The best interests standard is subject to the overriding recognition that the relationship between parent and child is constitutionally protected.

12. **Child Custody: Parental Rights.** While the best interests of the child remain the lodestar of child custody disputes, a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child.
13. **Guardians and Conservators.** A guardianship is no more than a temporary custody arrangement established for the well-being of a child.
14. **Guardians and Conservators: Parental Rights.** The appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights.
15. **Parental Rights.** Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.

Appeal from the County Court for Dundy County: B. BERT LEFFLER, Judge. Reversed and remanded with directions.

Sally A. Rasmussen, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

P. Stephen Potter, P.C., and Jeffrey M. Eastman for appellees Tim H. and Sherry H.

Michael E. Piccolo, of Dawson & Piccolo, for appellee Tory J.

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

GERRARD, J.

At a time of financial and emotional difficulties, the appellant, Carla R., asked her parents to care for her biological child. Thereafter, Carla signed a petition for her parents to be appointed guardians for her child. The county court ordered the guardianship. Three years later, having achieved financial security and emotional well-being, Carla sought to regain custody of her child. Finding that Carla had forfeited her parental rights and that the best interests of her child would be served by continuing the guardianship, the county court denied her petition to terminate the guardianship. Carla appeals, and for the reasons that follow, we reverse, and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

On July 25, 1992, Carla and Tory J. were married. On June 7, 1993, their child, D.J., was born. Thereafter, Carla and Tory's

marriage began to deteriorate, and Tory moved out of their home in 1996. At that time, Carla lived in her own home in Max, Nebraska, but spent much of her time with her parents, Tim H. and Sherry H. (collectively the grandparents), who also lived in Max. Carla worked full time, and, since shortly after D.J.'s birth, most of D.J.'s time was spent with the grandparents.

In July 1997, Carla moved to Lincoln, Nebraska, in search of work. Believing she could not properly care for D.J., and suffering emotionally from the separation with Tory, Carla left D.J. in the care of the grandparents. Carla testified that during her time in Lincoln, she maintained consistent contact with D.J. through monthly visits, telephone calls, and letters and gifts sent via the mail. However, the grandparents dispute the existence of much of this contact.

On June 8, 1998, Carla and Tory filed a petition for appointment of a guardian for D.J. The petition nominated the grandparents to serve as the guardians for D.J. In addition, both Tory and Carla filed corresponding affidavits in support of appointing the grandparents as guardians. On July 7, the grandparents accepted the appointment, and on July 13, the county court filed its order appointing the grandparents as guardians.

Carla testified that prior to filing the petition for guardianship, she consulted a lawyer to discuss her pending divorce action. Carla testified that she informed the lawyer that she wanted custody of D.J., but that the lawyer told her that she could not have custody because D.J. was not living with her at the time. According to Carla, the lawyer then gave her a document, purportedly the petition to establish a guardianship over D.J., for her signature. Carla testified that her mother, who was present at this meeting, told her the purpose of the document was to preclude Tory from taking D.J. in the middle of the night. Carla signed the petition and an affidavit which was notarized by her mother.

According to Carla, the lawyer failed to explain the ramifications of establishing a guardianship and advised her about "the ease" with which a guardianship could be terminated. Carla also testified that the lawyer was representing the grandparents in their attempt to become guardians of D.J. and that the lawyer failed to tell her of this potential conflict of interest. Carla testified to these

facts under oath and discussed them in her appellate brief. However, Carla's pleadings in this proceeding did not allege that the initial establishment of the guardianship was the result of undue influence or fraud. Therefore, we assume for the purposes of deciding this appeal that the guardianship was properly ordered in the first instance.

While in Lincoln, Carla began to abuse alcohol and drugs. In an attempt to solve her substance abuse problem, Carla left Lincoln and moved back into her parents' home in January 1999. Carla stayed with her parents through July, when she returned to Lincoln in search of a job. Carla testified that she attempted to take D.J. with her to Lincoln at this time; however, her parents dispute this claim. In any event, Carla testified that she traveled 240 miles to Max on numerous occasions to visit with D.J. and supplemented those visits with telephone calls and gifts.

On August 12, 2000, Carla married Brian R. At the time of trial, Carla and Brian lived in Roca, Nebraska, with Brian's daughter from his first marriage and a child born to Brian and Carla on February 17, 2001. Carla testified that she has not used illegal drugs since January 1999 and is employed as a licensed practical nurse at a rehabilitation hospital in Lincoln.

Three years after the guardianship was ordered, Carla filed a petition with the county court, pursuant to Neb. Rev. Stat. § 30-2616 (Reissue 1995), to remove the grandparents as guardians of D.J. and terminate the guardianship. In the petition, Carla alleged that she was now able to assume full care, custody, and control of D.J. and that it was in D.J.'s best interests to be reunited with her. The grandparents filed an answer to the petition which disputed these allegations.

After trial, the county court found that D.J. had thrived in the grandparents' care and that D.J. had developed a strong attachment to them. The court recognized that Carla, as the natural parent, had a superior right to the custody of D.J., but determined that she had forfeited that right by "substantial, continuous, and repeated failure to discharge her duties of parental care and protection." The court went on to conclude that it was in the best interests of D.J. to continue in the guardianship, and denied Carla's petition. Carla filed a timely appeal.

ASSIGNMENTS OF ERROR

Carla assigns, restated, that the county court erred in (1) finding that she had forfeited her parental rights to D.J., (2) failing to terminate the guardianship of D.J. and remove the grandparents as guardians, (3) admitting expert testimony without proper foundation, (4) admitting inadmissible hearsay, and (5) failing to maintain an impartial and unbiased role at trial.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002), are reviewed for error on the record. *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

Section 30-2616 states, in relevant part:

> (a) Any person interested in the welfare of a ward . . . may petition for removal of a guardian on the ground that removal would be in the best interest of the ward. . . .
>
> (b) After notice and hearing on a petition for removal . . . the court may terminate the guardianship and make any further order that may be appropriate.

We begin by determining the standard of proof necessary for a biological parent to terminate the guardianship with respect to their child. Specifically, we must determine if under § 30-2616, the sole inquiry in such a termination proceeding is whether it is in the child's best interests to terminate the guardianship and reunite the child with his or her natural parent, or whether the parental preference principle establishes a rebuttable presumption that the best interests of the child are served by terminating the guardianship and reuniting the child with his or her natural parent.

The resolution of this question requires us to examine two different principles found in child custody jurisprudence. On one hand, we have stated that the paramount concern in child custody

disputes is the best interests of the child. See *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). See, also, § 30-2616(a) ("[a]ny person interested in the welfare of a ward . . . may petition for removal of a guardian on the ground that removal would be in the best interest of the ward").

[3] On the other hand, the principle of parental preference provides that a court "may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right." *In re Interest of Amber G. et al.*, 250 Neb. 973, 982, 554 N.W.2d 142, 149 (1996). See, also, § 30-2608(a) ("[t]he father and mother are the natural guardians of their minor children and are duly entitled to their custody . . . being themselves competent to transact their own business and not otherwise unsuitable").

Obviously, the parties disagree as to the proper interaction of these two principles and their application to the facts before us. Noting the tension between the two aforementioned statutes, Carla argues that the best interests analysis is always subject to the overriding consideration of a natural parent's superior rights, which, as we will discuss below, are founded in the U.S. Constitution. The grandparents dispute this assertion and argue that under § 30-2616, whether to terminate a guardianship is solely a question of the best interests of the ward.

[4] For the following reasons, we conclude that in guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.

[5-7] We have stated that "[t]he right of a parent to maintain the custody of his or her child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child." *In re Interest of Witherspooon*, 208 Neb. 755, 758, 305 N.W.2d 644, 646 (1981). See, also, *In re Interest of Kimsey*, 208 Neb. 193, 302 N.W.2d 707 (1981). Under the parental preference principle, a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship and the preferences of the child. *Blecha v. Blecha*, 257 Neb. 543, 599 N.W.2d 829 (1999). Stated

otherwise, "in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child." *In re Interest of Amber G. et al.*, 250 Neb. at 982, 554 N.W.2d at 149, citing *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992). See, also, *Nielsen v. Nielsen*, 207 Neb. 141, 149, 296 N.W.2d 483, 488 (1980) ("[t]he right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties"). Thus, we have repeatedly held that a court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). Accord, *In re Interest of Amber G. et al., supra*; *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992); *Stuhr, supra*; *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987); *Nielsen, supra*; *Marcus v. Huffman*, 187 Neb. 798, 194 N.W.2d 221 (1972); *State ex rel. Cochrane v. Blanco*, 177 Neb. 149, 128 N.W.2d 615 (1964); *Ripley v. Godden*, 158 Neb. 246, 63 N.W.2d 151 (1954); *Norval v. Zinsmaster*, 57 Neb. 158, 77 N.W. 373 (1898). See, also, *In re Interest of A.C.*, 239 Neb. 734, 478 N.W.2d 1 (1991) (order terminating parental rights must be based upon clear and convincing evidence).

[8,9] The primary justification for the parental preference principle is based upon constitutional considerations. As the U.S. Supreme Court stated in *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978):

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 [97 S. Ct. 2094, 53 L. Ed. 2d 14] (1977) (Stewart, J., concurring in judgment).

See, also, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Shoecraft v. Catholic Social Servs. Bureau*,

222 Neb. 574, 385 N.W.2d 448 (1986). Applying this principle, we have stated:

> A biological or adoptive parent's superior right to custody of the parent's child is acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion into that relationship. Hence, the parental superior right to child custody protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent. See *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (both parents and children in a familial relationship are protected by the U.S. Constitution). Establishment and continuance of the parent-child relationship " 'is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights.' " *Johnson v. Hunter*, 447 N.W.2d 871, 876 (Minn. 1989) (quoting from *Ruddock v. Ohls*, 91 Cal. App. 3d 271, 154 Cal. Rptr. 87 (1979)).

Uhing, 241 Neb. at 374-75, 488 N.W.2d at 371.

[10,11] In recognizing the constitutionally protected status of the parent-child relationship, we have often said that "[w]here the custody of a minor child is involved . . . the custody of the child is to be determined by the best interests of the child, with *due regard* for the superior rights of a fit, proper, and suitable parent." (Emphasis supplied.) *Nielsen v. Nielsen*, 207 Neb. 141, 149, 296 N.W.2d 483, 488 (1980). Accord, *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992); *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992); *State ex rel. Cochrane v. Blanco*, 177 Neb. 149, 128 N.W.2d 615 (1964); *Ripley v. Godden*, 158 Neb. 246, 63 N.W.2d 151 (1954); *Killip v. Killip*, 156 Neb. 573, 57 N.W.2d 147 (1953). Likewise, we held that the " 'best interests' standard is subject to the overriding recognition that 'the relationship between parent

and child is constitutionally protected.' " *Uhing*, 241 Neb. at 373, 488 N.W.2d at 370. In other words, we have repeatedly recognized that in custody disputes between a biological or adoptive parent and a third party, the U.S. Constitution requires that the superior rights of the parent be taken into consideration.

In addition to these constitutional considerations, in custody disputes between a parent and nonparent, courts turn to the parental preference principle because the best interests standard, taken to its logical conclusion, would place the minor children of all but the "worthiest" members of society in jeopardy of a custody challenge. See *Watkins v. Nelson*, 163 N.J. 235, 748 A.2d 558 (2000). Cf., *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996); *Uhing, supra*. Moreover, by establishing a presumption in favor of parental custody, the judiciary's ability to engage in social engineering is dramatically restricted. See *Watkins, supra*. More than 100 years ago, this court stated:

> We are aware that this court has several times asserted that in [child custody] controversies . . . the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed . . . .

Norval v. Zinsmaster, 57 Neb. 158, 161-62, 77 N.W. 373, 374 (1898).

[12] Therefore, unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child. While the best interests of the child remain the lodestar of child custody

disputes, a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child. The question remains, however, whether a parent's superior right should also be taken into account during guardianship termination proceedings.

[13,14] A guardianship is no more than a temporary custody arrangement established for the well-being of a child. See, *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996) (noting temporary nature of guardianship); *Dependency of A.V.D.*, 62 Wash. App. 562, 815 P.2d 277 (1991) (noting temporary nature of guardianship). Important here, the "appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights." *In re Guardianship of Zyla*, 251 Neb. at 166, 555 N.W.2d at 771. See, also, *In re Interest of Amber G. et al., supra*. Rather, guardianships give parents an opportunity to temporarily relieve themselves of the burdens involved in raising a child, thereby enabling parents to take those steps necessary to better their situation so they can resume custody of their child in the future. See *Dependency of A.V.D., supra*.

The policy behind this rule is straightforward: guardianships are intended to encourage parents experiencing difficulties to temporarily turn over the custody and care of their children—safe in the knowledge that they will be able to regain custody in the future. This policy would be frustrated if guardianships were permanent or resulted in the automatic termination of parental rights, because parents would be less likely to voluntarily petition for a guardian to be appointed to care for their minor children. Therefore, children would unnecessarily be placed in jeopardy in many circumstances.

Furthermore, because a guardianship is temporary and does not terminate parental rights, we conclude that the constitutional concerns which serve as the justification for the parental preference principle in other situations also apply to parents seeking to regain custody by terminating the guardianship with respect to their children. Absent circumstances which terminate a parent's constitutionally protected right to care for his or her child, due regard for that right requires that a biological or adoptive

parent be presumptively regarded as the proper guardian for his or her child.

Thus, we hold that in guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of the child are served by reuniting the minor child with his or her parent. In other words, an individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.

As discussed above, the appointment of a guardian did not terminate Carla's parental rights to D.J. Therefore, unless it was affirmatively proved by clear and convincing evidence that Carla was either unfit or forfeited her right to D.J., the guardianship over D.J. should have been terminated and Carla's custody of D.J. restored.

In denying Carla's petition to terminate the guardianship, the court did not find Carla to be an unfit parent. Because the appellees did not assign this as error by way of cross-appeal, Carla's fitness as a parent is not at issue. However, the court did find that Carla had forfeited her superior right to custody of D.J. by "substantial, continuous, and repeated failure to discharge her duties of parental care and protection." The court, however, did not state the factual basis for this determination.

[15] Our review for error on the record leads us to conclude that the county court's finding of forfeiture is not supported by competent, clear, and convincing evidence. In the past, we have stated that "[p]arental rights may be forfeited by substantial, continuous, and repeated neglect of a child *and* a failure to discharge the duties of parental care and protection." (Emphasis supplied.) *State v. Jenkins*, 198 Neb. 311, 317, 252 N.W.2d 280, 284 (1977). Accord, *In re Interest of Witherspoon*, 208 Neb. 755, 305 N.W.2d 644 (1981); *In re Interest of Kimsey*, 208 Neb. 193, 302 N.W.2d 707 (1981).

Essentially, the grandparents argue that the evidence establishes that Carla forfeited her rights to D.J. by failing to take an

active part in D.J.'s life. Specifically, the grandparents argue that Carla forfeited her right to D.J. by, inter alia, (1) failing to attend D.J.'s parent-teacher conferences; (2) failing to contact D.J.'s schoolteachers to check D.J.'s progress; (3) failing to attend a variety of school activities; (4) failing to supply the grandparents with financial support for D.J.'s care; (5) failing to attend church with D.J.; (6) failing to attend D.J.'s summer activities, including swimming lessons, Bible school programs, and T-ball games; (7) failing to visit D.J.; and (8) failing to show an appropriate amount of interest in D.J.

We disagree. While it is true that Carla missed a variety of activities that one would normally associate with parenting, this is a natural consequence of the establishment of a guardianship. As noted above, guardianships are designed to temporarily relieve parents of the rigors of raising a child. Those appointed as guardians are aware that they become the caretakers of the child during their appointment. In essence, the grandparents ask us to find that parents who have been temporarily relieved of their parenting duties, through the appointment of a guardian, are guilty of failing to do the very duties of which they were expressly relieved. This we will not do. Such a rule would provide a powerful disincentive for parents to come forward and request help during their time of need, defeating the very purpose of guardianships.

Thus, the nature of a guardianship makes it particularly inappropriate in this context to establish the forfeiture of parental rights by solely focusing on a parent's failure to "discharge the duties of parental care and protection." *Jenkins*, 198 Neb. at 317, 252 N.W.2d at 284. There must also be clear and convincing evidence of "substantial, continuous, and repeated neglect of a child." *Id.* See, also, *Gray v. Hartman*, 181 Neb. 590, 596, 150 N.W.2d 120, 123 (1967) ("forfeiture of parental rights may be effected by the indifference of a parent for a child's welfare over a long period of time"); *Raymond v. Cotner*, 175 Neb. 158, 163, 120 N.W.2d 892, 895 (1963) (forfeiture established by parent's "complete indifference" to child's welfare), *overruled on other grounds, Bigley v. Tibbs*, 193 Neb. 4, 225 N.W.2d 27 (1975).

Here, the record does not establish Carla's neglect or complete indifference toward D.J. Instead, the evidence shows that

Carla adequately provided for D.J.'s care by placing D.J. in the capable and loving hands of her parents. Moreover, Carla made substantial and repeated efforts to maintain a relationship with D.J. throughout the guardianship. For example, the record shows that Carla helped care for D.J. when she returned from Lincoln in January 1999 until her departure in July 1999. In addition, despite living in Lincoln, Carla managed to regularly visit D.J. At trial, Carla testified that she saw D.J. 64 times from July 1999 until July 2000 and 74 times from July 2000 until July 2001. In fact, Carla testified that the longest period she went without physical contact with D.J. was for 1 month during which she was not allowed to travel due to complications stemming from her pregnancy. Moreover, Carla supplemented these personal visits with frequent telephone calls, letters, and gifts.

The evidence also demonstrates that Carla maintained a high level of interest in D.J. For example, she attended D.J.'s kindergarten graduation, baptism, and Christmas program. In addition, two of D.J.'s teachers testified that Carla came to school a few times to eat lunch with D.J. and that D.J. brought Carla and Brian's daughter to school for show and tell. Carla also demonstrated her knowledge of D.J.'s interests and activities. In sum, the court's finding of parental forfeiture is not supported by the evidence.

This in no way diminishes the substantial role that is undertaken by guardians on behalf of wards for significant periods of time. The grandparents are to be commended for stepping in on behalf of Carla and caring for D.J. at a crucial time in D.J.'s life. Nonetheless, the evidence adduced at trial, when considered in light of the sound policy behind the parental preference principle in guardianship situations, leads us to conclude that the judgment of the county court must be reversed.

Having concluded that Carla's first and second assignments of error have merit and are dispositive of this appeal, we need not consider her remaining assignments of error. See *Mooney v. Gordon Mem. Hosp. Dist., post* p. 273, 682 N.W.2d 253 (2004).

CONCLUSION

The county court erred in finding that Carla had forfeited her right to parent D.J. and in failing to terminate the guardianship.

The judgment of the court is reversed, and the cause is remanded to the county court with directions to remove the grandparents as guardians, to terminate the guardianship, and to reinstate in Carla the care, custody, and control of her minor child, D.J.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., not participating.

NEBRASKA HOSPITAL ASSOCIATION CHARITABLE, SCIENTIFIC, AND EDUCATIONAL FOUNDATION, DOING BUSINESS AS BIO-ELECTRONICS, APPELLANT, V. C & J PARTNERSHIP, A NEBRASKA GENERAL PARTNERSHIP, ET AL., APPELLEES.

682 N.W.2d 248

Filed July 2, 2004. No. S-03-068.

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 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. **Property: Sales: Escrow.** If the property in the custody of the escrow holder is either embezzled or lost by it, then, as between the seller and the buyer, the loss falls on the one who owns the property at the time of the embezzlement or loss.
4. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** As defined by Neb. U.C.C. § 3-201(a) (Reissue 2001), negotiation is a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.
5. **Negotiable Instruments: Sales: Words and Phrases.** The remitter of a negotiable instrument is the owner of the instrument until ownership is transferred to the seller by delivery. The remitter is a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.
6. **Uniform Commercial Code: Negotiable Instruments.** Under Neb. U.C.C. § 3-203(a) (Reissue 2001), an instrument is deemed transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded with directions.

Charles M. Pallesen, Jr., and Jeffrey E. Mark, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Tim Engler, of Harding, Shultz & Downs, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Nebraska Hospital Association Charitable, Scientific, and Educational Foundation doing business as Bio-Electronics (Bio-Electronics), brought an action for specific performance of a real estate purchase agreement against appellees, C & J Partnership, Krieger Family Children's Trust, Chuck Uribe, John Daubert, and Albert Pepler (collectively C & J Partnership). Bio-Electronics and C & J Partnership filed motions for summary judgment and for partial summary judgment, respectively. The district court for Lancaster County, Nebraska, sustained C & J Partnership's partial motion for summary judgment and dismissed Bio-Electronics' petition for specific performance. The issue we must resolve is whether a genuine issue of material fact exists regarding which party to a real estate transaction must bear the loss when funds are embezzled by an escrow agent before closing.

BACKGROUND

The parties in this action have a long history together. At the time this action was filed, the real property at issue in this case had been the subject of an ongoing lease agreement between Bio-Electronics and C & J Partnership for over 15 years. On November 9, 2001, Bio-Electronics offered to purchase the leased property located in Lincoln, Nebraska, for $152,000. A few days later, C & J Partnership accepted Bio-Electronics' offer by and through one of its partners, Uribe. The sale was scheduled to close on December 20, 2001, at the offices of State Title Services, Inc. (State Title), in Lincoln.

At the scheduled closing on December 20, 2001, Bio-Electronics delivered a cashier's check made payable to C & J Partnership for the agreed-upon net purchase price. Uribe signed

the back of the check on behalf of C & J Partnership. The closing, however, was not completed on that date because one of C & J Partnership's partners had not yet signed the warranty deed.

In their briefs, both parties describe State Title as the escrow agent. Bio-Electronics describes the nature of this case as "this dispute was not completed because the purchase price that was placed in escrow with a title company was embezzled." Brief for appellant at 2. C & J Partnership states that "State Title served as the title company as well as the escrow/title agent . . . ." Brief for appellees at 5. We will, therefore, treat this as an escrow case.

On January 28, 2002, before the warranty deed was fully executed, State Title filed for chapter 7 bankruptcy as the result of an alleged embezzlement of corporate funds by its president. Among the funds embezzled were $152,870 from the December 20, 2001, scheduled closing. The real property at issue is currently encumbered by a deed of trust from C & J Partnership to Union Bank and Trust Company.

On February 15, 2002, Bio-Electronics filed a petition for specific performance in the district court. The petition requested that the court compel C & J Partnership to do equity and (1) release from escrow and deliver to Bio-Electronics the warranty deed of conveyance with clear title or execute and deliver to Bio-Electronics a substitute warranty deed with clear title and (2) to compel C & J Partnership to cause the property at issue to be released from the deed of trust to Union Bank and Trust Company.

Bio-Electronics contended in its motion for summary judgment that it delivered payment for the real estate to C & J Partnership, giving C & J Partnership dominion and control over the funds. As such, Bio-Electronics contended that C & J Partnership failed to perform under the purchase agreement by wrongfully withholding a fully executed warranty deed. In its cross-motion, C & J Partnership contended, in relevant part, that Bio-Electronics was the rightful owner of the funds when they were embezzled by the escrow agent. Accordingly, C & J Partnership contended that Bio-Electronics breached the purchase agreement by failing to deliver the purchase price to C & J Partnership.

During the hearing on the parties' motions, C & J Partnership admitted that because the parties had contemplated exchanging

the deed and purchase price during the December 20, 2001, closing, an escrow had not been established for the closing. In Uribe's affidavit, which was admitted into evidence at the hearing, Uribe stated that he signed the back of the cashier's check on behalf of C & J Partnership in order to allow Bio-Electronics to deposit the proceeds in escrow with State Title. The evidence is inconclusive regarding whether the unexecuted warranty deed is currently in escrow with State Title, as Bio-Electronics contends, or was simply left with State Title on December 20 pending closing, as C & J Partnership contends.

The district court granted C & J Partnership's motion for partial summary judgment and denied Bio-Electronics' motion for summary judgment. The district court noted that the issue in this case centered on which party must bear the loss of funds apparently embezzled by the title agent. The court noted that both parties agreed that the general rule applicable in this case is that if an escrow agent " 'embezzles the funds before the time has come to release them, he has embezzled the funds of the depositor.' " That is, the district court noted, the wrong of an escrow holder must be borne by the party who, at the time of its occurrence, was lawfully entitled to the right or property affected.

The district court recognized that to circumvent the general rule that absconded funds are the funds of the depositor, there must be a finding that the funds had been transferred to another party. The court stated that Uribe's endorsement of the cashier's check did not give control of the funds to C & J Partnership because C & J Partnership had not yet delivered a fully signed warranty deed. The court found that State Title was to have served as Bio-Electronics' agent to protect its funds and as C & J Partnership's agent to protect its real estate. At oral argument, Bio-Electronics contended that because of a long relationship between the parties, it was not insisting on an escrow to deliver the $152,870 cashier's check. The record is not clear which party, Bio-Electronics, C & J Partnership, or State Title requested the escrow. The district court concluded that Bio-Electronics retained title to the funds and, accordingly, that Bio-Electronics bore the risk of loss.

While the district court found that specific performance was an appropriate remedy, it concluded that it would be inequitable

under the circumstances to order Bio-Electronics' specific performance under the terms of the contract. Accordingly, the district court overruled both parties' respective requests for specific performance and granted C & J Partnership's request to dismiss the petition.

ASSIGNMENTS OF ERROR

Bio-Electronics assigns that the district court erred in concluding that (1) the loss of the embezzled funds must fall on Bio-Electronics because the evidence clearly established that the funds were transferred to C & J Partnership before they were embezzled; (2) Bio-Electronics breached the purchase agreement because Bio-Electronics fully performed all conditions pursuant to the purchase agreement; and (3) the loss should fall on Bio-Electronics because, as between these two innocent parties, C & J Partnership's inaction set in motion the events that allowed the funds to be embezzled by State Title.

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. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004); *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (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. *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004); *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003).

ANALYSIS

Bio-Electronics contends that the evidence admitted at the hearing on the parties' respective motions for summary judgment clearly establishes that Bio-Electronics transferred the funds to C & J Partnership before they were deposited with State Title. Bio-Electronics contends that its delivery to Uribe of the

cashier's check made payable to C & J Partnership constituted a negotiation under article 3 of the Nebraska Uniform Commercial Code (U.C.C.). As such, Bio-Electronics contends that ownership of the funds was transferred to C & J Partnership.

[3] Both parties contend in their briefs that the controlling rule of law in this case is that if an escrow agent "embezzles the funds before the time has come to release them, he has embezzled the funds of the depositor." See 28 Am. Jur. 2d *Escrow* § 31 at 30 (2000). Several other jurisdictions have adopted the general rule that " '[i]f the property in the custody of the escrow holder is either embezzled or lost by it, then, as between the seller and the buyer, the loss falls on the one who owns the property at the time of the embezzlement or loss.' " *Bixby Ranch Co. v. U.S.*, 35 Fed. Cl. 674, 679 (1996). See, *Schmidt et ux. v. Fitzsimmons et ux.*, 190 Or. 415, 226 P.2d 304 (1951); *Stuart v. Clarke*, 619 A.2d 1199 (D.C. App. 1993); *Zaremba v. Konopka*, 94 N.J. Super. 300, 228 A.2d 91 (1967).

[4-6] Bio-Electronics contends article 3 of the U.C.C., which governs negotiable instruments, including cashier's checks, applies to determine who had ownership of the funds in question. "Negotiation" is defined under the U.C.C. as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." Neb. U.C.C. § 3-201(a) (Reissue 2001). Comment 2 to U.C.C. § 3-201 provides that the remitter is the owner of the check until ownership is transferred to the seller by delivery. The "[r]emitter" of a negotiable instrument is "a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser." Neb. U.C.C. § 3-103(11) (Reissue 2001). In this case, Bio-Electronics is the remitter of the cashier's check made payable to C & J Partnership. An instrument is deemed transferred "when it is delivered by a person other than its issuer *for the purpose of giving to the person receiving delivery the right to enforce the instrument.*" (Emphasis supplied.) Neb. U.C.C. § 3-203(a) (Reissue 2001).

At the December 20, 2001, closing, Bio-Electronics presented the cashier's check to C & J Partnership. Uribe, of C & J Partnership, took possession or delivery of the cashier's check

and endorsed it. The possession of the cashier's check, therefore, went from Bio-Electronics to Uribe, of C & J Partnership, who endorsed the check, and then to State Title. The undisputed facts show that the check was negotiated and that C & J Partnership is the "depositor." As the depositor, C & J Partnership bears the risk of loss of embezzlement by the escrow agent with whom C & J Partnership deposited the funds. Contrary to the district court's ruling, C & J Partnership did not show it was entitled to judgment as a matter of law, and we must reverse the district court's orders on summary judgment.

CONCLUSION

We reverse the holding of the district court, vacate the order of dismissal, and remand the cause with directions to enter an order granting the specific relief sought by Bio-Electronics.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

OTTACO ACCEPTANCE, INC., APPELLANT, V.
JANET M. HUNTZINGER ET AL., APPELLEES.

682 N.W.2d 232

Filed July 2, 2004. No. S-03-143.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
4. **Statutes: Legislature: Intent: Time.** In noncriminal cases, substantive statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively.
5. **Tax Sale: Deeds: Presumptions: Proof.** In suits relating to the rights of the purchaser, a county treasurer's tax deed is presumptive evidence that all things whatsoever required by law to make a good and valid tax sale and vest title in the purchaser were done. The presumption is not conclusive and may be rebutted but the burden is upon the party attacking the validity of such a deed to show by competent evidence some jurisdictional defect voiding the deed.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed and remanded with directions.

Robert S. Lannin, of Shively Law Offices, P.C., L.L.O., for appellant.

Jason S. White, of Schaper & White Law Firm, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Ottaco Acceptance, Inc. (Ottaco), appeals from a judgment entered against it by the district court for Custer County. Ottaco sought to quiet title to three separate tracts of property, alleging that it was the owner of the properties by virtue of treasurer's tax deeds it acquired. The district court found that Ottaco failed to give proper notice to the record owner of the properties, Janet M. Huntzinger, and to the tenants in possession of the properties and thus denied Ottaco's petition. We reverse, and remand with directions.

BACKGROUND

On July 24, 1996, tax sales certificates Nos. 307, 308, and 340 were sold by the Custer County treasurer on real estate described, respectively, as follows: The west half of the northeast quarter and the north half of the northwest quarter of Section 23, Township 14 North, Range 18 West of the 6th P.M., Custer County, Nebraska; the north half of the southeast quarter and the southwest quarter of the southeast quarter of Section 23, Township 14 North, Range 18 West of the 6th P.M., Custer County, Nebraska; and the south half of the southwest quarter of Section 26, Township 14 North, Range 18 West of the 6th P.M., Custer County, Nebraska.

The purchaser of the tax certificates later assigned them to Ottaco. The record owner of each of the three properties was Huntzinger. In April 1999, Ottaco sent notices to Huntzinger containing the information required by Neb. Rev. Stat. § 77-1831 (Reissue 2003). The notices were sent by certified mail to Huntzinger at "555 Russell Rd A-5 Westfield, MA 01086." The

record contains signed certified mail receipts indicating that on May 18, 1999, "J Huntzinger" received the notices. Stamps on the notices indicate that they were received in Wheeling, Illinois.

Huntzinger testified at trial that she never signed the certified mail receipts, never authorized anyone to sign on her behalf, and never received the notices sent by Ottaco. She testified that she lived at the Westfield, Massachusetts, address from September 1994 to September 1998, at which time she moved to Wheeling, Illinois. The Massachusetts address was the address on file with the Custer County treasurer. Huntzinger testified that she did not inform the Custer County treasurer of her change of address but did arrange with the post office to have all her mail forwarded to her in Wheeling. She further testified that she was present in Wheeling on May 18, 1999.

On January 12, 2000, Ottaco received treasurer's tax deeds for the three properties. Shortly thereafter, it initiated this action. Ottaco's petition placed five properties at issue, although the parties' dispute over two of them was eventually settled and only the three properties mentioned above remain at issue in this appeal. Ottaco's petition also alleged, among other things, that Wiese Brothers, a partnership between Dean Wiese and Duane Wiese, may claim an interest in the properties as a tenant in possession. Wiese Brothers filed an answer admitting that it was a tenant in possession of the properties at issue, but denying that it received proper notice.

Following a bench trial, the district court denied Ottaco's petition on January 30, 2003. The court found that neither Huntzinger nor the tenant in possession received notice as required by law; thus, the treasurer's tax deeds were unlawfully issued and conveyed no valid title to Ottaco. The court specifically said that "[Huntzinger's] testimony shows that she did not sign the mail receipts and that she was not living at the address shown on the receipts at the time alleged." Ottaco appealed, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

Ottaco assigns that the district court erred in (1) refusing to quiet title in favor of Ottaco, (2) finding that Huntzinger's signature did not appear on the certified mail receipts, (3) finding that

notice was not provided to Huntzinger, (4) finding that notice was required to an unidentified farm tenant, (5) applying the statutory presumption in Neb. Rev. Stat. § 77-1842 (Reissue 2003), and (6) finding that Huntzinger could maintain her claim without satisfying Neb. Rev. Stat. §§ 77-1843 and 77-1844 (Reissue 2003).

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

When a county treasurer sells real property for delinquent taxes under chapter 77 of the Nebraska Revised Statutes, the purchaser receives a tax sale certificate which acts as a lien against the property for the taxes paid by the purchaser. Neb. Rev. Stat. § 77-1818 (Reissue 2003). After a period of 3 years, the purchaser can elect to acquire a deed to the property by either requesting a treasurer's tax deed under the procedures of article 18 or commencing a foreclosure action under article 19. Neb. Rev. Stat. §§ 77-1837 (Reissue 1996) and 77-1902 (Reissue 2003). In this case, Ottaco requested and obtained treasurer's tax deeds under article 18.

Ottaco argues, in part, that Huntzinger is precluded from contesting the title it acquired to the properties by virtue of those treasurer's tax deeds. It relies upon § 77-1844, which provides:

> No person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and *that all taxes due upon the property had been paid by such person* or the persons under whom he claims title as aforesaid.

(Emphasis supplied.)

Ottaco specifically argues that Huntzinger failed to pay all taxes due upon the properties. Our most recent interpretation of

the italicized language above came 90 years ago in *Cornell v. Maverick Loan & Trust Co.*, 95 Neb. 842, 843, 147 N.W. 697, 698 (1914), where we stated that

> we are of the opinion that it makes no difference whether at the time of the commencement of the suit the taxes due are paid or not. The "showing" of taxes paid is at the trial, and if all taxes are paid before or during the trial, or before final judgment, that is enough. *The "showing" is made by the evidence, and not by the pleadings alone.*

(Emphasis omitted.) (Emphasis supplied.)

[3] In this case, Huntzinger did not "show" by the evidence that she had paid all taxes due on the properties. Trial in this case was held on October 30, 2002, and the district court entered judgment on January 30, 2003. The transcript includes a copy of a receipt from the Custer County treasurer indicating that "Jason White, Trustee for Janet M. Huntzinger Trust" paid $45,050.01. The receipt itself is dated January 24, 2003. The copy of the receipt in the transcript is file stamped by the clerk of the district court as being received on January 30, 2003. However, this receipt was not offered and received into evidence in this case; it was merely included in the transcript. We have repeatedly held that a bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002). Thus, under *Cornell v. Maverick Loan & Trust Co., supra*, there has been no showing of compliance with § 77-1844, and Huntzinger is precluded from questioning the titles acquired by Ottaco.

Ottaco's petition was also challenged by Wiese Brothers. Wiese Brothers' answer asserted that at all relevant times, it was the tenant in possession of each of the properties at issue. It further asserted that it did not receive notice from Ottaco as required by law and that, therefore, Ottaco's treasurer's tax deeds were not valid.

Prior to requesting a treasurer's tax deed, Ottaco was required to comply with the notice provisions of § 77-1831 and Neb. Rev. Stat. § 77-1832 (Reissue 1996). Section 77-1831 requires that a purchaser of a tax sale certificate serve or cause to be served notice at least 3 months before applying for the deed. It further addresses

the required contents of such notice. Section 77-1832 sets forth how and to whom such notice must be served. It provides:

> Service of the notice provided by section 77-1831 shall be made *on every person in actual possession or occupancy of the real property*, upon the person in whose name the title to the real property appears of record, and upon every encumbrancer of record in the office of the register of deeds of the county if, upon diligent inquiry, he or she can be found in the county. Whenever the record of a lien shows the post office address of the lienholder, notice shall be sent by certified or registered mail to the holder of such lien at the address appearing of record.

(Emphasis supplied.) See, also, Neb. Const. art. VIII, § 3 (providing in part that "occupants shall in all cases be served with personal notice before the time of redemption expires").

[4] We note that § 77-1832 was revised by 2003 Neb. Laws, L.B. 319, effective April 3, 2003. It no longer requires that notice be served upon "every person in actual possession or occupancy of the real property." The amendment became effective after the district court entered judgment and Ottaco filed its notice of appeal in this case. Thus, we apply the prior version of § 77-1832 quoted above. See, generally, *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002) (in noncriminal cases, substantive statutes are generally not given retroactive effect unless Legislature has clearly expressed intention that new statute is to be applied retroactively).

If a request is made within the proper timeframe, the county treasurer shall execute and deliver a treasurer's tax deed to the purchaser of a tax sale certificate "*upon compliance with the provisions of sections 77-1801 to 77-1837.*" (Emphasis supplied.) § 77-1837. Thus, compliance with the notice provisions of §§ 77-1831 and 77-1832 is a prerequisite to the county treasurer's execution and delivery of a treasurer's tax deed.

The burden of proving such noncompliance with respect to the tenant in possession falls upon Wiese Brothers in this case. Section 77-1842 provides:

> Deeds made by the county treasurer shall be presumptive evidence in all courts of this state, in all controversies and suits in relation to the rights of the purchaser and his or her

> heirs or assigns to the real property thereby conveyed, of the following facts: . . . (7) that the notice had been served or due publication made as required in sections 77-1831 to 77-1835 before the time of redemption had expired . . . .

[5] We have held that in suits relating to the rights of the purchaser, a county treasurer's tax deed is presumptive evidence that all things whatsoever required by law to make a good and valid tax sale and vest title in the purchaser were done. *Kuska v. Kubat*, 147 Neb. 139, 22 N.W.2d 484 (1946). The presumption is not conclusive and may be rebutted but the burden is upon the party attacking the validity of such a deed to show by competent evidence some jurisdictional defect voiding the deed. *Id.* Thus, in this case, we must consider whether Wiese Brothers rebutted the presumption that Ottaco complied with the notice provisions of §§ 77-1831 and 77-1832.

Wiese Brothers did not appear at trial. The *only* evidence received at trial that remotely deals with the tenant in possession is the following question by Huntzinger's attorney and her answer: "Q. Do you know whether or not your tenants on the property received notice? A. I have not heard from them that they received anything."

In our de novo review, we conclude that this evidence was insufficient to rebut the presumption under § 77-1842 that Wiese Brothers had received proper notice.

CONCLUSION

Based on our de novo review, we conclude that Huntzinger is precluded from questioning the titles acquired by Ottaco because of her failure to satisfy § 77-1844. We further conclude that the tenant in possession did not rebut the presumption that it was properly served with the notice required by §§ 77-1831 and 77-1832. We reverse the district court's judgment in favor of Huntzinger and remand the cause with directions to enter judgment quieting title to the properties in favor of Ottaco.

REVERSED AND REMANDED WITH DIRECTIONS.

LEOTA SWANSON, APPELLANT, V. DAVID H. PTAK, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILMA L. PRITCHARD, DECEASED, APPELLEE.

682 N.W.2d 225

Filed July 2, 2004. No. S-03-183.

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. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
5. **Negligence: Actions: Attorney and Client.** Although an attorney-client relationship rests in contract, an attorney's professional misconduct does not give rise to a breach of contract action, but, rather, gives rise to a professional negligence action.
6. **Negligence.** A cause of action for negligence depends upon the breach of a duty by the defendant to use due care to avoid injury to the plaintiff.
7. **Attorney and Client: Parties.** A lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties absent facts establishing a duty to them.
8. **Decedents' Estates: Attorney and Client.** When an attorney is employed to render services in settling an estate, he or she acts as attorney for the personal representative.

Appeal from the District Court for Madison County: DARVID D. QUIST, Judge. Affirmed.

George H. Moyer, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

STEPHAN, J.

Leota Swanson brought this action against David H. Ptak to recover an inheritance she contends she should have received

from an estate. Ptak, an attorney, serves as personal representative of the estate. The district court for Madison County granted Ptak's motion for summary judgment and dismissed the action after determining that Ptak owed no legal duty to Swanson. Swanson perfected this appeal, which we removed 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).

FACTS

Allan L. Pritchard and Wilma L. Pritchard were married late in their lives and had no children. Prior to the marriage, Allan had accumulated a substantial estate. Allan died intestate on April 19, 1997, in Norfolk, Nebraska, leaving Wilma as his only heir. Wilma died intestate on August 21, 1998, in Norfolk, leaving as her only legal heirs a brother, Thomas Fillmore of Klamath Falls, Oregon, and a sister, Nona Fillmore Wittler of Hoskins, Nebraska, now deceased.

Swanson is Allan's niece. After Wilma's death, Swanson, Wittler, and other family members went to Ptak's law office in Norfolk to inquire about her estate. Ptak had performed legal services for both Allan and Wilma during their lifetimes. Ptak generally advised the family members that he was not aware of any will left by Wilma and that under the laws of intestate succession, Fillmore and Wittler would inherit the entire estate unless they agreed to surrender half of the estate to Allan's family, including Swanson. Ptak diagrammed for the family members the approximate distribution of the estate if such an agreement were reached. Under this scenario, Swanson would have received one-fourth of the estate, amounting to approximately $250,000.

Ptak was subsequently appointed the personal representative of Wilma's estate. On October 7, 1998, Ptak sent a letter to Fillmore, Swanson, and the other family members, describing how the estate would be distributed if Wilma's heirs agreed to give 50 percent to Allan's family, including Swanson. In this letter, Ptak stated:

> If this is correct and you are agreeable to this distribution of the estate, I will need to prepare an agreement to be signed by Wilma's heirs which consents to this distribution. I met with Nona Wittler last week and went over this distribution with her and she is agreeable to it.

Swanson continued to receive correspondence from Ptak, in his capacity as personal representative, regarding the estate. The correspondence generally indicated that the estate would be distributed half to Wilma's heirs and half to Allan's heirs. In June 1999, Swanson informed Ptak that she and her husband wished to purchase a new condominium and asked if she could obtain a partial distribution of her one-fourth interest in the estate. On September 13, 1999, Ptak issued Swanson a check for $99,000 as a partial distribution.

In late November 1999, Ptak received a telephone call from Fillmore's wife informing him that Fillmore had never agreed to share the estate with Swanson and other descendants of Allan. Shortly thereafter, Ptak received letters from Fillmore and Wittler confirming that they would not agree to share the estate with Allan's descendants. In his subsequent deposition testimony, Fillmore denied that he had ever agreed to share any portion of the estate with Swanson.

Upon receipt of the letters from Fillmore and Wittler, Ptak wrote to Swanson and the other family members involved advising them that Fillmore and Wittler had notified him that they would not consent to an equal division of the estate with Allan's family. This was the first notice Swanson had that Ptak had not obtained a written agreement from Wilma's heirs to share the estate with Allan's family. Ptak requested that Swanson return the $99,000 partial distribution and eventually filed suit as the personal representative to recover the money from Swanson. The record in this case does not reflect any final disposition of that separate proceeding, in which Swanson asserted a counterclaim against Ptak in his capacity as personal representative.

Swanson filed this action against Ptak in his individual capacity. She alleged three theories of recovery: professional negligence, breach of contract, and negligent failure to furnish accurate information. With respect to all three theories of recovery, she alleged that Ptak's negligence caused her (1) to incur legal fees defending against Ptak's lawsuit for the return of the $99,000, (2) to make gifts to each of her two children of $10,000, and (3) to fail to receive the remaining $90,900 of her one-fourth share of Wilma's estate. Pursuant to a motion to strike by Ptak, the district court struck the allegation that

Ptak's negligence caused Swanson to make the $10,000 gifts to her children.

In granting Ptak's motion for summary judgment and dismissing the action, the district court determined as a matter of law that Ptak owed no legal duty to Swanson.

ASSIGNMENTS OF ERROR

Swanson assigns, restated and consolidated, that the district court erred in (1) finding that Ptak owed her no duty, (2) finding there was no genuine issue of material fact and sustaining Ptak's motion for summary judgment, and (3) striking the language regarding the gifts she made to her children from the petition.

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. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004); *First Colony Life Ins. Co. v. Gerdes*, 267 Neb. 632, 676 N.W.2d 58 (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. *First Colony Life Ins. Co. v. Gerdes, supra*; *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004).

[3,4] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003); *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Fu v. State, supra*; *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001).

ANALYSIS

The issue of law presented in this case is whether Ptak had a duty to secure an inheritance for Swanson from the estate of Wilma. We begin by noting that upon Wilma's death, Swanson

had no legal entitlement to any portion of the intestate estate because she was not a legal heir of the deceased. See Neb. Rev. Stat. § 30-2303 (Reissue 1995). Any "inheritance" which Swanson might receive from the estate could only occur as a result of a gratuitous undertaking by the legal heirs to share the estate with Swanson and the other members of Allan's family. See Neb. Rev. Stat. § 30-24,110 (Reissue 1995).

PROFESSIONAL NEGLIGENCE

[5] In her first theory of recovery, Swanson alleges that Ptak was acting as her attorney in his efforts to obtain the written agreement from Fillmore and Wittler. In her second theory of recovery, she asserts that Ptak breached a contract because he undertook to perform a service for her, i.e., to obtain the written agreement of Fillmore and Wittler to an equal division of the estate, and failed to do so. Although an attorney-client relationship rests in contract, an attorney's professional misconduct "does not give rise to a breach of contract action, but, rather, gives rise to a professional negligence action." *Gravel v. Schmidt*, 247 Neb. 404, 408, 527 N.W.2d 199, 202 (1995). We therefore consider Swanson's first and second theories of recovery as a single professional negligence claim against Ptak.

[6,7] A cause of action for negligence depends upon the breach of a duty by the defendant to use due care to avoid injury to the plaintiff. *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980). Under Nebraska law, a lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties absent facts establishing a duty to them. *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988); *Ames Bank v. Hahn, supra.* Thus, in determining whether Ptak owed a professional duty to Swanson, we must first determine whether she was his client.

[8] Swanson admitted that she had no written agreement with Ptak regarding legal representation and that he never billed her for professional services. However, she "felt" that as personal representative of the estate, he was representing her legal interests. This perception on the part of Swanson is contrary to the principle that when an attorney is employed to render services in

settling an estate, he or she acts as attorney for the personal representative. See *In re Estate of Wagner*, 222 Neb. 699, 386 N.W.2d 448 (1986). See, also, *In re Estate of Snover*, 4 Neb. App. 533, 548, 546 N.W.2d 341, 352 (1996) ("when a personal representative hires an attorney, the *personal representative* is the attorney's client, not the estate"). Thus, any legal services which Ptak performed in connection with the administration of the estate of Wilma were on behalf of himself as personal representative of the estate.

Swanson argues that while there was no written agreement whereby Ptak would serve as her lawyer, the existence of an attorney-client relationship is implicit from his conduct with respect to the proposed agreement of Fillmore and Wittler to share the estate with Swanson. In this regard, Swanson relies on *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 458-59, 466 N.W.2d 499, 506 (1991), in which we stated:

> "An attorney-client relationship ordinarily rests on contract, but it is not necessary that the contract be express or that a retainer be requested or paid. The contract may be implied from the conduct of the parties. . . . The relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. . . . In appropriate cases the third element may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it."

Quoting *Kurtenbach v. TeKippe*, 260 N.W.2d 53 (Iowa 1977).

In *McVaney*, we held that an attorney-client relationship existed in the absence of an express employment agreement when there was evidence of a longstanding relationship between the client and the attorney and there was both general and specific discussion of what action the client wished the attorney to undertake with regard to a specific matter. In this case, there is no evidence that Ptak had ever served as Swanson's attorney. Her primary argument in support of her assertion that there was an implied attorney-client relationship with Ptak was that she

understood that Ptak was advocating for her. This understanding was based upon the fact that Ptak suggested that the division of the estate between Allan's family and Wilma's heirs would be fair and then undertook steps to seek the consent of Fillmore and Wittler to such distribution. Swanson further argues that the $99,000 advance distribution which Ptak made to her from the estate is evidence that he was advocating her position and that his efforts to settle the dispute after it became apparent Fillmore did not intend to sign the agreement demonstrate that Ptak was acting as her attorney. Although Swanson's unilateral belief that Ptak was acting as her attorney may have been sincere, it was based upon a misunderstanding of his duties as personal representative of the estate. We conclude as a matter of law that there are no facts in this record upon which an attorney-client relationship between Ptak and Swanson can be implied.

This does not end the inquiry, inasmuch as our law recognizes that an attorney's duty may extend to a third party if there are "facts establishing a duty." *Landrigan v. Nelson*, 227 Neb. 835, 836, 420 N.W.2d 313, 314 (1988). Accord *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980). However, there are no such facts in this record. We have held that the duty of a lawyer who drafts a will on behalf of a client does not extend to heirs or purported beneficiaries who claim injury resulting from negligent draftsmanship. *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983); *St. Mary's Church v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982). Here, the basis for extending the lawyer's duty to a third party is even more tenuous than in those cases, given the nature of Swanson's claim to a share of the estate. No lawyer, and particularly not one who serves as the personal representative of an intestate estate, could compel persons who are lawful heirs to share the estate with persons who are not. We therefore conclude that as an attorney, Ptak had no professional duty to secure a gratuitous agreement from Wilma's heirs for the benefit of Swanson.

Negligent Failure to Furnish Accurate Information

As an alternative theory of recovery, Swanson alleges that as an attorney and personal representative of the estate, Ptak had a

duty "as a trustee" to furnish accurate information to Swanson regarding the administration of the estate and her "status as a beneficiary." She further alleges that Ptak breached this duty by providing her with information which he knew or should have known to be inaccurate.

The precise legal underpinning of this theory of recovery is unclear. Swanson cites *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952), in which this court held that a petition alleged extrinsic fraud sufficient to justify setting aside the probate of a will. No fraud is alleged here. Swanson also relies upon Restatement (Second) of Torts § 323 at 135 (1965), which provides that "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking . . ." if certain conditions are met. Swanson alleges no "physical harm." She also relies on Restatement, *supra*, § 552 (1977), adopted by this court in *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 370, 518 N.W.2d 910, 921 (1994), which creates liability on the part of one who negligently supplies false information " 'for the guidance of others in their business transactions.' " The damages recoverable under this theory of liability are limited to " 'pecuniary loss caused . . . by . . . justifiable reliance upon the information.' " *Id.* at 370, 518 N.W.2d at 921, quoting Restatement, *supra*. Here, Swanson does not contend that Ptak furnished false information for her guidance in any "business transaction," and the damages she claims are not reliance damages, but, rather, the difference between the $99,000 advance she received and the total amount she would have received if Wilma's heirs had agreed to share the estate.

The record reflects that Ptak initially proceeded as personal representative of the estate under the belief, based upon statements made to him by Wittler in 1998, that Fillmore and Wittler would agree to share one-half of the estate with Swanson and other descendants of Allan. In 1999, when Fillmore and Wittler advised Ptak that they would not agree to this division of the estate, Ptak promptly notified Swanson. Fillmore denied that he had ever agreed to share any portion of the estate with Swanson.

These facts do not establish any legal duty on the part of Ptak in his individual capacity which would form the basis of the recovery sought by Swanson in this action.

CONCLUSION

Finding no error in the conclusion of the district court that Ptak, in his individual capacity, owed no legal duty to Swanson, we affirm the judgment of dismissal.

AFFIRMED.

GERRARD, J., not participating.

YVONNE MOONEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ADA I. HAMILTON, DECEASED, APPELLEE, v. GORDON MEMORIAL HOSPITAL DISTRICT, A NEBRASKA POLITICAL SUBDIVISION, DOING BUSINESS AS GORDON COUNTRYSIDE CARE CENTER, APPELLANT.

682 N.W.2d 253

Filed July 2, 2004. No. S-03-311.

1. **New Trial: Appeal and Error.** In reviewing a district court's order granting a new trial, the decision of the trial court will be upheld in the absence of an abuse of discretion.
2. **Trial: Appeal and Error.** One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.
3. **Trial: Judges: Appeal and Error.** One cannot know of improper judicial conduct, gamble on a favorable result by remaining silent as to that conduct, and then complain that he or she guessed wrong and does not like the outcome.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON and BRIAN SILVERMAN, Judges. Reversed and remanded with direction.

Lyman L. Larsen, Neil B. Danberg, and Andrew C. McElmeel, of Stinson, Morrison & Hecker, L.L.P., for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, and Patrick M. Connealy, of Crites, Shaffer, Connealy, Watson & Harford, for appellee.

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

GERRARD, J.

After a bench trial resulting in an unfavorable verdict, Yvonne Mooney, the plaintiff, filed a motion for new trial, based on her allegation that the district court judge had not been fair and impartial. The court granted Mooney's motion for new trial. The primary issues presented in this appeal are whether Mooney's objection to the judge's conduct was timely and, if so, whether Mooney's allegations were sufficient to warrant granting her motion for new trial.

BACKGROUND

Mooney's mother, Ada I. Hamilton, died in 1999 following a fall at the Gordon Community Care Center, where she resided. Mooney, in her capacity as personal representative of her mother's estate, filed an action against the Gordon Memorial Hospital District (Gordon) pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2002), alleging that negligence by Gordon's employees had caused Hamilton's death.

The matter proceeded to a bench trial, after which the court found generally for Gordon, entered judgment in favor of Gordon, and dismissed Mooney's petition. Mooney filed a motion for new trial, which generally listed *all* of the grounds for a new trial set forth in Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002). However, the basis for the motion was specified in the sole piece of evidence offered in support of the motion: Mooney's own affidavit. Because the averments contained in that affidavit are essential to our analysis of the issues presented in this appeal, the substance of the affidavit is set forth below in its entirety.

> THE UNDERSIGNED, being first duly sworn upon oath, deposes and says as follows:
>
> 1. I am the plaintiff in the above-captioned action.
>
> 2. Trial in this matter was held before Judge [Paul] D. Empson on January 8, 9, and 10, 2003.
>
> 3. My attorneys in this matter are Michael J. Javoronok and Patrick M. Connealy.
>
> 4. On Friday, January 10, 2003, Judge Empson had called for a luncheon recess, and I was still in the courtroom with

both of my attorneys when I overheard a conversation initiated by Judge Empson with Attorney Javoronok.

5. Opposing counsel was also present in the courtroom.

6. Judge Empson stated to Attorney Javoronok that he had met Mr. Javoronok's ex-wife, and that she had spoken highly of him. Attorney Javoronok's response was to the effect of, "Oh, that's good."

7. Judge Empson then stated that Mr. Javoronok's ex-wife told him that things just didn't work out for them. Mr. Javoronok advised that he had been the custodial parent of his daughter, and Judge Empson replied "I bet you learned a lot from her." Mr. Javoronok replied that he had learned nurturing and patience.

8. Mr. Javoronok then advised Judge Empson that he was engaged to be married. A strange look came over Judge Empson's face, he became rather animated, and he said, "Well, if you have done anything improper, then you should get down on your knees and ask your fiancee for forgiveness." Mr. Javoronok replied that he had done nothing to warrant such an apology. Judge Empson became even more animated, repeating the same, and then offered to provide what appeared to be marital and sexual counseling to my attorney, Mr. Javoronok, as well as cautioning him about what appeared to be pre-marital sex.

9. At this point, I felt very uncomfortable about Judge Empson and the trial. I left the courtroom before I could hear the remainder of the conversation.

10. I am a Christian, but it troubles me that Judge Empson was asking searching questions of my lawyer in an area that I felt was inappropriate and embarrassing to me.

11. I am concerned that Judge Empson decided the case on something other than the facts. It was clear that my mother was placed in the care of the defendant rest home, they did not care for her and she received catastrophic injuries which hastened her death. I cannot see anyway [sic] that the court could have ruled against me on the above case, unless it was something outside the evidence that was presented in the courtroom.

> 12. I feel that justice was not done, and I was done a disservice by Judge Empson's comments during the trial, particularly when he stated that he would ignore the testimony of our expert, Mary Hollins, and he sat through her videotaped deposition with his eyes primarily closed.
>
> 13. Judge Empson's warnings to Mr. Javoronok concerning sexual impropriety lead me to believe he was judging my attorney and not the facts being presented. His apparent dismissal of Mary Hollins' deposition after argument by Mr. Javoronok further exasperates this concern. Other comments that I cannot fully recall at this time were peppered with smart remarks that made me feel once again that justice was not done, and I did not have a fair and impartial judge.
>
> FURTHER AFFIANT SAITH NOT.

At the hearing on the motion for new trial, Gordon specifically argued that the issues raised by Mooney's affidavit should have been objected to at the time and presented by a timely motion for mistrial. Nonetheless, the court ruled:

> Okay. I'm going to grant the motion. Here's why: I am sure that counsel knows, as Mr. Javoronok knows, I was just yanking his chain. But his client doesn't know that. His client feels like she got ripped, and I take her affidavit to be true.
>
> And so if she thinks she didn't get a fair trial, I want to make sure that she gets a chance to get a fair trial. . . .
>
> Motion for new trial is granted.

Gordon asked that it be allowed to submit its own affidavits. The court permitted Gordon to submit affidavits, although the court indicated that it would not change its ruling. Gordon submitted the affidavit of Andrew McElmeel, counsel for Gordon, who related his recollection of the conversation described in Mooney's affidavit. McElmeel averred, in relevant part, that the conversation was "jovial and light-hearted in nature," that the judge had merely suggested that "the secret of a good marriage was to start with a clean slate and ask for forgiveness for anything done prior to the marriage," that Javoronok had not appeared to be offended by the judge's remarks, and that generally, "[t]he comment was nothing more than good-natured

banter, and appeared to be taken in that vein by everyone who was present."

The record does not reflect that any objection, or motion for mistrial or recusal, was made for any reason during the proceedings, including any of the instances discussed in Mooney's affidavit, prior to the motion for new trial.

The judge entered an order granting the motion for new trial and recused himself. The case was reassigned to another judge, who denied Gordon's motions for reconsideration or to alter or amend the judgment. Gordon filed this timely appeal.

ASSIGNMENTS OF ERROR

Gordon's 13 assignments of error, restated, consolidate to form 5: The district court erred in (1) accepting Mooney's affidavit into evidence, (2) granting a motion for new trial on grounds that had not been raised during the course of the trial, (3) granting a new trial when no prejudice was shown, (4) not assigning the motion for new trial to another judge for disposition, and (5) failing to grant Gordon's motion to reconsider.

STANDARD OF REVIEW

[1] In reviewing a district court's order granting a new trial, the decision of the trial court will be upheld in the absence of an abuse of discretion. *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (2002).

ANALYSIS

[2] We first turn to Gordon's second assignment of error, because our determination in that regard is dispositive of this appeal. As will be explained more fully below, the incidents forming the basis for Mooney's motion for new trial were known to the parties before the cause was submitted to the court for disposition. Yet Mooney made no complaint about the fairness or impartiality of the district court judge until after an adverse judgment was rendered. One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). The court abused its discretion in granting Mooney's motion for new trial when the issue presented by that motion was untimely.

Our disposition of this appeal is controlled by our decision in *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). In *Wolfe*, a medical malpractice case, a verdict was returned in favor of the defendants, and the district court sustained the plaintiffs' motion for new trial based, in part, on the defendants' improper closing argument. On appeal, we concluded that the court had abused its discretion in granting a new trial when the plaintiffs had not made a timely objection to the alleged impropriety. *Id.* We noted the "controlling principle" that "one may not waive an error, gamble on a favorable verdict, and, upon obtaining an unfavorable result, assert the previously waived error." *Id.* at 343, 506 N.W.2d at 697. Accordingly, we concluded that in order to preserve the alleged misconduct as a ground of appeal, the plaintiffs were required to make an objection no later than the conclusion of the closing argument, and reversed the district court's order granting a new trial. See, also, *Martindale v. Weir*, 254 Neb. 517, 577 N.W.2d 287 (1998); *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[3] Those principles are equally applicable to the situation presented in the present case. The fact that the alleged misconduct in this case was committed by the trial court, instead of counsel, does not distinguish this situation. "One cannot know of improper judicial conduct, gamble on a favorable result by remaining silent as to that conduct, and then complain that he or she guessed wrong and does not like the outcome." *State v. Jenson*, 232 Neb. 403, 405, 440 N.W.2d 686, 688 (1989). In fact, we specifically noted in *Wolfe* that "[i]n point of fact, we do not permit a party to gamble on a favorable result and later complain of a waived error *even where the misconduct spews from the mouth of the trial judge*." (Emphasis supplied.) 244 Neb. at 344, 506 N.W.2d at 697, citing *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984).

Nor is this case distinguished by the fact that this was a bench trial, instead of a jury trial. Mooney was still obligated to make a timely objection to any perceived misconduct by the trial judge, and if the judge's fairness or impartiality was called into question, Mooney should have moved for recusal prior to submitting the case for disposition. See *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). As previously noted, Mooney made no timely objection or motion based upon the incidents that formed the basis of her motion for new trial. Specifically, Mooney's affidavit discusses a conversation that occurred between the trial judge and counsel during the noon recess on the final day of trial. No mention of this conversation appears in the record prior to submission of the cause. The bill of exceptions shows that after the noon recess, Mooney concluded cross-examination of the defendant's expert witness, and redirect and recross-examination were had. Mooney was herself recalled to the stand for further direct examination. Before the cause was submitted, both parties made motions to dismiss which were denied, and closing arguments were made. In short, the record establishes that Mooney had ample opportunity to object to the court's conduct after the recess, but did not do so.

Mooney's affidavit also claims that the trial judge "stated that he would ignore the testimony of our expert, Mary Hollins, and he sat through her videotaped deposition with his eyes primarily closed." This appears to refer to the judge's remarks, made on the record, which questioned the relevance of the expert's deposition testimony. In response to Gordon's objection to the deposition, the trial judge stated that the evidence was "singularly unhelpful," but that he had been "listening intently" for evidence that was pertinent to the issues presented in the case. In ruling on the objection, the judge informed the parties, "So I'm not going to kick it out, but I'm letting you know how much weight it has. The objection is overruled. It didn't help me much, if at all." Mooney's counsel responded to this ruling by stating, "I suppose we'll argue that later." The judge replied, "Yeah, you can argue it to your heart's content. Well, almost."

We assume, based on our review of the bill of exceptions, that this is the exchange to which Mooney's affidavit referred, although the judge's comments to the parties were directed at the issues presented, and would not appear to call the judge's fairness or impartiality into question. Mooney's counsel, instead of objecting or asking for the judge's recusal, simply declared his intent to argue to the court about why the evidence should be given more weight. This did not preserve or raise any question of bias on the part of the trial judge.

The only other allegation of misconduct contained in Mooney's affidavit is her reference to "[o]ther comments" made by the trial court that "were peppered with smart remarks." Neither Mooney's affidavit, nor the appellee's brief, make any effort to identify for this court what those "smart remarks" might have been. We have nonetheless examined the record in search of those instances, both to determine whether timely objections were made, and to evaluate the possibility of plain error. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004) (plain error may be asserted for first time on appeal or noted by appellate court on its own motion).

We have stated that 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. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004); *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). Our application of this objective standard to the record in this case reveals no conduct on the part of the trial judge that would satisfy this standard, much less any comments that were the basis of a timely objection or motion for recusal.

In short, to the extent that we have located references in the record to the incidents forming the basis for Mooney's motion for new trial, we cannot locate any corresponding objection, or motion for recusal or mistrial. Based on *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993), we conclude that the court abused its discretion in granting Mooney's motion for new trial where Mooney was aware of the basis for that motion during trial, gambled on a favorable judgment from the court, and, upon obtaining an unfavorable result, asserted the previously waived error. We conclude that Gordon's second assignment of error has merit and is dispositive of this appeal. Having so concluded, we need not consider Gordon's remaining assignments of error. See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

CONCLUSION

The district court erred in granting Mooney's motion for new trial after Mooney failed to object during trial to the judge's

alleged misconduct. We reverse the district court's order granting a new trial, and remand the cause with the direction that the district court reinstate the order of judgment of dismissal originally filed on January 27, 2003.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., participating on briefs.

DAVID J. CAMPBELL, APPELLEE, V. CITY OF OMAHA POLICE AND FIRE RETIREMENT SYSTEM BOARD OF TRUSTEES, APPELLANT.

682 N.W.2d 259

Filed July 2, 2004. No. S-03-408.

1. **Administrative Law: Evidence: Appeal and Error.** In reviewing the decision of an administrative board on a petition in error, both the district court and the appellate court review the decision of the board to determine whether it acted within its jurisdiction and whether the decision of the board is supported by sufficient relevant evidence. The evidence is sufficient, as a matter of law, if an administrative board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.

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

Mark E. Novotny and Craig F. Martin, of Lamson, Dugan & Murray, L.L.P., for appellant.

Thomas M. White, Michaela M. White, and C. Thomas White, of White & Wulff, for appellee.

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

STEPHAN, J.

The City of Omaha Police and Fire Retirement System Board of Trustees granted Officer David J. Campbell a disability pension based on a service-connected injury to his T6 vertebra that

occurred in 1993. Campbell filed a petition in error, and the district court for Douglas County determined that the board of trustees erred in calculating the amount of the pension and further erred in basing it solely on the T6 injury. The board of trustees filed this timely appeal.

BACKGROUND

Campbell began his service as an Omaha police officer in 1974. On February 20, 1993, Campbell was injured when his police cruiser, which was parked at the scene of an accident investigation, was struck from the rear by a motorist who lost control of a vehicle while traveling on Interstate 680 in Omaha, Nebraska. Campbell suffered a thoracic compression fracture of his T6 vertebra and a neck injury. Subsequently, he suffered a right shoulder injury and aggravated the neck injury during a struggle to effectuate an arrest on February 14, 2000; an aggravation of the shoulder and neck injuries during shotgun qualification training on August 10; and a further aggravation of the thoracic compression fracture and shoulder and neck injuries during self-defense training on January 2, 2001. He also suffered from hypertension in the years following the 1993 motor vehicle accident. It is generally undisputed that Campbell is no longer physically fit for active duty with the Omaha Police Department.

Campbell filed an action against the City of Omaha under the Americans with Disabilities Act, and a jury returned a verdict in his favor in late 2000. He subsequently perceived that the city was engaging in retaliatory behavior toward him and filed another suit against the city. On December 3, 2001, Campbell and the city entered into a written settlement agreement which provided that Campbell would receive $7,814.17 as "Back Pay," $50,000 as "Front Pay," $200,000 for "Pain and Suffering and Compensatory Damages," and $175,000 in "Attorney Fees." The agreement further provided in relevant part:

> The back pay will be tendered to David Campbell retroactively and applied during the period of February 1, 1999 through December 2000 through the regular City payroll and subject to all normal deductions for taxes and pension benefits.

> The front pay will be tendered to David Campbell in thirteen (13) equal installments through the regular City payroll (in addition to his current salary) and subject to all normal deductions for taxes and pension benefits, commencing on December 10, 2001, or the first pay period thereafter, and continuing each following pay period for a total of thirteen (13) pay periods. The City agrees that the front pay described above represents the amount a Sergeant in the Omaha Police Department could earn in a fiscal year in addition to his normal salary through overtime and other special pay for testimony, training, etc.
>
> The parties agree that David Campbell, by virtue of the decision not to promote him to Sergeant, was denied the opportunity to earn such additional monthly compensation. Therefore, as part of the settlement and compromise of this litigation the City of Omaha and David Campbell specifically agree that the front and back pay shall be considered to be "monthly compensation" included in the amounts used to calculate his pension benefits as defined in Omaha Municipal Code Chapter [2]2, Art. III, Section 22-76 (1996) and *Brunken v. Board of Trustees of City of Omaha Police and Fire Retirement System*, 261 Neb. 626, 624 N.W.2d 629 (2001). It is in reliance on this agreement that David Campbell agrees to retire as is provided for subsequently in this document.

Arguments presented to the board of trustees further clarified that the settlement agreement was intended to acknowledge that Campbell was illegally passed over for sergeant and to compensate him as he would have been had he been lawfully promoted.

On April 12, 2002, Campbell filed an application with the board of trustees for a service-connected disability pension due to hypertension, neck disorder, T6 compression fracture, and right shoulder disorder. On June 20, the board of trustees heard the application and received evidence in support thereof, but deferred ruling on it for 30 days, or until July 18. At the July 18 meeting of the board of trustees, Campbell reoffered all of the exhibits he originally offered at the June 20 hearing. At the close of the July 18 meeting, the board of trustees again deferred ruling on the application. Campbell thereafter successfully sought

a writ of mandamus ordering the board of trustees to make a decision on his application at its August 15 meeting.

During the August 15, 2002, hearing, Campbell again offered into evidence all exhibits offered at the previous hearings, as well as a transcript of the July 18 hearing. After considering the evidence before it and various options for how to calculate Campbell's pension benefit, the board of trustees determined that Campbell's pension benefit would be calculated based solely on his salary as a patrolman, without considering the additional amounts he received monthly pursuant to his settlement agreement with the city. The board of trustees further determined that the sole basis of the disability pension was the injury Campbell received to his T6 vertebra in the 1993 accident.

Campbell filed a petition in error in the district court for Douglas County, contending that the board of trustees improperly refused to calculate his pension benefit based upon his monthly compensation received pursuant to the settlement agreement and further erred in relating his disability solely to the injury suffered to his T6 vertebra in the 1993 accident. The district court concluded that the board of trustees erred in calculating Campbell's pension and in determining the disabling injury, and remanded the cause to the board of trustees with directions to make an appropriate award. The board of trustees filed this timely appeal.

ASSIGNMENTS OF ERROR

The board of trustees assigns, restated, that the district court erred in (1) finding that the board of trustees should have considered the settlement between Campbell and the City of Omaha in calculating Campbell's disability benefit and (2) finding that the board of trustees incorrectly determined the basis for Campbell's disability benefits.

STANDARD OF REVIEW

[1] In reviewing the decision of an administrative board on a petition in error, both the district court and the appellate court review the decision of the board to determine whether it acted within its jurisdiction and whether the decision of the board is supported by sufficient relevant evidence. *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23

(2003). The evidence is sufficient, as a matter of law, if an administrative board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Id.*

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001).

ANALYSIS

CALCULATION OF DISABILITY BENEFIT

In its first assignment of error, the board of trustees contends that the district court erred in finding that its calculation of the amount of Campbell's disability pension benefit was improper. This assignment requires us to examine the evidence offered before the board of trustees and the applicable sections of the Omaha Municipal Code.

The record includes medical records and copies of relevant portions of the Omaha Municipal Code which Campbell submitted to the board of trustees in support of his application for a service-connected disability pension. Chapter 22, article III, of the Omaha Municipal Code is entitled "Police and Fire Retirement System." The award of disability pensions is governed by Omaha Mun. Code, ch. 22, art. III, § 22-78 (1996), which provides in relevant part:

> Any member of the system who, while in the line of duty, has sustained or shall sustain injuries or sickness, arising out of the immediate or direct performance or discharge of his/her duty, which immediately or after a lapse of time permanently unfit such annuitant for active duty in his/her department, shall receive a monthly accidental disability pension as long as such annuitant remains unfit for active duty in such member's department, equal to 50 percent of such member's *average final monthly compensation.* In addition thereto, such annuitant shall be paid medically necessary covered services which may be incurred as a result of such sickness or injury.

(Emphasis supplied.) Omaha Mun. Code, ch. 22, art. III, § 22-63 (1995) defines "[a]verage final monthly compensation" as used

in article III as "[t]he member's highest average monthly compensation during any consecutive 26 pay periods, during the member's last five years of service as a member of the system for which service credit has been earned."

The dispute in this case is whether the board of trustees erred in ignoring Campbell's settlement agreement with the city and the resulting increase in his monthly pay when determining his "average final monthly compensation." We addressed a similar issue in *Brunken, supra*, and both parties rely on *Brunken* to support their arguments. In that case, Donald E. Brunken, an Omaha firefighter, applied for general retirement benefits under Omaha Mun. Code, ch. 22, art. III, § 22-76 (1996). Section 22-76 is the provision for age-related retirement, and its provisions are very similar to § 22-78. Most notably, § 22-76 provides in relevant part that participants in the city's fire and police systems " 'shall be entitled, upon . . . retirement, to a monthly service retirement pension payable each month for the remainder of [his or her] natural life after retirement equal to [a certain percentage] of the member's *highest average monthly compensation*' during any year of the member's last 5 years of service." (Emphasis supplied.) *Brunken*, 261 Neb. at 627, 624 N.W.2d at 631. Brunken argued that the board of trustees erred in calculating his retirement pension because it refused to consider a one-time, lump-sum payment he received in 1995 of $7,117.38, representing retroactive wages from 1994, in his overall total income for the year 1995. The retroactive wage payment was a result of contract negotiations between the firefighters and the city.

In analyzing Brunken's claim, we determined that although the backpay was part of his total compensation for the year 1995, it was not "monthly compensation" as contemplated by § 22-76 because it was a one-time payment, not "regular compensation received every month." *Brunken v. Board of Trustees*, 261 Neb. 626, 632, 624 N.W.2d 629, 634 (2001). We thus determined that the " 'happenstance' " receipt of the backpay in 1995 did not alter Brunken's regular "monthly compensation" in that year and that thus, the board of trustees did not err in calculating Brunken's retirement benefit without reference to the lump-sum backpay. *Id.*

In this action, the board of trustees argues that Campbell's receipt of the moneys outlined in his settlement agreement with

the city is similarly only happenstance. In addition, the board of trustees contends that it should not be bound by the settlement agreement, to which it was not a party, when calculating Campbell's disability pension benefits.

As an initial matter, we note that the clear language of § 22-78 does not give the board of trustees discretion in calculating pension benefits. The board of trustees' sole duty under § 22-78 is to award a disability pension based upon a member's "average final monthly compensation." Thus, if Campbell's agreement with the city results in a higher average monthly compensation than he would otherwise receive, the board of trustees is bound to award him a disability pension based upon that amount regardless of whether it was privy to the settlement agreement. The issue is not whether the board of trustees is bound by Campbell's settlement with the city, but, rather, whether certain funds which Campbell actually received pursuant to the settlement were part of his "monthly compensation" as that term is defined under the applicable ordinance.

In this respect, the instant case is distinguishable from *Brunken*, which involved a single lump-sum payment for backpay. The settlement agreement at issue in this case specifically and clearly provides that the front pay awarded to Campbell was to be disbursed through the regular city payroll in regular monthly installments. Moreover, it is equally clear from the terms of the settlement agreement that its purpose was to put Campbell in the position he would have been in had the city lawfully promoted him to the rank of sergeant, and thus the fact that the additional payments were regularly awarded on a continuing monthly basis for 13 months was hardly happenstance. Because Campbell was thus receiving regular monthly compensation in an amount greater than that considered by the board of trustees in calculating his pension benefit, its calculation was not based upon sufficient relevant evidence and the district court correctly concluded that the board of trustees erred in making its calculations.

Basis of Disability Pension

In its second assignment of error, the board of trustees contends that the district court erred in finding that there was not sufficient relevant evidence to support its decision to base the

disability pension on Campbell's T6 injury. Campbell requested a pension based on disability for "Hypertension, Neck Disorder, Right Shoulder Disorder, and T-6 Compression Fracture." According to the transcript of the August 15, 2002, meeting, the board of trustees awarded Campbell a "service-connected disability for T6." The district court found that the board of trustees erred in not awarding the disability pension based also on "various physical conditions [Campbell] incurred while in the course of duty after February 20, 1993." The basis of the disability pension is significant because § 22-78 provides that the disabled member will be paid, in addition to the disability pension, for "medically necessary covered services which may be incurred as a result of" the injury forming the basis of the disability pension.

The board of trustees argues in its brief that there is sufficient relevant evidence in the record to support its award of the disability pension based solely on the 1993 injury. Notably, however, the record clearly reveals that the disability pension was not based on "the 1993 injury," but, rather, on only the T6 injury which Campbell sustained in the 1993 motor vehicle accident. It appears that the board of trustees simply ignored substantial evidence in the record that Campbell suffered other service-related injuries in that accident and afterward.

The board of trustees relies heavily upon a June 10, 2002, "DISABILITY EVALUATION REPORT" submitted by Dr. Dean K. Wampler. However, in doing so, the board of trustees appears to mischaracterize the findings in this report. A review of the report reveals that Wampler found nine "*Diagnoses*" for Campbell:

1. Chronic Cervical Pain (connected to 1993 work injury).
2. Chronic Headaches (connected to 1993 work injury).
3. Interscapular Thoracic Pain (caused by T6 compression deformity in 1993 injury).
4. Right Shoulder Impingement and AC Joint Arthritis (alleged due to work injury of 2/00).
5. Bilateral Upper Extremity Paresthesia (cause unknown).
6. Past History of Lumbar Strain (cause not evaluated).
7. Hypertension (cause *alleged* to work related stresses).

8. Situational Anxiety and Single Panic Attack (alleged to work-related stresses).

9. Cervical Degenerative Spine Disease (condition of life).

In his "*Treatment Suggestions*" following his diagnoses, Wampler noted that Campbell remained symptomatic for *all* of his conditions. In stating his prognosis, Wampler concluded that Campbell's "neck and upper back" symptoms would remain largely unchanged over time and that it was unknown whether his high blood pressure could be controlled adequately. Finally, in assessing Campbell's "*Work Abilities*," Wampler concluded:

> Mr. Campbell has conditions that make him medically unsuitable for many duties of an Omaha Police Officer. Limitations resulting from his medical conditions include restriction from potentially combative suspects through arrests or interrogation. More importantly, his perceived level of stress and its aggravation to his high blood pressure will be a problem in many circumstances, including office work.

Wampler stated that Campbell's hypertension "requires continuous medication treatment."

Taken as a whole, Wampler's report does not constitute sufficient relevant evidence to support the board of trustees' decision to limit the basis of Campbell's disability to only the T6 compression fracture sustained in 1993. Notably, Wampler diagnosed Campbell with injuries related to the 1993 accident other than the T6 injury, as well as other injuries related to subsequent events. Additional evidence in the record further documents those injuries and the fact that they are service related. Moreover, Wampler's report puts significant weight upon the disabling effects of Campbell's hypertension, which is attributed by Wampler to general work stresses and is not specific to either the 1993 accident or the T6 compression fracture. Wampler's report, therefore, does not support the board of trustees' position. Rather, it establishes that Campbell's inability to continue work as a police officer, and thus his disability, is based on various conditions, including those arising from the 1993 accident and his subsequent service-related injuries and conditions. For these reasons, the district court correctly reversed the board of trustees' award of a disability based solely on the T6 injury.

CONCLUSION

The board of trustees has no discretion under the Omaha Municipal Code to determine the amount of disability pension that should be awarded to a retirement system member. Instead, it is required to award a disability pension based upon the member's "average final monthly compensation" as that term is defined by § 22-63. Because Campbell was paid additional compensation pursuant to his settlement with the city in regular monthly installments, the board of trustees erred in disregarding these amounts in calculating his final monthly compensation. Moreover, the board of trustees' decision to award the disability pension based solely on the 1993 T6 compression fracture is not supported by sufficient relevant evidence, as the record clearly establishes that Campbell's disability and resulting lack of fitness for duty are due to this and other service-related injuries and illnesses. For the foregoing reasons, we affirm the judgment of the district court reversing the decision of the board of trustees and remanding the cause to the board of trustees for recalculation of Campbell's disability retirement benefits in a manner consistent with its opinion.

AFFIRMED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. LUIS FERNANDO-GRANADOS, ALSO KNOWN AS LUIS VARGAS, APPELLANT.

682 N.W.2d 266

Filed July 2, 2004. No. S-03-471.

1. **Motions to Suppress: Miranda Rights: Waiver: Proof.** Where suppression of a statement is sought based upon a claimed violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the State bears the burden of proving waiver by a preponderance of the evidence.
2. **Constitutional Law: Motions to Suppress: Self-Incrimination: Waiver: Appeal and Error.** On appellate review of a trial court's ruling on a motion to suppress a custodial statement based upon a claimed inadequacy of *Miranda* warnings, findings of fact as to the warnings given are reviewed for clear error, and the determination of whether such warnings were sufficient to form the basis of a knowing and intelligent waiver of the Fifth Amendment privilege against compulsory self-incrimination is reviewed de novo.

3. **Expert Witnesses.** The standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion.
4. **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.
5. **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 the judicial system.
6. **Courts: Expert Witnesses.** Under the framework set out in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the trial court must act as a gatekeeper to ensure the evidentiary relevance and reliability of the expert's opinion. This entails a preliminary assessment of 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.
7. ____: ____. 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.
8. ____: ____. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), expert evidence is admissible so long as foundation is presented to satisfy the court of the validity of the theory or methodology underlying the proffered opinion.
9. ____: ____. 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.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

STEPHAN, J.

After a bench trial, Luis Fernando-Granados, also known as Luis Vargas, was convicted of one count of first degree murder and one count of use of a deadly weapon to commit a felony. He was sentenced to life in prison on the first degree murder conviction and to 10 to 20 years' incarceration on the weapon conviction, the sentences to be served consecutively. He perfected this appeal in which he contends that the district court erred in denying his motion to suppress statements he made to police because he was inadequately advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prior to making the statements. He also contends that the district court erred in receiving certain DNA evidence at his trial.

I. BACKGROUND

On Sunday, May 26, 2002, the body of Mindy Schrieber was found in the parking lot of a restaurant in Douglas County where she was employed as a manager. Schrieber had been responsible for closing the restaurant on the evening of May 25. Investigators at the crime scene observed a tire tread pattern on the curb near the location where Schrieber's body was found and on the body itself. Other markings on the body were found to be consistent with markings on the oil pan of a Ford Escort automobile. The cause of death was determined to be multiple stab wounds and blunt trauma consistent with being struck by a motor vehicle.

Fernando-Granados and his girl friend were living together in May 2002. Fernando-Granados had been employed as a cook at the same restaurant where Schrieber had worked. Fernando-Granados' girl friend testified that on May 25, Fernando-Granados left their residence with Victor Hernandez in a Ford Escort owned by Hernandez. Fernando-Granados returned at approximately 3 o'clock the next morning, and on the following day, Fernando-Granados and his girl friend made a downpayment of $600 on a used car. Fernando-Granados made the payment in $100 bills. His girl friend learned of the homicide from news reports and on June 5, called Crimestoppers to leave an

anonymous tip that Hernandez may have been involved. On June 6, Fernando-Granados' girl friend found Schrieber's checkbook and driver's license hidden in a box of crackers in a kitchen cupboard of the residence she shared with Fernando-Granados.

On June 5, 2002, Omaha police notified the Douglas County Sheriff's Department that they were holding Fernando-Granados on an unrelated charge. Deputy Robert Jones and Det. John Pankonin interviewed Fernando-Granados at Omaha police headquarters on that day. Prior to this interview, Fernando-Granados was advised of his *Miranda* rights, in Spanish, from a form utilized by the sheriff's office. He indicated in Spanish that he understood the warnings and agreed to speak to the officers. During an interview that lasted approximately 1 hour, Fernando-Granados denied any involvement in the death of Schrieber.

On June 6, 2002, Hernandez implicated Fernando-Granados in the homicide. Deputies reinterviewed Fernando-Granados later that same day. Prior to this second interview, he was again advised of his rights in Spanish using the same advisory form and again indicated that he understood and agreed to give a statement. During this second interview, Fernando-Granados admitted that he killed Schrieber in the course of robbing the restaurant where they had worked. Prior to trial, Fernando-Granados filed a motion to suppress the statements which he gave to law enforcement officers. The district court denied the motion.

Fernando-Granados also filed a pretrial motion in limine to exclude evidence of DNA testing and the results of such testing. A hearing was conducted on whether the evidence was admissible under the standards articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). At the conclusion of the hearing, the court overruled the motion in limine.

Fernando-Granados waived his right to a jury trial, and a bench trial was conducted on March 20 and 21, 2003. At trial, the State offered the statements Fernando-Granados made to law enforcement officers and DNA evidence relating to blood found on a $1 bill taken during the robbery and on a portion of the wheel well of the Ford Escort owned by Hernandez. Fernando-Granados renewed the objections asserted in his pretrial motions, and the court overruled the objections and received the evidence.

Additional facts will be included in our analysis of the issues presented for appellate review.

II. ASSIGNMENTS OF ERROR

Fernando-Granados assigns, restated, that the trial court committed reversible error (1) by denying his motion to suppress his statements because the rights advisory form written in Spanish did not conform to the requirements established by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and (2) by admitting evidence and testimony concerning DNA testing, analysis, and results because the State failed to meet the foundational requirements of *Daubert, supra.*

III. ANALYSIS

1. Denial of Motion to Suppress

(a) *Miranda v. Arizona*

The Fifth Amendment to the Constitution of the United States provides in part that no person "shall be compelled in any criminal case to be a witness against himself." This constitutional privilege against compulsory self-incrimination "is also protected by the Fourteenth Amendment against abridgment by the States." *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

In *Miranda*, the U.S. Supreme Court specifically addressed the application of the Fifth Amendment to interrogation of persons held in the custody of law enforcement agencies. The Court held in *Miranda* that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. Specifically, the Court in *Miranda* held that

> when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise

> of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 478-79. The Court further held that such warnings and waiver "are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement" made by a defendant in police custody. 384 U.S. at 476. *Miranda* announced a "constitutional rule" which "requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." *Dickerson v. United States*, 530 U.S. 428, 442, 444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

(b) Suppression Hearing

[1] In this case, Fernando-Granados filed a pretrial motion seeking to suppress "any and all statements obtained from him by members of the Douglas County Sheriff's Department or members of the FBI on or about June 7, 2002." The bases for his motion included that the statements were obtained "without properly advising him of his right to counsel, and his right against compulsory self-incrimination" and that he "did not make a knowing, voluntary and intelligent waiver of his right to counsel, and his right against compulsory self-incrimination." Where, as in this case, suppression of a statement is sought based upon a claimed violation of *Miranda*, the State bears the burden of proving waiver by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed.

2d 473 (1986); *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).

The State called Jones, Pankonin, and Gilberto Balli as witnesses at the suppression hearing. Jones was a deputy for the Douglas County sheriff's office, and Pankonin worked as a detective for that office. On June 5, 2002, they interviewed Fernando-Granados and three other individuals at the Omaha central police station in connection with the investigation of the death of Schrieber. The interviews were conducted by Pankonin. Jones, who is fluent in Spanish, assisted with translation where necessary.

At the beginning of the June 5, 2002, interview, Jones and Pankonin ascertained that Fernando-Granados spoke both English and Spanish. It was agreed that the interview would be conducted in English and that Jones would translate it into Spanish if necessary. Before the interview began, Jones advised Fernando-Granados of his rights utilizing a "Rights Advisory Form (Spanish)" bearing the letterhead of the Douglas County Sheriff's Department. The form consisted of six questions printed in Spanish:

> Q. Le hago intender que yo soy oficial de la policia. ¿Usted entiende eso?
>
> Q. Usted tiene el derecho de quedarse callado y no hacer ningún comentario ni contestar ninguna de mis preguntas. ¿Usted entiende eso?
>
> Q. Cualquier cosa que usted diga se puede usar, y se usará en contra de usted en la corte. ¿Usted entiende eso?
>
> Q. Usted tiene el derecho de consultar con un abogado y tener presente al abogado con usted durante las preguntas. ¿Usted entiende eso?
>
> Q. Si usted no tiene el dinero para emplear a un abogado, la corte puede nombrar uno par que lo representa. ¿Usted entiende eso?
>
> Q. Entendiendo sus derechos en esta situación, ¿esta usted despuesto a hacer una declaración conmigo ahora?

The form contained a blank space beneath each question in which the answer was to be written. After Jones read each question aloud in Spanish, Fernando-Granados indicated that he understood and Jones wrote "si" in the corresponding space on

the form. Fernando-Granados then initialed each "si" response and signed the form.

The actual interview was conducted in English, although Fernando-Granados requested that a few questions be rephrased in Spanish. During this interview, which lasted approximately 1 hour, Fernando-Granados did not request a lawyer or express an unwillingness to talk to the officers. He denied any involvement in the robbery of the restaurant or the Schrieber homicide.

After obtaining additional information which implicated Fernando-Granados in the crimes, officers interviewed him a second time on June 6, 2002. On this occasion, Pankonin was accompanied by Balli, a special agent with the Federal Bureau of Investigation (FBI) assigned to its Omaha office. Balli is fluent in Spanish and certified by the FBI as a Spanish speaker. Balli conducted the interview after first advising Fernando-Granados of his rights, in Spanish, utilizing another copy of the same form which had been used in the first interview. Balli testified that he read the rights to Fernando-Granados from the form. Fernando-Granados gave affirmative responses to each question and signed the form. Balli ascertained from Fernando-Granados that he would be more comfortable speaking in Spanish, so he conducted the interview in that language, although at times during the interview, Fernando-Granados made comments in English. After initially denying involvement, Fernando-Granados admitted committing the robbery and homicide. All three officers involved in the two interviews denied making any threats, promises, or inducements to Fernando-Granados, and testified that he appeared willing to speak to them and did not request a lawyer.

During the suppression hearing, both Jones and Balli translated the substantive content of the rights advisory form from Spanish to English. The two substantially agreed that the translation of the first through fourth and sixth questions, with the English translation noted in brackets, was as follows:

> Le hago intender que yo soy oficial de la policia. ¿Usted entiende eso? ["I will have you understand that I am an officer or agent of the police. Do you understand that?"]
>
> . . . Usted tiene el derecho de quedarse callado y no hacer ningún comentario ni contestar ninguna de mis preguntas. ¿Usted entiende eso? ["You have the right to remain silent

> and not make any statements nor answer my questions. Do you understand that?"]
>
> . . . Cualquier cosa que usted diga se puede usar, y se usará en contra de usted en la corte. ¿Usted entiende eso? ["Anything you make can be used against you and will be used against you in court. Do you understand that?"]
>
> . . . Usted tiene el derecho de consultar con un abogado y tener presente al abogado con usted durante las preguntas. ¿Usted entiende eso? ["[Y]ou have the right to consult with a lawyer and have a lawyer present with you during questioning. Do you understand this?"]
>
> . . . .
>
> . . . Entendiendo sus derechos en esta situación, ¿esta usted despuesto a hacer una declaración conmigo ahora? ["Understanding your rights in this situation are you willing to make a statement with me now?"]

During direct examination, Jones and Balli were questioned concerning the fifth rights advisement on the form, which provided, "Si usted no tiene el dinero para emplear a un abogado, la corte puede nombrar uno par que lo representa. ¿Usted entiende eso?" Both testified that this advisement provided that if the suspect did not have money to hire an attorney, the court "will appoint" one. On cross-examination, however, both conceded that by utilizing the Spanish word "puede," the advisement did not say "will," but, rather, that the correct translation was "the court may" or the court "has the ability to" appoint a lawyer.

Fermin Garcia testified on behalf of Fernando-Granados at the hearing on the motion to suppress. Garcia is a professor of Spanish language and literature at the University of Nebraska at Omaha. Garcia translated the fifth advisement to provide:

> "If you don't have money to employ a lawyer, the court," and this is the difficult thing, puede, p-u-e-d-e, could be translated into could, could be — be able to name or would name, and also "may" is implied with that puede. So the court could or be able to or may name one, one lawyer to represent, to represent the person.

He stated that in his opinion, the language was ambiguous because "it implies that it might not happen. It's not said clearly that he or she will get one — somebody to represent the person.

It implies that it could happen. So it leaves the person in doubt that may not have one to represent that person." Garcia further testified that the Spanish language rights advisement form utilized by the FBI uses language which, translated into English, states: "If you, the person, cannot pay the expenses of a lawyer, one will be assigned before initiating the interrogation. And if you desire that way, if you so desire."

In its order denying the motion to suppress, the district court found that Fernando-Granados

> was told in his native language that he had a right to remain silent, that anything he said could be used against him in court, that he had a right to speak to an attorney and have an attorney present during questioning. He was further advised that if he did not have the money to pay for a lawyer the Court [could, may, can] had the ability to appoint one for him.

The district court further found that "[a]t no time during the interviews did [Fernando-Granados] indicate he did not understand or comprehend what was going on. He never indicated he wanted an attorney or could not understand what was being said about the lawyer." Based upon these findings of fact, the district court concluded that Fernando-Granados made "a knowing, voluntary, and intelligent waiver of his rights" and overruled his motion to suppress.

(c) Standard of Review

Although the motion to suppress was based upon alternative grounds, in this appeal, Fernando-Granados contends that the district court erred in denying it for a single reason; namely, that the advisements given to him in Spanish did not conform to the requirements of *Miranda* because they did not inform him that an indigent suspect "will be" provided an attorney at no cost if he cannot afford counsel. He makes no claim on appeal that the statements should have been suppressed as the product of threats, promises, or inducements. Compare *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004) (applying clearly erroneous standard of review to district court's determination that defendant's statement was voluntarily made and not product of promise of leniency).

We have not previously articulated the standard by which we review the denial of a motion to suppress a defendant's custodial statement based solely upon a claim that the *Miranda* warnings given were incomplete or otherwise inadequate to effectuate a knowing waiver of the defendant's Fifth Amendment privilege. Appellate review of such a claim involves two distinct inquiries. First, what warnings were actually given before the statement was obtained? Second, were such warnings legally sufficient under *Miranda* to form the basis of a knowing waiver of the privilege against compulsory self-incrimination? The first inquiry involves review of the factual determinations made by the district court, while the second requires consideration of whether the district court correctly assessed the legal consequences which flow from its factual determinations.

In *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995), the U.S. Supreme Court held that whether a suspect is "in custody" and therefore entitled to *Miranda* warnings presents a mixed question of law and fact. Based upon this holding, we concluded in *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000), that appellate review of this Fifth Amendment issue should be governed by the two-stage standard set forth in *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), with respect to mixed questions of law and fact in a Fourth Amendment context. See, also, *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). We therefore held in *Burdette* that in reviewing a motion to suppress statements to determine whether an individual was "in custody" for purposes of *Miranda*, findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error, and the determination of whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave is reviewed de novo.

Other appellate courts have applied this two-stage standard in reviewing a trial court's determination regarding a waiver of *Miranda* rights. See, e.g., *People v. Platt*, 81 P.3d 1060 (Colo. 2004) (holding trial court's determination of whether there has been valid waiver of *Miranda* rights involves both factfinding and law application; former entitled to deference if supported by competent evidence, and latter reviewed de novo on appeal);

State v. Jaco, 130 Idaho 870, 873, 949 P.2d 1077, 1080 (Idaho App. 1997) (factual findings reviewed for substantial evidence, and " 'free review of the lower court's decision as to whether the constitutional requirements have been satisfied in light of the facts found,' " quoting *State v. Carey*, 122 Idaho 382, 834 P.2d 899 (Idaho App. 1992)); *State v. Lockhart*, 830 A.2d 433, 442 (Me. 2003) ("[a]lthough the suppression court's factual findings are reviewed for clear error, the issue of whether rights under *Miranda* have been knowingly and intelligently waived is reviewed de novo"); *State v. Dominguez-Ramirez*, 563 N.W.2d 245, 252 (Minn. 1997) ("[o]n appeal, this court will independently determine, on the basis of the facts as found by the district court, whether the state has shown by a fair preponderance of the evidence that the waiver was knowing, intelligent, and voluntary"); *State v. Barrera*, 130 N.M. 227, 234, 22 P.3d 1177, 1184 (2001) ("we review the trial court's findings of fact for substantial evidence and review de novo the ultimate determination of whether a defendant validly waived his or her *Miranda* rights prior to police questioning"); *State v. Ramirez-Garcia*, 141 Ohio App. 3d 185, 187, 750 N.E.2d 634, 636 (2001) (factual findings supported by evidence are accepted, and based on those facts, "we then must determine 'without deference to the trial court, whether the court has applied the appropriate legal standard,' " quoting *State v. Anderson*, 100 Ohio App. 3d 688, 654 N.E.2d 1034 (1995)). Contra *Jackson v. Com.*, 266 Va. 423, 432, 587 S.E.2d 532, 540 (2003) ("[w]hether the waiver was made knowingly and intelligently is a question of fact that will not be set aside on appeal unless plainly wrong").

[2] We therefore hold that on appellate review of a trial court's ruling on a motion to suppress a custodial statement based upon a claimed inadequacy of *Miranda* warnings, findings of fact as to the warnings given are reviewed for clear error, and the determination of whether such warnings were sufficient to form the basis of a knowing and intelligent waiver of the Fifth Amendment privilege against compulsory self-incrimination is reviewed de novo.

(d) Resolution

Advising persons in police custody of what "have come to be known colloquially as '*Miranda* rights' " prior to interrogation is

"embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 435, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). "*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." *Dickerson*, 530 U.S. at 442. "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 170, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). A " 'defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly, and intelligently.' " *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986), quoting *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The waiver inquiry has "two distinct dimensions":

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran, 475 U.S. at 421. In this case, we focus on the second dimension of the waiver inquiry to determine if the advisements given were sufficient to establish a knowing and intelligent waiver of Fernando-Granados' Fifth Amendment privilege.

It is undisputed that Fernando-Granados was advised, in his native language, that he had a right to remain silent and that anything he said could be used against him in a court of law. He was thus made aware "not only of the privilege, but also of the consequences of forgoing it." See *Miranda*, 384 U.S. at 469. Likewise, it is undisputed that Fernando-Granados was advised, in Spanish, that he had a right to consult with a lawyer and to have a lawyer present during interrogation. The Court in *Miranda* held this right to be "indispensable to the protection of

the Fifth Amendment privilege" delineated in its opinion. See 384 U.S. at 469.

The issue presented for our review is whether Fernando-Granados was adequately warned of the remaining "*Miranda* right," i.e., that "if he is indigent a lawyer will be appointed to represent him." See 384 U.S. at 473. The Court in *Miranda* reasoned:

> Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Id.

With respect to this warning, the district court made a factual determination that Fernando-Granados was advised that "if he did not have the money to pay for a lawyer the Court [could, may, can] had the ability to appoint one for him." Fernando-Granados does not assign nor do we find clear error in this finding of historical fact, and we therefore accept it as true and proceed with our independent evaluation of whether this advisement, together with those that preceded it, was legally sufficient to effectuate an intelligent and knowing waiver of Fernando-Granados' Fifth Amendment privilege under *Miranda*.

Other courts have held that a defendant's statement must be suppressed under *Miranda* if there is a complete failure to advise of the right of an indigent person to appointment of counsel. See, e.g., *United States v. Fox*, 403 F.2d 97, 100 (2d Cir. 1968) (holding defendant's statement inadmissible where "[n]othing at all was said to [defendant] about his right to have an attorney appointed prior to questioning if he could not afford one, as *Miranda* requires"); *Thompson v. State*, 595 So. 2d 16, 17 (Fla. 1992) (holding "police must somehow communicate to the accused the basic idea of the right to consult a free attorney

before being questioned"); *State v. Ford*, 713 So. 2d 1214 (La. App. 1998) (finding error in failing to suppress statement where there was no evidence that defendant was advised of his right to court-appointed counsel if he was indigent). The instant case is distinguishable from the foregoing, however, in that prior to any questioning, Fernando-Granados was given an advisement on the subject of court-appointed counsel. His contention is that this advisement was legally inadequate because it "indicates a mere possibility, instead of an absolute right to have appointed counsel." Brief for appellant at 9.

The U.S. Supreme Court has "never insisted that *Miranda* warnings be given in the exact form described in that decision." *Duckworth v. Eagan*, 492 U.S. 195, 202, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989). The "'"rigidity" of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant,' and . . . 'no talismanic incantation [is] required to satisfy its strictures.'" *Duckworth*, 492 U.S. at 202-03, quoting *California v. Prysock*, 453 U.S. 355, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981). A court "need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. *The inquiry is simply whether the warnings reasonably 'conve*[*y*] *to* [*a suspect*] *his rights as required by* Miranda.'" (Emphasis supplied.) *Duckworth*, 492 U.S. at 203, quoting *Prysock, supra.*

Fernando-Granados relies principally upon three cases in support of his argument that this standard was not met. In *U.S. v. Higareda-Santa Cruz*, 826 F. Supp. 355 (D. Or. 1993), a defendant was purportedly advised of his *Miranda* rights through the use of a card on which the rights were printed in Spanish. After making a specific finding that the defendant was never in fact shown "the Spanish *Miranda* card," the court noted in dicta that even if the card had been shown, its statement of the defendant's rights was inadequate. *Higareda-Santa Cruz*, 826 F. Supp. at 359. As translated, the card stated: "'In case that you do not have money, you have the right to petition an attorney from the court.'" *Id.* at 359-60. Without referring to the *Duckworth* standard, the court reasoned that this statement implied both that the defendant must be completely without money before an appointed attorney could be obtained and that the defendant might not even then obtain counsel because he had to somehow

"petition" the court for an attorney. *Higareda-Santa Cruz*, 826 F. Supp. at 360.

Fernando-Granados also relies upon *State v. Ramirez*, 135 Ohio App. 3d 89, 732 N.E.2d 1065 (1999), and *People v. Diaz*, 140 Cal. App. 3d 813, 189 Cal. Rptr. 784 (1983). In *Ramirez*, the court concluded that attempts to advise the defendant of his *Miranda* rights failed due to a poor Spanish translation which utilized a term that meant " 'right hand side' " instead of " 'legal right,' " and also did not inform the defendant that anything he said could be used against him and that "he had the right to an attorney free of charge during all stages of questioning." *Ramirez*, 135 Ohio App. 3d at 94-95, 732 N.E.2d at 1068-69. In *Diaz*, the court stated in dicta that a warning stating that " '[i]f you cannot *get* a lawyer, one can be named before they ask you questions' " did not comply with *Miranda* because the defendant "was never advised that he had the right to appointed counsel if he could not *afford* one." 140 Cal. App. 3d at 822, 824, 189 Cal. Rptr. at 789-90.

The State argues that the facts in *Duckworth v. Eagan*, 492 U.S. 195, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989), demonstrate the degree of grammatical latitude which may be taken with respect to the *Miranda* warnings. After being advised of his right to remain silent, the consequences of forgoing that right, and his right to counsel before and during any interrogation, the defendant was advised that he had the right to the advice and presence of a lawyer even if he could not afford to hire one. Then, police informed him, " '*We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*' " *Duckworth*, 492 U.S. at 198. The Court of Appeals for the Seventh Circuit held that because this statement conveyed the impression that the suspect would be entitled to appointment of counsel only at some point after interrogation, the warning was constitutionally inadequate. Viewing the warnings in their totality, the U.S. Supreme Court held that they reasonably conveyed the suspect's rights as required by *Miranda*, noting that "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." *Duckworth*, 492 U.S. at 204.

In *U.S. v. Soria-Garcia*, 947 F.2d 900 (10th Cir. 1991), the court applied the *Duckworth* rationale to a *Miranda* warning which was given in Spanish. One of the arresting officers testified that the English translation was: " 'If you don't have the money to employ a lawyer one will be appointed to you before answering any questions, if you so decide.' " (Emphasis omitted.) *Soria-Garcia*, 947 F.2d at 901. An interpreter for the district court translated the sentence as follows: " 'If you do not have the money to employ an attorney, one can be obtained for you before we ask you any questions, if you so desire.' " *Id.* The district court determined this warning to be deficient because it did not include an advisement that a lawyer would be appointed " 'at no cost.' " *Id.* Focusing primarily on this issue, the court of appeals reversed, determining that under the *Duckworth* standard, the "thrust of the warning, regardless of which translation is used," " 'reasonably conveyed' " the suspect's rights as required by *Miranda*. *Soria-Garcia*, 947 F.2d at 902-03.

Fernando-Granados was advised in Spanish that " 'you have the right to consult with a lawyer and have a lawyer present with you during questioning.' " After answering " 'si,' " he was then advised that "if he did not have the money to pay for a lawyer the Court [could, may, can] had the ability to appoint one." The precise issue presented is whether the two warnings, read together, would create a misunderstanding that a court has discretion to deny an indigent person's request for appointment of counsel.

Under similar circumstances, other state and federal courts have resolved this question in the negative. For example, in *State v. Rhines*, 548 N.W.2d 415, 428 (S.D. 1996), the defendant was told " 'if you cannot afford an attorney an attorney can be appointed for you free of charge.' " The court concluded that given that the police had correctly informed the defendant of his other rights, the " 'can' be appointed" language would not have misled him into believing that a request for an attorney could have been denied. *Id.* Similarly, in *U.S. v. Miguel*, 952 F.2d 285, 287 (9th Cir. 1991), the defendant was told " '[y]*ou may have an attorney appointed* by the U.S. Magistrate or the court to represent you, if you cannot afford or otherwise obtain one.' " The court determined that read within the context of the other warnings, which were correctly given, the defendant would have been

"able to grasp the substance of what he was told—that he had the right to appointed counsel if he could not afford a lawyer." *Id.* at 288. Likewise, in *Commonwealth v. Colby*, 422 Mass. 414, 418, 663 N.E.2d 808, 811 (1996), the defendant was told that " 'if he could not afford an attorney, the Commonwealth would attempt to provide one for him.' " The court refused to suppress the defendant's incriminating statements, noting that "[t]he departure from the standard Miranda language here seems less harmful than the departure tolerated in the *Duckworth* case." 422 Mass. at 418, 663 N.E.2d at 811.

Considering in their totality the advisements given in this case, Fernando-Granados was clearly advised of his right to remain silent, the consequences of forgoing that right, and his right to have an attorney present during questioning. The challenged warning, while not a verbatim Spanish translation of the language used in *Miranda*, was sufficient to accomplish what the U.S. Supreme Court stated as its purpose, namely, to prevent a misunderstanding that the right to consult a lawyer is conditioned upon having the funds to obtain one. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Fernando-Granados was effectively advised that if he wanted a lawyer and could not afford one, he could request appointed counsel and that the court had the authority to grant his request. Although the phrase "will appoint" was not used, the advisement was nevertheless sufficient to reasonably inform him of his right to an attorney, and to apprise him that a method, i.e., appointment by the court, existed for ensuring that an attorney was available to him. Considered in their entirety, the warnings given to Fernando-Granados do not imply that the court had discretion to deny a request for appointment of counsel. After the prosecution had demonstrated "the use of procedural safeguards effective to secure the privilege against self-incrimination," see *Miranda*, 384 U.S. at 444, as a matter of law, the district court did not err in denying the motion to suppress the statements given by Fernando-Granados while in custody.

2. Admission of DNA Evidence

(a) Additional Background

In the statement given on June 6, 2002, Fernando-Granados told authorities that he stabbed Schrieber in the course of robbing

the restaurant. After the killing, Fernando-Granados ran over Schrieber's body in the parking lot with Hernandez' Ford Escort. Fernando-Granados stated that he and Hernandez, who had been waiting for him in the restaurant parking lot, then went to a friend's home.

Pursuant to a search warrant, police searched the residence identified by Fernando-Granados and recovered cash wrapped in a towel. A substance having the appearance of blood was found on one of the bills. DNA testing was later performed to determine the source of the blood found on the bill and additional blood found on the body of the Ford Escort owned by Hernandez. The tests disclosed that the blood contained genetic markers consistent with the known genetic markers of Schrieber and a high probability that she was the source of the blood.

Fernando-Granados filed a pretrial motion in limine to exclude the DNA evidence, contending that it was inadmissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) and the interpretative principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), which principles were adopted by this court in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). Following an evidentiary hearing, the district court made specific findings that the scientific evidence was admissible under *Daubert/Schafersman* and overruled the motion. Fernando-Granados preserved his objection at trial. On appeal, Fernando-Granados argues the State failed to establish the evidentiary reliability and relevance of the DNA evidence under the *Daubert/Schafersman* standard, and thus the district court erred in admitting the DNA evidence.

(b) Standard of Review

[3-5] The *Daubert* standards require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion. *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003); *Schafersman, supra*. 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*, 267 Neb. 397, 675 N.W.2d 89 (2004); *Perry Lumber Co., supra*. 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 the judicial system. *Carlson, supra.*

(c) Resolution

[6-8] Under the *Daubert/Schafersman* framework, the trial court must act as a gatekeeper to ensure the evidentiary relevance and reliability of the expert's opinion. *Carlson, supra*; *Schafersman, supra.* This entails a preliminary assessment of 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. *Id.* 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. *Id.* 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. *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. *Id.* Under *Daubert* and *Schafersman*, expert evidence is admissible "so long as foundation is presented to satisfy the court of the validity of the theory or methodology underlying the proffered opinion." *Schafersman*, 262 Neb. at 233, 631 N.W.2d at 877.

The DNA evidence in this case was presented through the expert testimony of Dr. James Wisecarver and a medical technologist, Kelly Duffy. Both were associated with the molecular diagnostics laboratory at the University of Nebraska Medical Center. They employed a DNA testing methodology known as polymerase chain reaction short tandem repeat (PCR-STR). In *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998), we held

that the trial court did not err in finding that the PCR-STR DNA test was generally accepted within the scientific community under the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which then governed the admissibility of scientific evidence in this state.

Wisecarver is a pathologist who also holds a doctorate in physiology. He serves as the medical director of the molecular diagnostics laboratory at the University of Nebraska Medical Center, which has conducted forensic DNA testing since 1996. Wisecarver testified that the laboratory did not conduct such testing prior to that date because of concerns about the certainty of interpretation in the restriction fragment length polymorphism (RFLP) methodology which preceded PCR-STR. He testified that after the PCR-STR methodology was developed and validated in the early 1990's, his laboratory began using it, initially in connection with bone marrow transplants and then for forensic purposes.

Wisecarver testified that PCR-STR is generally accepted in the scientific community and is used widely by forensic laboratories across the country, including those of the FBI and the Armed Forces Institute of Pathology. Wisecarver's laboratory has developed protocols for performing the PCR-STR analysis which have been reviewed by the American Society of Crime Laboratory Directors (ASCLD), a credentialing body which reviews and accredits forensic DNA laboratories. Among the ASCLD quality assurance standards for forensic DNA testing laboratories is a requirement that the laboratory have a program of proficiency testing which "measures the capability of its examiners and the reliability of its analytical results." The molecular diagnostics laboratory participates in a proficiency testing program and was accredited by the ASCLD at the time of Wisecarver's testimony in this case.

The PCR-STR analysis of blood on blood involves several steps. First, presumptive testing is done to confirm the presence of hemoglobin in specimens thought to contain traces of blood. If the presence of blood is thus confirmed, nucleic acids containing DNA are extracted from the specimen and exposed to a reacting agent. Instruments are then utilized to amplify DNA fragments, separate them by size, and label them with a fluorescent

marker. This process results in 15 short tandem repeat genetic markers designating the location on the gene and another marker, known as amelogenin, which designates gender. This raw data is then subjected to a computer program, known as Genotyper, which assigns an allelic designation to each marker. The results are then compared to a reference sample from a known individual. If the genetic profile obtained from the sample being tested does not match the reference sample, the submitter of the sample is excluded as a contributor of the test specimen. However, if a match is produced, a statistical analysis is performed utilizing a population database to determine the frequency of occurrence of the fragment sizes identified in the test. The database used in this case was published in the Journal of Forensic Sciences in 2001. A technique known as the "product rule" is then utilized to determine the probability of an unrelated individual matching the DNA profile obtained from the test specimen. Wisecarver testified that the published source of the database is a peer-reviewed scientific journal and that the "product rule" is peer-reviewed and accepted in the scientific community.

The district court took judicial notice of the Nebraska DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2002), which became effective on September 1, 2001, and provides a procedure whereby a convicted person in custody may seek previously unavailable DNA testing which may be used to secure release or a new trial. See, §§ 29-4120 and 29-4123; *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004). The act includes a legislative finding that "[b]ecause of its scientific precision and reliability, DNA testing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant" and in other instances "may have significant probative value to a finder of fact." § 29-4118(2). The Legislature further found that

> new forensic DNA testing procedures, such as polymerase chain reaction amplification, DNA short tandem repeat analysis, and mitochondrial DNA analysis, make it possible to obtain results from minute samples that previously could not be tested and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce.

§ 29-4118(3). The act further provides that any DNA testing done pursuant to its provisions must be performed in a laboratory accredited by one of several national accrediting bodies, including the ASCLD, or a public agency with equivalent requirements. § 29-4120(6).

[9] Based upon this record, we conclude that the district court did not abuse its discretion in finding that the PCR-STR DNA testing methodology employed in this case "is a reliable technique, validated and generally accepted within the scientific community and has been subjected to peer review." However, as recently stated in *Carlson v. Okerstrom*, 267 Neb. 397, 413, 675 N.W.2d 89, 105 (2004), "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."

Here, the trial court made an additional finding that "Medical Technician Kelly Duffy followed the protocol in place to ensure that the tests were performed properly and with a known rate of error." The record supports this finding. Duffy holds a bachelor of science degree with majors in microbiology and medical technology and a minor in chemistry. She completed a 1-year internship in medical technology, and she holds certifications as a medical technologist, a clinical histocompatibility technologist, and a clinical histocompatibility specialist. At the time of her testimony, she had been employed at the molecular diagnostics laboratory since 1988. She performed the DNA testing in this case utilizing the approved protocols for PCR-STR DNA testing, with minor deviations approved by Wisecarver which had no impact on the process. She examined 12 submitted items of evidence and a known reference specimen from Schrieber. Presumptive testing for hemoglobin eliminated 5 of 12 evidence specimens submitted and confirmed the presence of hemoglobin (presumptive for blood) on the other 7 specimens. Of these seven specimens, five were subjected to further testing. After determining that DNA from these five specimens, including the $1 bill and wheel-well cover, matched the reference specimen from Schrieber, Duffy did a frequency analysis which determined that Schrieber was not excluded as a major contributor of the blood on the specimens and that the probability of an unrelated individual matching the major

DNA profile was 1 in 280 quadrillion for Caucasians, 1 in 37 quintillion for African Americans, and 1 in 16.2 quintillion for American Hispanics. Duffy prepared a report documenting the tests performed pursuant to protocol and the results obtained. The report was reviewed and signed by Wisecarver, by the laboratory director, and by Duffy.

Because the record reflects that the DNA testing in this case was properly performed in accordance with a scientifically reliable methodology, we conclude that the district court did not abuse its discretion in finding that the results offered by the State were reliable and relevant and that their probative value outweighed the risk of unfair prejudice. Our research indicates that every jurisdiction that has addressed the admissibility of PCR-STR DNA analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), has found the evidence admissible. *U.S. v. Ewell*, 252 F. Supp. 2d 104 (D.N.J. 2003); *U.S. v. Trala*, 162 F. Supp. 2d 336 (D. Del. 2001); *People v. Shreck*, 22 P.3d 68 (Colo. 2001); *Commonwealth v. Rosier*, 425 Mass. 807, 685 N.E.2d 739 (1997); *State v. Butterfield*, 27 P.3d 1133 (Utah 2001).

IV. CONCLUSION

Finding no error in the admission of the statements given by Fernando-Granados while in custody or the results of DNA testing conducted by the State, we affirm the convictions and sentences imposed by the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROGER R. HOLTHAUS, RESPONDENT.

686 N.W.2d 570

Filed July 2, 2004. No. S-04-044.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, Roger R. Holthaus, was admitted to the practice of law in the State of Nebraska on June 27, 1972, and at all times relevant hereto was engaged in the private practice of law in Omaha, Nebraska. On January 12, 2004, formal charges were filed against respondent. The formal charges set forth one count that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), 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 May 17, 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) 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 6-month 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 6 months.

FACTS

In summary, the formal charges allege that respondent neglected his responsibilities as the attorney for the personal representative of a probate estate by not timely filing pleadings in the probate case, not filing tax returns, not communicating with the residual beneficiary, and not properly handling estate assets. As a result of respondent's failure to properly handle the probate proceedings, the estate's residual beneficiary filed a petition to surcharge the personal representative and respondent, which resulted in a judgment against respondent and the personal representative. Respondent has satisfied the judgment.

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 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) 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 6 months, 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.

STATE OF NEBRASKA, APPELLEE, V. DARRELL J. VAUGHT, APPELLANT.

682 N.W.2d 284

Filed July 9, 2004. No. S-02-1480.

1. **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.
2. **Constitutional Law: Trial: Rules of Evidence: Hearsay.** Where testimonial statements are at issue, the Confrontation Clause demands that such hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination.
3. **Constitutional Law: Evidence.** The Confrontation Clause does not exclude the admission of medical diagnosis and treatment statements, whether or not the record shows that the declarant is unavailable.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge. Judgment of Court of Appeals affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy P. Burns for appellant.

Jon Bruning, Attorney General, and James H. Spears for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Darrell J. Vaught was convicted in the district court for Douglas County of first degree sexual assault on a child. Over Vaught's objection, the emergency room physician who treated and diagnosed the victim testified that the victim had identified Vaught as the perpetrator of the assault. Vaught's conviction and sentence were affirmed on appeal to the Nebraska Court of Appeals. *State v. Vaught*, 12 Neb. App. 306, 672 N.W.2d 262 (2003). We granted Vaught's petition for further review in which

he asserts that the Court of Appeals erred (1) in concluding that the district court had not erred in admitting the physician's testimony and (2) in concluding that trial counsel was not ineffective for failing to object to the physician's testimony on confrontation grounds. We affirm the Court of Appeals' decision.

STATEMENT OF FACTS

The facts of this case are set forth in the Court of Appeals' opinion as follows:

> The victim in this case was the 4-year-old daughter of Vaught's half sister. The events which gave rise to the present action occurred on or about August 23, 2000. On that date, the victim and her mother were staying at the residence of the victim's grandparents; Vaught also resided there. The victim's mother testified that the victim called Vaught "[D]J." The victim's mother testified that she put the victim to sleep on the couch wearing a nightgown and underwear. When the victim's mother left the victim, Vaught was the only other person awake in the house, and he was watching television near the victim.
>
> The next morning the victim's mother noticed that the victim awoke without any underwear on. Although the victim's mother acknowledged that the victim would sometimes change her underwear during the night if she wet herself, on this occasion the victim's missing underwear were never located and the couch was not at all wet. The victim begged her mother to allow her to go to her father's house. The victim then went to the residence of her father and his wife.
>
> That evening, the victim wet herself and the victim's father's wife gave her a bath. During the bath, the victim's father's wife noticed that the victim's genital area was red and swollen. The victim's father's wife had a conversation with the victim about what had happened, which conversation prompted the victim's father's wife to ask the victim's father who "[D]J" was. The victim's mother was then called, and the victim was taken to the hospital to be examined.
>
> Dr. Larry Lamberty testified that he was the emergency room physician who examined the victim. He testified that

> he saw the victim in one of the examination rooms, that he introduced himself as a doctor, and that he had no concerns that the victim was unable to understand where she was or who he was. He further testified that he explained to the victim that he was going to do an examination and that he asked her what had happened to her. Over hearsay objections, he testified that the victim said that "her Uncle DJ put his finger in her pee-pee." His examination indicated that the victim's "hymen was intact."
>
> Dr. Cathy Hudson testified that she saw the victim a few days later for a more thorough examination, including the use of a colposcope. The colposcopic examination indicated a small puncture wound in the victim's vaginal area where "the distal-most portion of her vagina meets the hymenal tissue." She testified that the injury was consistent with digital penetration.
>
> On September 28, 2000, Vaught was charged by information with first degree sexual assault on a child. Prior to trial, Vaught requested a psychological examination of the victim. The court overruled this request. After a bench trial, including the evidence and testimony set forth above, the court found Vaught guilty on June 24, 2002. On December 5, the court sentenced Vaught to 6 to 10 years' incarceration. This appeal followed.

Vaught, 12 Neb. App. at 307-08, 672 N.W.2d at 265-66.

On appeal to the Court of Appeals, Vaught made five assignments of error. The Court of Appeals rejected Vaught's five assignments of error and affirmed his conviction. Vaught's petition for further review is limited to the decision of the Court of Appeals with respect to only two of the five initial assignments of error; therefore, only the two relevant assignments of error will be discussed herein. Before the Court of Appeals, Vaught essentially asserted that (1) the district court had erred in admitting Dr. Larry Lamberty's testimony regarding the victim's statements as statements made by a declarant patient for the purpose of medical diagnosis or treatment under Neb. Rev. Stat. § 27-803(3) (Cum. Supp. 2002) and (2) trial counsel had provided ineffective assistance by failing to object to such testimony on confrontation grounds. The Court of Appeals rejected both assignments of error.

The following additional information with respect to the testimony at issue in these two assignments of error is found in the opinion of the Court of Appeals as follows:

> [T]he statement at issue was made by the victim during the course of a medical examination by Dr. Lamberty in the emergency room. Dr. Lamberty testified that he was dressed as a doctor at the time, that he was speaking to the victim in an examination room at the hospital, that he had explained to her that he was going to do an examination, and that he had no concerns that the victim did not understand where she was or who he was. Additionally, Dr. Lamberty testified that it is important for a medical professional in the situation he was in to obtain a thorough history regarding the causation and nature of the injury. Dr. Lamberty further testified that it is important for him, in assessing the patient's condition and determining treatment, to know who the perpetrator was, both so that he does not release a patient into the care of a perpetrator and for purposes of treating the patient's mental well-being. In this case, when Dr. Lamberty asked the victim what had happened to her, she replied that "her Uncle DJ put his finger in her pee-pee," and she indicated that she meant her vagina.

State v. Vaught, 12 Neb. App. 306, 310-11, 672 N.W.2d 262, 267 (2003).

After finding no merit to Vaught's assignments of error, the Court of Appeals affirmed Vaught's conviction. Vaught petitioned for further review. We granted Vaught's petition for further review.

ASSIGNMENTS OF ERROR

Vaught asserts that the Court of Appeals erred in concluding that the district court did not err in admitting Dr. Lamberty's testimony and in concluding that trial counsel was not ineffective for failing to object to the testimony on confrontation grounds.

STANDARD OF REVIEW

[1] 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. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

ANALYSIS

Admissibility Under § 27-803(3).

At trial, Vaught's counsel objected on hearsay grounds to Dr. Lamberty's testimony that the victim identified Vaught as the perpetrator of the assault. Vaught asserts on further review that the Court of Appeals erred in affirming the district court's decision to admit Dr. Lamberty's testimony. We conclude that the testimony by Dr. Lamberty regarding what the victim-declarant stated was admissible pursuant to § 27-803(3), and, insofar as there was no confrontation violation as indicated below, we reject Vaught's first assignment of error.

Section 27-803(3) provides that among statements that are not excluded by the hearsay rule even though the declarant is available as a witness are "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

In rejecting Vaught's hearsay argument, the Court of Appeals noted that this court has previously found statements similar to the statement admitted in this case and made under somewhat similar circumstances to be admissible under § 27-803(3). The Court of Appeals cited two Nebraska appellate cases in which it was decided that a child victim's statement to a doctor identifying the perpetrator of a sexual assault was admissible. See, *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992) (10-year-old victim made statements to doctor in context of medical examination and diagnosis identifying mother's boyfriend as perpetrator of sexual assault); *State v. Max*, 1 Neb. App. 257, 492 N.W.2d 887 (1992) (3-year-old victim being treated for genital warts made statements to doctor identifying her adoptive father as perpetrator of sexual assault).

On further review, Vaught urges this court to adopt a rule enunciated by the U.S. Court of Appeals for the Eighth Circuit

with regard to statements made by children for purposes of medical treatment. In *Olesen v. Class*, 164 F.3d 1096 (8th Cir. 1999), the Eighth Circuit considered a habeas corpus case which originated in state court in South Dakota in which one victim, a 5-year-old girl, made a statement to an examining physician which identified the defendant as the perpetrator of a sexual assault. The trial court had admitted the physician's testimony regarding the victim's statement pursuant to a South Dakota statute similar to § 27-803(3). The Eighth Circuit concluded that such statement was inadmissible.

In concluding that the victim's statement in *Olesen* was inadmissible, the Eighth Circuit stated that the hearsay exception for statements made for purposes of medical treatment "is bottomed upon the premise that a patient's 'selfish motive' . . . in receiving the proper treatment guarantees the trustworthiness of the statements made to her physician." 164 F.3d at 1098. Focusing on the victim's state of mind, the Eighth Circuit held that such statements were

> admissible only when the prosecution is able to demonstrate that the victim's motive in making the statement was consistent with the purpose of promoting treatment—that is, "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding."

Id. The Eighth Circuit Court of Appeals determined that the prosecutor in *Olesen* had failed to establish that this victim's frame of mind at the time of the examination was that of a patient seeking medical treatment and that there was no evidence that the physician had explained to her that his questions regarding the identity of her abuser were important to diagnosis or treatment or that she understood the medical significance of being truthful in identifying her abuser to the doctor. The Eighth Circuit Court of Appeals reversed the federal district court's ruling as to this victim.

Although we decline Vaught's invitation to explicitly adopt the rule in *Olesen*, the discussion in *Olesen* by the Eighth Circuit Court of Appeals regarding the purposes behind the exception for statements made for the purpose of medical diagnosis or

treatment informs our analysis in this case. In order for testimony to be admissible under § 27-803(3), it is necessary to establish that the statement at issue falls within the exception, bearing in mind the purposes noted by the court of appeals in *Olesen*. Therefore, the evidence must satisfactorily demonstrate that the circumstances under which the statement was made were such that the declarant's purpose in making the statement was to assist in the provision of medical diagnosis or treatment, that the declarant's statement was reasonably pertinent to such diagnosis or treatment and, further, that a doctor would reasonably rely on such statement. Under § 27-803(3), there need not be direct evidence of the declarant's state of mind, as seems to be required under *Olesen*; instead, the appropriate state of mind of the declarant may be reasonably inferred from the circumstances. We note that § 27-803(3) does not make any exceptions or qualifications based on the age of the declarant, and we decline to presume that children speaking to physicians are not truthful and are not motivated by promoting medical treatment. See *U.S. v. Edward J.*, 224 F.3d 1216 (10th Cir. 2000) (rejecting such presumptions under Fed. R. Evid. 803(4) and declining to adopt *Olesen* rationale). However, we recognize that cases where the declarant is a child, as compared to an adult, may require additional evidence of the circumstances surrounding the statement in order to establish that the state of mind of the declarant was consistent with the objective of medical diagnosis or treatment.

In the present case, we determine that the evidence was sufficient for the district court to conclude that the victim's statement to Dr. Lamberty qualified under § 27-803(3) as a statement "made for purposes of medical diagnosis or treatment and describing . . . the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Dr. Lamberty testified in detail regarding the circumstances under which the victim made her statement. As described, those circumstances were such that the 4-year-old victim clearly understood that a medical examination was being performed, that the purpose of the doctor's questions was to assist in medical diagnosis and treatment and, thus, that the victim's statements were motivated by seeking treatment. Dr. Lamberty testified that he had no concerns that the victim did not understand the nature of the

examination, and his testimony indicates his state of mind was such that he reasonably relied on the victim's statement. Dr. Lamberty also testified that there were valid medical treatment purposes for learning the identity of the perpetrator and that such purposes were pertinent to diagnosis and treatment. Such testimony by Dr. Lamberty was sufficient to infer the victim's state of mind in making the statement.

Dr. Lamberty's testimony regarding the circumstances surrounding the victim's statement was sufficient for the district court to conclude that the victim's statement was of the type described in § 27-803(3) and therefore admissible under that statute. We conclude that the Court of Appeals did not err in affirming the district court's admission under § 27-803(3) of Dr. Lamberty's testimony regarding the victim's identification of Vaught as the perpetrator.

Ineffective Assistance of Counsel and Confrontation Clause.

Vaught's trial counsel objected to Dr. Lamberty's testimony on hearsay grounds but did not specifically object on Confrontation Clause grounds. Vaught asserted on appeal that his trial counsel was ineffective for failing to make this latter objection. The Court of Appeals rejected this argument.

Vaught asserts on further review that the Court of Appeals erred in concluding that trial counsel did not provide ineffective assistance by failing to make an objection on the basis of the Confrontation Clause. We conclude that the admission of Dr. Lamberty's testimony did not violate the Confrontation Clause, that trial counsel was not ineffective for failing to object on confrontation grounds, and that the decision by the Court of Appeals regarding this issue was not in error.

The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Neb. Const. art. I, § 11, provides, in relevant part: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ." We have held that the analysis under article I, § 11, is the same as that under the Sixth Amendment to the U.S. Constitution. *State v. Jacobs*, 242 Neb. 176, 494 N.W.2d 109 (1993).

We have previously stated that analysis of the issue of whether the Confrontation Clause prohibits admission of hearsay testimony is made by reference to the U.S. Supreme Court's decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). See *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). In *Sheets*, we stated that in *Roberts*,

> the U.S. Supreme Court determined that when a witness is unavailable for cross-examination, his or her statements are admissible only if they bear adequate indicia of reliability. Reliability can be inferred, without more, in a case in which the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, absent a showing by the State of particularized guarantees of trustworthiness.

Sheets, 260 Neb. at 336, 618 N.W.2d at 127.

[2] However, in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court recently altered the test enunciated in *Roberts*. *Crawford* was filed subsequent to the decision by the Court of Appeals, which decision is now on further review. In *Crawford*, the U.S. Supreme Court held that where "testimonial" statements are at issue, the Confrontation Clause demands that such hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. 541 U.S. at 68. Therefore, at least with respect to testimonial statements, the Court overruled the holding in *Roberts* that hearsay statements could be admitted despite the absence of a prior opportunity for cross-examination if the statements fell within a firmly rooted hearsay exception or the statements bore particularized guarantees of trustworthiness.

Because *Crawford* limited its holding to testimonial statements, our initial step is to determine whether the statements at issue in the present case were testimonial in nature. The U.S. Supreme Court in *Crawford* declined to provide a comprehensive definition of "testimonial" but stated that the term applied at a minimum to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68. We note that Justice Thomas joined the opinion of the Court in *Crawford* and that further illumination of the term

"testimonial" may be found in Justice Thomas' concurrence in *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992). In his concurrence in *White*, Justice Thomas noted that the United States, as an amicus, had suggested in *White* that "the Confrontation Clause should apply only to those persons who provide in-court testimony or the functional equivalent, such as affidavits, depositions, or confessions that are made in contemplation of legal proceedings." 502 U.S. at 364. Justice Thomas proposed that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." 502 U.S. at 365.

Although the U.S. Supreme Court has not fully defined "testimonial," it did provide three formulations of the core class of testimonial statements which the Court of Appeals for the First Circuit described as follows:

> In the first, testimonial statements consist of "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." . . . The second formulation described testimonial statements as consisting of "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." . . . Finally, the third explained that testimonial statements are those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." . . . While the Court declined to settle on a single formulation, it noted that, "[w]hatever else the term [testimonial] covers, it applies . . . to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern abuses at which the Confrontation Clause was directed."

(Citations omitted.) *Horton v. Allen*, No. 03-1423, 2004 WL 1171383 at *6 (1st Cir. May 26, 2004).

We agree with the First Circuit's analysis. The victim's statement herein did not fit any of these formulations, nor did it share

characteristics of these formulations. We believe on the facts of this case that the victim's statement to the doctor was not a "testimonial" statement under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). As discussed above, the victim's identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment. In the present case, the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment. There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination. See *Evans v. Luebbers*, No. 03-1900, 2004 WL 1277980 (8th Cir. June 10, 2004). Compare *Snowden v. State*, 156 Md. App. 139, 846 A.2d 36 (2004) (stating in child sexual abuse case that where children were interviewed for express purpose of developing their testimony, statements of victims presented by social worker were "testimonial" under *Crawford*). Our decision as to whether the statement at issue is "testimonial" under *Crawford* does not preclude a different conclusion based on a different set of facts.

Because the U.S. Supreme Court specifically referred to testimonial statements in its holding in *Crawford*, the effect of the Confrontation Clause on the admission of nontestimonial hearsay statements post-*Crawford* is unclear. The Court in *Crawford* stated that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." 541 U.S. at 68. The Court made no explicit statement regarding nontestimonial statements but did suggest that either such statements required no Confrontation Clause scrutiny or that prior standards developed under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), or its progeny still applied to nontestimonial hearsay evidence. Our observation in this regard is consistent with post-*Crawford* jurisprudence. See, e.g., *U.S. v. Reyes*, 362 F.3d 536, 540 n.4 (8th Cir. 2004) (stating that "*Crawford* did not provide additional protection for nontestimonial statements, and indeed,

questioned whether the Confrontation Clause protects nontestimonial statements at all").

Therefore, if after *Crawford*, nontestimonial statements require no Confrontation Clause scrutiny, the nontestimonial statement of the victim in this case was admissible under the hearsay rule analysis recited above. To the extent that after *Crawford*, the confrontation-based standards developed in *Roberts* and its progeny still apply to nontestimonial statements, as explained below, the admission of the statements in the present case did not violate the Confrontation Clause. In this regard, we note that subsequent to *Roberts* and prior to *Crawford*, the U.S. Supreme Court considered the effect of the Confrontation Clause on the admission of statements made for the purpose of medical diagnosis and treatment in *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992). We consider the possible impact of *White* upon this case.

[3] In *White*, the Court analyzed medical diagnosis and treatment statements under the *Roberts* test and held that (1) a determination that a declarant was unavailable was a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding and (2) that the hearsay exception for statements made for purposes of medical diagnosis or treatment was a firmly-rooted hearsay exception. The Court held in *White* that the Confrontation Clause did not exclude the admission of medical diagnosis and treatment statements, whether or not the record showed that the declarant was unavailable. As we noted above, the victim's identification of Vaught in the present case was a statement made for purposes of medical diagnosis or treatment. Thus, to the extent *White* survives *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), under *White*, whether or not the victim in this case was unavailable as a witness, the Confrontation Clause would not exclude the admission of such a statement.

Given our analysis of confrontation law in the area of the medical diagnosis and treatment hearsay exception, we conclude that whether such nontestimonial statements are exempt from Confrontation Clause scrutiny after *Crawford* or whether pre-*Crawford* case law, including *White*, is still applicable, the

admission of the statement in the present case did not violate the Confrontation Clause. Because there was no Confrontation Clause violation, Vaught's counsel was not ineffective for failing to object on confrontation grounds. We conclude that the Court of Appeals did not err in rejecting this assignment of error.

VI. CONCLUSION

We conclude that Dr. Lamberty's testimony regarding the victim's identification of Vaught as the perpetrator was admissible under § 27-803(3). We further conclude that under the facts of this case, the statement at issue was nontestimonial under *Crawford* and that its admission did not violate the Confrontation Clause. In view of our analysis, trial counsel did not provide ineffective assistance by failing to object to the physician's testimony on confrontation grounds. We affirm the Court of Appeals' decision affirming Vaught's conviction and sentence.

AFFIRMED.

DEANNA WRIGHT MILLER, APPELLEE, V.
JOHN P. STEICHEN, APPELLEE, AND COREGIS INSURANCE COMPANY, INC., GARNISHEE-APPELLANT.

682 N.W.2d 702

Filed July 9, 2004. No. S-03-226.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Motions to Vacate: Judgments: Evidence: Appeal and Error.** The decision to vacate an order is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. A much stronger showing is required to substantiate an abuse of discretion when a judgment is vacated than when it is not.
3. **Pleadings: Jurisdiction.** Under the statutory pleading rules applicable to actions commenced prior to January 1, 2003, a party could file a special appearance for the sole purpose of objecting to the court's assertion of personal jurisdiction over the objector.
4. ____: ____. An appearance is special when its sole purpose is to question the jurisdiction of the court; however, a further or later request for other relief may be a general appearance.

5. **Default Judgments: Proof: Time.** Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.
6. **Default Judgments: Motions to Vacate: Words and Phrases.** In the context of a motion to vacate a default judgment, a meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.
7. **Default Judgments: Motions to Vacate.** Although a defendant seeking to vacate a default judgment is required to present a meritorious defense, it is not required that the defendant show he will ultimately prevail in the action, but only that the defendant show that he has a defense which is recognized by the law and is not frivolous.
8. **Insurance: Contracts.** An insurance policy is a contract, and when the facts are undisputed, whether or not a claimed coverage exclusion applies is a matter of law.

Appeal from the District Court for Douglas County: MARY G. LIKES and GARY B. RANDALL, Judges. Reversed and remanded with directions.

Gerald L. Friedrichsen and Susan H. Carstens, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., and Jeffrey A. Goldwater, Michelle M. Bracke, and Frank Valenti, of Bollinger, Ruberry & Garvey, for garnishee-appellant.

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellee Deanna Wright Miller.

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

STEPHAN, J.

The district court for Douglas County entered a judgment in the amount of $325,000 in favor of Deanna Wright Miller against John P. Steichen in this professional liability action. The issues presented in this appeal involve a garnishment proceeding against Coregis Insurance Company, Inc. (Coregis), which is alleged to have issued a professional liability insurance policy providing coverage for Miller's claim against Steichen. A default judgment was entered against Coregis, which it unsuccessfully challenged by special appearance and by a motion to vacate. In this appeal, Coregis contends that the district court erred in not sustaining its special appearance or, in the alternative, in overruling its motion to vacate the default judgment.

BACKGROUND

After obtaining her judgment against Steichen, Miller served a summons and order of garnishment and interrogatories in aid of execution on Coregis to recover the amount of the judgment. The summons was addressed to "Sally Ann Hawk, President, 181 West Madison Street, Suite 2600, Chicago, IL 60602." In Coregis' 2000 annual statement, Sally Ann Hawk was named as the "Chairman, President & Chief Executive Officer" as well as one of the "Directors or Trustees." The 2000 annual statement also lists the Chicago address as Coregis' main administrative office, mailing address, and primary location of books and records.

Miller filed a proof of service with the district court on December 4, 2001. Coregis did not respond to the interrogatories. On December 14, Miller sent a copy of her application for judgment and notice of hearing to Coregis by regular mail to Hawk at the Chicago office. Following a hearing, the district court entered a default judgment against Coregis on December 21, finding that

> pursuant to Neb. Rev. Stat. § 25-1028 [(Reissue 1995)], Garnishee, Coregis . . . in failing to answer the Interrogatories within ten (10) days from the date of service upon it, is presumed to be indebted to the Defendant/Judgment Debtor . . . Steichen, in the full amount of the claim of Plaintiff/Judgment Creditor . . . Miller.

Coregis filed a special appearance on January 8, 2002, arguing that it did not receive proper and sufficient service of summons. Coregis argued that Hawk "was not an employee of Coregis . . . at the time of the purported service." In addition, it argued that the affidavit and praecipe for summons was improperly issued because there was no merit to Miller's contention that Coregis was indebted to Steichen under his professional liability insurance policy in light of the U.S. District Court's memorandum opinion in *Coregis Ins. Co. v. Fellman*, 8:99CV14 (D. Neb. May 23, 2000), which found in part that the same policy did not require Coregis to defend or indemnify Steichen in regard to Miller's claim.

The district court overruled Coregis' special appearance on March 4, 2002, finding that "the return receipt would lead a reasonable person to conclude that proper service was had on the

individual purporting to be the President of Coregis" and that the issues before the U.S. District Court were distinguishable from the issues before the Douglas County District Court.

On April 17, 2002, Coregis, purporting to renew and preserve its special appearance, filed a motion to vacate the December 21, 2001, default judgment. The motion reiterated Coregis' arguments regarding insufficiency of process and alleged that it was not until on or about January 1, 2002, that Coregis' claim representative became aware of the summons and notice of hearing and that thereafter, Coregis promptly filed its special appearance. Coregis argued that it "should be given a full opportunity to present its contentions in court and be given full relief against slight and technical omissions." The district court overruled the motion to vacate in a September 6, 2002, journal entry.

On September 16, 2002, Coregis, again purporting to renew and preserve its special appearance, filed three motions: a motion to alter or amend the judgment and order, a motion for new trial, and a motion to set aside the order or judgment. In each of the motions, Coregis moved the court to reconsider the motion to vacate and grant Coregis a trial on the merits. The district court overruled all three motions in an October 1 docket entry and subsequently filed an order reaffirming that entry on October 29.

Coregis appealed from the March 1, September 6, and October 1, 2002, orders. The Nebraska Court of Appeals dismissed the appeal pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001), because the September 6 journal entry purporting to overrule the motion to vacate was neither signed nor date stamped and therefore did not constitute a final, appealable judgment. See *Miller v. Steichen*, 11 Neb. App. lxix (No. A-02-1249, Dec. 5, 2002). Pursuant to Coregis' motion, the district court entered a final, appealable order overruling the motion to vacate on January 30, 2003. Coregis then filed this appeal, which we moved to our docket pursuant to our authority to regulate the caseloads of this court and the Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

On appeal, Coregis assigns, restated, (1) that the district court erred in overruling its special appearance because Miller failed to

properly serve Coregis with summons and (2) that the district court abused its discretion in failing to vacate the default judgment against Coregis because Coregis acted promptly to obtain relief and presented a meritorious defense to the garnishment action.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003).

[2] The decision to vacate an order is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999). A much stronger showing is required to substantiate an abuse of discretion when a judgment is vacated than when it is not. *Id.*

ANALYSIS

We begin by addressing Miller's argument that we should affirm the judgment of the district court under the principle that a party cannot complain of error which the party has invited the court to commit. See, *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003); *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997). Miller's argument focuses on the motion filed by Coregis in the district court after the Court of Appeals dismissed its first appeal on the jurisdictional ground that there was no final, appealable order. We view this motion as a request that the district court correct a procedural defect with respect to its entry of judgment. This is not "invited error" which would preclude our substantive review of the judgment, but, rather, a legitimate request to correct an error by the district court which prevented its judgment from becoming final and thereby deprived Coregis of its right to appellate review. Contrary to Miller's assertion, this circumstance is clearly distinguishable from *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004), in which we held that a plaintiff could not voluntarily dismiss a case without prejudice, consent to entry of such an order, and then seek appellate review of an adverse pretrial order.

[3,4] Turning to the merits of the appeal, we begin by noting our agreement with Miller's contention that Coregis appeared generally in the district court. Under the statutory pleading rules applicable to actions commenced prior to January 1, 2003, a party could file a special appearance for the sole purpose of objecting to the court's assertion of personal jurisdiction over the objector. See Neb. Rev. Stat. § 25-516.01 (Reissue 1995 & Cum. Supp. 2002). An appearance is special when its sole purpose is to question the jurisdiction of the court; however, a further or later request for other relief may be a general appearance. *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996); *West Town Homeowners Assn. v. Schneider*, 221 Neb. 674, 380 N.W.2d 265 (1986); *Ivaldy v. Ivaldy*, 157 Neb. 204, 59 N.W.2d 373 (1953). Under § 25-516.01 (Reissue 1995), where a special appearance is overruled, a "defendant's participation in proceedings on any issue other than jurisdiction over the person waives any objection that the court erred in overruling the special appearance except the objection that the defendant is not amenable to process issued by a court of this state."

Coregis has never contended that it is not amenable to process issued by a Nebraska court, only that such process was not properly served. Here, however, the special appearance filed by Coregis asserted not only the alleged defect in service of process, but also a contention that Coregis was not obligated under its professional liability policy based upon a previous declaratory judgment issued by a federal court. This assertion is incorporated by reference in Coregis' motion to vacate. Because the coverage defense asserted by Coregis involves issues unrelated to personal jurisdiction, we conclude that Coregis appeared generally and subjected itself to the jurisdiction of the district court.

This general appearance, however, does not resolve the question of whether the district court had personal jurisdiction over Coregis when it entered the default judgment. In *Ivaldy v. Ivaldy, supra*, the defendant appeared specially after a default judgment had been entered against him and objected to the court's jurisdiction over his person. Before any ruling on the special appearance, the defendant moved to vacate the judgment on the ground that he had a meritorious defense. This court held that while the latter filing was a general appearance which subjected the defendant to

the jurisdiction of the district court, it did not relate back to validate the default judgment, which judgment was entered at a time when the defendant had not been properly served, and was therefore void. Applying the same principle to this case, we conclude that Coregis subjected itself to the jurisdiction of the district court after entry of the default judgment but is not foreclosed from challenging the validity of that judgment on the ground that the court lacked personal jurisdiction, due to defective service of process, at the time the judgment was entered.

Given that Coregis subjected itself to the jurisdiction of the district court prospectively, the issue is whether that court erred in not setting aside the prior default judgment on one of two alternate grounds: (1) that Coregis had demonstrated the existence of a meritorious defense or (2) that the judgment was void because the district court lacked personal jurisdiction over Coregis at the time of entry, due to a defect in service of process.

Neb. Rev. Stat. § 25-2001(1) (Cum. Supp. 2002) provides that "[t]he inherent power of a district court to vacate or modify its judgments or orders during term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six months after the entry of the judgment or order." The district court for Douglas County has a term coextensive with the calendar year. See Rules of Dist. Ct. of Fourth Jud. Dist. 4-1C (rev. 1995). In this case, the default judgment was entered on December 21, 2001, and the motion to vacate was filed on April 17, 2002. Because the motion was filed after term but less than 6 months after the default judgment, § 25-2001(1) applies and the district court had the discretion under its statutory power to vacate the judgment on the same grounds as if it had been within term.

[5] Generally,

> [w]here a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.

Steinberg v. Stahlnecker, 200 Neb. 466, 467, 263 N.W.2d 861, 862 (1978). This court has further stated:

> "It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions. On the other hand, it is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. . . . *Mere mistake or miscalculation of a party or his attorneys is not sufficient, in itself, to warrant the refusal to set aside a default judgment, when there is a good defense pleaded or proved and no change of position or substantial misjustice [sic] will result from permitting a trial on the merits.*"

(Emphasis supplied.) (Emphasis in original.) *DeVries v. Rix*, 203 Neb. 392, 402, 279 N.W.2d 89, 95 (1979), quoting *Beliveau v. Goodrich*, 185 Neb. 98, 173 N.W.2d 877 (1970).

[6,7] The record discloses that Coregis acted promptly when it learned that a default judgment had been entered against it on December 21, 2001. It filed its special appearance on January 8, 2002, contending that summons was not properly served and that it had a defense to the garnishment proceeding. The critical issue, therefore, is whether Coregis made the requisite showing that it has a meritorious defense to the garnishment proceeding. In this context, " '[a] meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.' " *Steinberg v. Stahlnecker*, 200 Neb. at 468, 263 N.W.2d at 862-63, quoting *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977). Although a defendant seeking to vacate a default judgment is required to present a meritorious defense, it is not required that the defendant "show he will ultimately prevail in the action, but only that the defendant show that he has a defense which is recognized by the law and is not frivolous." *Beren Corp. v. Spader*, 198 Neb. at 685, 255 N.W.2d at 253. Accord *Steinberg v. Stahlnecker, supra.*

Coregis seeks to assert a defense that it has no assets from which the judgment against Steichen can be satisfied because the professional liability insurance policy which it issued to him excludes coverage for the acts or omissions by Steichen upon which Miller's claim embodied in the default judgment is based. In this regard, Coregis presented to the district court a judgment

entered in the U.S. District Court for the District of Nebraska, finding in part that Coregis had no duty under the policy in question to defend or indemnify Steichen or his law firm for claims made regarding his representation of Miller. That judgment was based on an exclusion in Steichen's policy which excludes coverage for claims "arising out of conversion [or] misappropriation." The court concluded that "[w]hen the direct and precipitating cause of the claim against the insured is an act within the exclusion, e.g., theft, embezzlement, misappropriation, or conversion, the insured's negligent failure to supervise the wrongdoer 'does not change the fact that the exclusionary clause precludes coverage.' " Coregis argues that this judgment, although not necessarily res judicata as to Miller, raises a question of law that deserves a hearing on the merits and is clearly nonfrivolous.

Miller contends, however, that Coregis has failed to present a meritorious defense because although Steichen may have been guilty of conversion and misappropriation of funds, such acts were not the direct and precipitating cause of Miller's claim or the basis of her malpractice claim. Rather, she argues that it was Steichen's failure to communicate settlement offers and his allowing the case to be dismissed outside the statute of limitations that formed the basis of the claim. Miller further argues that because she was not a party to the federal declaratory judgment action, it is not binding upon her under our decision in *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998). Therefore, Miller contends that the exclusion does not apply and that the district court did not abuse its discretion when it denied Coregis' motion to vacate.

[8] An insurance policy is a contract, and when the facts are undisputed, whether or not a claimed coverage exclusion applies is a matter of law. See, *City of Scottsbluff v. Employers Mut. Ins. Co.*, 265 Neb. 707, 658 N.W.2d 704 (2003); *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). Coregis demonstrated that it had a defense which is "recognized by the law and is not frivolous" and is thus " 'worthy of judicial inquiry.' " *Steinberg v. Stahlnecker*, 200 Neb. 466, 468, 263 N.W.2d 861, 863 (1978), quoting *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977). This showing was sufficient under our law to warrant setting aside the default judgment so

that the garnishment proceeding could be resolved on the merits. The district court therefore abused its discretion in overruling, without explanation, Coregis' motion to vacate and subsequent motion to alter and amend the judgment. In reaching this conclusion, we express no opinion as to whether Coregis will ultimately prevail on its coverage defense.

Having determined that the district court erred in not setting aside the default judgment on the ground that Coregis demonstrated a meritorious defense, it is not necessary for this court to further determine whether or not Coregis was properly served.

CONCLUSION

For the reasons set forth herein, we reverse the judgment of the district court and remand the cause with directions to the district court to (1) vacate the default judgment entered against Coregis on December 21, 2001, and (2) give Coregis a reasonable time in which to file an appropriate responsive pleading.

REVERSED AND REMANDED WITH DIRECTIONS.

WAYNE KUBIK, INDIVIDUALLY AND AS A REPRESENTATIVE OF SAND CREEK FARMS, INC., APPELLANT, V. MARVIN KUBIK AND SHARON THOMPSON, APPELLEES.

683 N.W.2d 330

Filed July 9, 2004. No. S-03-765.

1. **Demurrer: Pleadings: Appeal and Error.** 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.
2. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled.
3. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
4. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.
5. **Derivative Actions: Words and Phrases.** A derivative action is a suit brought by a shareholder to enforce a cause of action belonging to the corporation.

6. **Derivative Actions: Pleadings: Corporations.** Normally, to maintain a derivative action, a shareholder must allege the making of a demand upon the corporation unless circumstances excuse the stockholder from making such a demand.
7. ____: ____: ____. In a shareholder derivative action, the demand notice and request should set forth the persons to be sued, and should describe all the causes of action which it is intended to assert. The demand must clearly state the corporate wrongs complained of and should state any facts upon which its charges were based.
8. **Derivative Actions.** A shareholder is not required to make a demand if it would be unavailing.
9. **Derivative Actions: Pleadings.** In order to state a derivative action, a petition must allege the fact that a demand has been made or that such a demand would be futile.
10. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled.
11. **Pleadings: Appeal and Error.** As a general rule, an appellate court disposes of a case on the theory presented in the district court.
12. **Appeal and Error.** An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded with directions.

John H. Sohl and Jaron J. Bromm, Senior Certified Law Student, of Edstrom, Bromm, Lindahl, Sohl & Freeman-Caddy, for appellant.

Michael A. Nelsen, of Hillman, Forman, Nelsen, Childers & McCormack, for appellees.

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

STEPHAN, J.

Wayne Kubik (Kubik) appeals from an order of the district court for Saunders County dismissing a derivative action he brought on behalf of Sand Creek Farms, Inc. (SCF), against his brother and sister who are the majority shareholders and directors of the corporation.

BACKGROUND

On December 3, 2002, Kubik commenced this derivative action on behalf of SCF against the majority shareholders and directors of SCF, Marvin Kubik and Sharon Thompson (collectively the defendants). In response to the original petition, the defendants filed an answer asserting various defenses,

including the insufficiency of the alleged demand made upon them by Kubik. Kubik filed a reply generally denying the defenses asserted in the answer. The defendants then filed a motion for summary judgment. In the district court's ruling on this motion, it noted that the action had been commenced under the code pleading rules which existed in this state prior to January 1, 2003, and that under those rules, our cases held that a motion for summary judgment was an inappropriate method for challenging the sufficiency of the pleadings. Accordingly, the district court treated the motion as a demurrer, sustained the demurrer, and granted Kubik leave to amend. Kubik then filed a first amended petition which is his operative pleading. We summarize here the factual allegations contained therein.

SCF was funded, organized, and incorporated by Edward and Blanche Kubik, husband and wife, in 1976. Edward died February 21, 1979, and Blanche died March 27, 1997. Kubik, Marvin Kubik, and Sharon Thompson are their only children. Marvin Kubik is a director of SCF and was elected as its president on or about March 19, 1998. Sharon Thompson is now and at all relevant times has been the secretary and treasurer of SCF. SCF has not held regular meetings of its shareholders, officers, or board of directors since before Blanche's death.

Kubik alleged that the following individuals are shareholders of SCF:

Shareholder	Number of Shares	Percentage of Shares
Marvin Kubik	16,666⅔	33.3
Wayne Kubik	14,612⅔	29.2
Sharon Thompson	13,160⅔	26.3
Sharon Thompson (custody Vickie Thompson)	1,240	2.5
Duane Thompson	1,840	3.7
Kellie A. Weston	1,240	2.5
Julie L. Bose	1,240	2.5
	50,000	100

Kubik further alleged on information and belief that without his prior knowledge, the number of outstanding shares was increased to 66,666⅔ shares, as evidenced by a January 1, 2002, domestic corporation occupation tax report, which is attached to the first

amended petition. The record does not disclose who owns or controls the additional 16,666⅔ shares.

More than 90 days prior to filing this action, Kubik served a written demand upon SCF to take the following actions:

> 1) That [SCF] remove from the Board of Directors, Marvin Kubik and Sharon Thompson;
>
> 2) That [SCF] make a full and complete accounting of all income received by the Corporation since Marvin Kubik became President;
>
> 3) That [SCF] make a full and complete accounting of all expenditures incurred for [SCF] since Marvin Kubik became President;
>
> 4) That [SCF] make a full and complete disclosure of any and all contracts entered into by [SCF] since Marvin Kubik became president;
>
> 5) That [SCF] hold regular Board of Directors Meetings;
>
> 6) That [SCF] hold regular, annual Shareholder Meetings;
>
> 7) That [SCF] bring an action against Marvin Kubik and Sharon Thompson for negligence in the administration of [SCF];
>
> 8) That [SCF] bring an action against Marvin Kubik and Sharon Thompson for disbursing Corporate funds to themselves without appropriate corporate/shareholder action;
>
> 9) That [SCF] be reimbursed for expenses incurred by said Corporation for the benefit of Marvin Kubik and Sharon Thompson without appropriate corporate/shareholder action; and
>
> 10) That Shareholder, Wayne Kubik, believes that Marvin Kubik and Sharon (Kubik) Thompson have been aware of some, if not all, of the above requests for more than ninety days; and
>
> 11) That unless an immediate restraining order is issued and/or immediate compliance with the above request is had by [SCF] irreparable harm would occur if the Corporation and/or the Shareholder(s) would await to take action.

Kubik alleged that he had requested but had not received financial information from SCF and that he was removed as the registered agent of the corporation without a directors meeting, approval of shareholders, or his consent. He alleged that the

corporation changed its name and filed new articles of incorporation without a board of directors meeting, approval of the shareholders, or his consent and that the defendants have accepted improper fees from the corporation, entered into improper long-term leases, and incurred "exorbitant legal fees to the detriment of the corporation's shareholders all without Board or Shareholder approval." Kubik further alleged that the defendants were in possession and control of the business and assets of SCF, that the defendants had utilized the corporation for various improper purposes "since at least March 19, 1998," and that irreparable harm would occur if the actions he demanded were not taken. Kubik sought appointment of a receiver and other relief, including compliance with the aforementioned demands.

In response to the amended petition, the defendants filed a motion to dismiss. The motion requested dismissal of the action

> pursuant to [Neb. Ct. R. of Pldg. in Civ. Actions] 12(b)(6) [(rev. 2003)] for failure to state a cause of action, or in the alternative an Order for Summary Judgment herein, concerning the issue of whether the written demand which was the prerequisite to filing the Petition herein pursuant to Neb. Rev. Stat. §21-2072 (Reissue 1995) was legally sufficient.

At a hearing on this motion, the defendants argued that Kubik's demand was deficient. Kubik argued that the demand was legally sufficient and that he could not be more specific in his allegations because the defendants refused to hold shareholder meetings and/or give him the information he requested. The district court entered an order of dismissal, reasoning:

> In the present case, a review of the Amended Petition and the demand attached thereto, it is clear that the demand made does not comport with the requirements set forth in [*Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993)]. Whether this case is treated as one filed before the adoption of Nebraska's new civil procedure rules—in which case the matter would be treated as a Demurrer or Motion for Judgment on the Pleadings or whether it is treated as one to which the new rules would apply—in which case it would be treated as a 12(b)(6) motion, the result is the same. Plaintiff has failed to

> allege that a demand, meeting the specificity requirements and giving rise to authority to sue was served upon the corporation. Given that the demand itself was attached to the Amended Petition, it appears unlikely that the Plaintiff would be able to amend the petition to cure the defect. Given this, the Amended Petition fails to state a claim. The matter is dismissed.

Kubik 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

Kubik assigns, restated and consolidated, that the district court erred in dismissing the action.

STANDARD OF REVIEW

Nebraska's new rules of pleading apply to "civil actions filed on or after January 1, 2003." Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2003). Because this action was filed prior to that date, we treat this as an appeal from an order sustaining a demurrer without leave to amend and dismissing the action.

[1-4] 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); *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003); *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002). In determining whether a cause of action has been stated, a petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled. *Rodehorst v. Gartner, supra*; *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002); *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Rodehorst v. Gartner, supra*; *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003). When a demurrer to a petition is sustained,

a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Regier v. Good Samaritan Hosp., supra*; *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002).

ANALYSIS

[5,6] A derivative action is a suit brought by a shareholder to enforce a cause of action belonging to the corporation. *Sadler v. Jorad, Inc., ante* p. 60, 680 N.W.2d 165 (2004); *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993). Normally, to maintain a derivative action, a shareholder must allege the making of a demand upon the corporation unless circumstances excuse the stockholder from making such a demand. *Sadler v. Jorad, Inc., supra*. See, *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *Kowalksi v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 71 N.W.2d 147 (1955); *Association of Commonwealth Claimants v. Hake, supra*; Neb. Rev. Stat. § 21-2072(1) (Reissue 1997). Kubik argues on appeal that he satisfied the demand requirement, or, in the alternative, that he was excused from making a demand because to do so would have been futile.

WAS DEMAND LEGALLY SUFFICIENT?

[7] Section 21-2072(1) provides:

> No shareholder may commence a derivative proceeding until:
>
> (a) A written demand has been made upon the corporation to take suitable action; and
>
> (b) Ninety days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the ninety-day period.

The statute does not address the required substantive content of the demand, and this court has not had occasion to consider the legal sufficiency of a demand made pursuant to § 21-2072(1). However, the Nebraska Court of Appeals addressed this issue in *Association of Commonwealth Claimants v. Hake, supra.* In that case, the assignees of depositors and creditors of an insolvent industrial loan and investment company brought a derivative

action against the former directors of the company, the former general counsel, and other alleged coconspirators, to recover for alleged mismanagement and other improprieties which resulted in the insolvency. The assignees appealed from a district court order dismissing the case after granting the defendant's demurrers. The demurrers were sustained on the basis that the assignees had failed to fulfill the demand requirement. Regarding the sufficiency of the demand, the Court of Appeals stated: " 'The demand notice and request should set forth the persons to be sued, and should describe all the causes of action which it is intended to assert. The demand must clearly state the corporate wrongs complained of and should state any facts upon which its charges were based.' " *Id.* at 130, 507 N.W.2d at 669-70, quoting 13 William Meade Fletcher et al., Cyclopedia of the Law of Private Corporations § 5968 (rev. perm. ed. 1991). We agree and adopt this principle of law.

The demand considered in *Hake* stated generally that the plaintiff had " 'reasonable grounds to believe' " that he had " 'meritorious causes of action' " against " 'members and directors.' " *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. at 130, 507 N.W.2d at 670 (1993). The Court of Appeals determined that the alleged demand was not legally sufficient because it failed to name specific persons or facts giving rise to the alleged causes of action and that the allegations in the demand were "mere conclusions." *Id.*

We agree with the determination of the district court in this case that the demand attached to the amended petition and incorporated by reference therein "[did] not comport with the requirements set forth in *Hake*." Although the demand identifies the specific individuals to be sued, it provides no detail regarding the specifications of alleged negligence on the part of those individuals or the date or amounts of any alleged improper disbursements made or expenses incurred. The demand fails to state specific facts " 'upon which its charges [are] based.' " *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 130, 507 N.W.2d 665, 670 (1993). See 13 Fletcher et al., *supra*, §§ 5963 and 5968 (rev. perm. ed. 1995) (demand should provide directors with sufficient information regarding relief sought and grounds for such relief so demand can be evaluated). Like the alleged

demand in *Hake*, Kubik's demand is based on mere conclusions. Accordingly, the district court did not err in finding that Kubik failed to allege the making of a demand which met the specificity requirements giving rise to authority to sue.

WAS DEMAND EXCUSED?

[8] As noted, Kubik makes an alternative argument in this appeal that he was excused from the demand requirement because demand would have been futile. We have held that a "shareholder is not required to make [a demand] if it would be unavailing." *Sadler v. Jorad, Inc., ante* p. 60, 66, 680 N.W.2d 165, 170 (2004). See, also, *Anderson v. Clemens Mobile Homes,* 214 Neb. 283, 333 N.W.2d 900 (1983) (minority shareholder not required to make demand where action would require majority shareholder to require his own accounting to corporation); *Association of Commonwealth Claimants v. Hake, supra* (it is generally accepted rule of corporate law that it is futile to request directors accused of wrongdoing to sue themselves); Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball*, 77 Minn. L. Rev. 1339, 1351 (1993) ("[a]s a general rule, some level of directorial involvement in a challenged transaction excuses demand").

[9] However, the record does not reflect that Kubik ever made this argument in the district court. His operative amended petition alleged that a demand was made, not that it was futile, and his arguments to the court focused exclusively on the sufficiency of the demand. This court has previously held that "[i]n order for appellants to state a derivative action, their petition *must* allege the fact that a demand has been made . . . or that such a demand would be futile." (Emphasis supplied.) *Weimer v. Amen*, 235 Neb. 287, 304, 455 N.W.2d 145, 157 (1990). See, also, *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 131, 507 N.W.2d 665, 670 (1993) ("[w]here no demand was made because it was deemed futile, the petition must state with particularity the facts which excuse such demand").

[10-12] The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled. *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003); *V.C. v. Casady*,

262 Neb. 714, 634 N.W.2d 798 (2001). As a general rule, an appellate court disposes of a case on the theory presented in the district court. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002). Likewise, an issue not presented to or decided by the trial court is not appropriate for consideration on appeal. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004); *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). Because the pleadings which were before the district court at the time of its ruling on the demurrer did not raise an issue that demand upon the directors and majority shareholders would have been futile and was therefore excused, the district court was not required or permitted to consider this issue in deciding whether the demurrer should be sustained.

However, as noted above, when a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002); *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002). Because we cannot conclusively determine that Kubik would be unable to plead facts upon which a court could find that demand would have been futile and is therefore excused, we conclude that the district court erred in sustaining the demurrer without leave to amend and dismissing the action.

CONCLUSION

The district court correctly found that Kubik's petition failed to allege that a demand meeting the specificity requirements and giving rise to authority to sue was served upon SCF. However, the district court erred in failing to grant Kubik leave to amend his petition to allege futility. We therefore affirm the district court's order sustaining the demurrer, but reverse the judgment of dismissal and direct that upon remand, Kubik shall have 30 days from entry of our mandate to file an amended petition.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

MCCORMACK, J., not participating.

BUTLER COUNTY SCHOOL DISTRICT NO. 502, ALSO KNOWN AS EAST BUTLER PUBLIC SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. CHRISTINE MEYSENBURG, IN HER CAPACITY AS BUTLER COUNTY CLERK, AND BUTLER COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES.

683 N.W.2d 367

Filed July 16, 2004. No. S-03-171.

1. **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.
2. **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.
3. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
4. **Demurrer: Pleadings: Records.** A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action.
5. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
6. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally, and if, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled.
7. ____: ____. When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.
8. **Demurrer: Pleadings: Appeal and Error.** Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion.
9. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
10. **Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.

11. **Political Subdivisions Tort Claims Act: Taxes.** Acts performed with respect to the assessment and collection of taxes are exempt under the Nebraska Political Subdivisions Tort Claims Act.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Steve Williams, of Recknor, Williams & Wertz, for appellant.

Randall L. Goyette and Andrew K. Smith, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant, Butler County School District No. 502, also known as East Butler Public Schools (the school district), brought this action pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Supp. 1999). The amended petition is the operative petition for purposes of this appeal. In the amended petition, the school district alleged that Christine Meysenburg, the Butler County clerk, failed to properly record and transcribe in the "2000 Abstract of Levies" a levy set by the school district's board of education. Butler County was also named as a defendant. As a result of Meysenburg's alleged "negligent or wrongful act, error, omission, or breach of duty," the school district claimed it received $150,000 less from the special building fund levy than had been approved. Appellees demurred to the amended petition, claiming that the amended petition failed to state a cause of action and that appellees were immune from liability. The district court for Butler County sustained the demurrer and dismissed the action without leave to replead. The school district appeals. We affirm the district court's decision sustaining the demurrer without leave to replead and dismissing the school district's action.

STATEMENT OF FACTS

On August 2, 2002, the school district filed an initial petition against Meysenburg and the Butler County Board of Supervisors,

alleging a claim against these defendants under the Political Subdivisions Tort Claims Act. Meysenburg and the board of supervisors demurred to the petition, alleging that there was a defect in the parties as to the board of supervisors and that the petition failed to state a cause of action. The school district conceded that the board of supervisors was not a proper party to the action, and the demurrer as to the board of supervisors was sustained on this ground. The board of supervisors is no longer a party to these proceedings. The district court sustained the demurrer on the additional ground that the petition failed to state a cause of action, and the school district was given leave to replead.

On December 4, 2002, the school district filed its amended petition in which it named Meysenburg and Butler County as defendants. The following facts are alleged in the amended petition: On September 11, 2000, the school district's board of education passed a resolution entitled "2000-2001 Tax Request Resolution for East Butler School District 12-0502," which adopted the 2000-2001 budget information contained in a previous tax request hearing notice. See Neb. Rev. Stat. § 77-1601.02 (Cum. Supp. 2000). Pursuant to the resolution, the school board set a tax request for a special building fund at $150,000 and created a levy of .0930 per $100 of taxable valuation of property subject to the levy.

According to paragraph 8 of the amended petition, shortly after the resolution was passed, and in accordance with Neb. Rev. Stat. § 13-508 (Cum. Supp. 2000), the school board filed the "2000-2001 State of Nebraska School District Budget Form for the East Butler Public Schools" with Meysenburg, in her capacity as the Butler County clerk. As alleged by the school district in paragraph 14 of the amended petition, "[p]ursuant to Neb. Rev. Stat. § 23-1302 [(Reissue 1997)] and/or other Nebraska Law, [Meysenburg] had a legal duty to accurately record and transcribe the levy amount . . . in the 2000 Abstract of Levies." Attached to the amended petition as exhibit D is a seven-page document entitled "2000 Abstract of Levies," which the school district alleged is a true and correct copy of the "2000 Abstract of Levies" maintained by Meysenburg. Exhibit D contains, inter alia, a list of governmental subdivisions and their corresponding levy amounts. The last page of exhibit D contains a certification

and the stamp of the Butler County clerk. Meysenburg signed the certification on the last page of exhibit D in her capacity as "Butler County Clerk," and the document bears a handwritten date of October 26, 2000. The following language appears above Meysenburg's signature: "I, Christine Meysenburg, County Clerk in and for Butler County, Nebraska, do hereby certify the above tax levies for Butler County taxing districts as set by the political subdivisions and approved by the County Board of Supervisors on October 13, 2000."

According to paragraph 9 of the amended petition, Meysenburg "failed to properly record or transcribe" in the 2000 abstract of levies the special building fund levy which had been set by the school district's school board, and according to paragraph 19, Meysenburg "publicly admitted . . . that she 'just made a mistake.' " The school district alleged that as a result of this failure, it had been damaged "in that it will receive $150,000.00 less from the special building fund levy than was approved." For its relief, the school district claimed that as a result of appellees' "failure to certify a proper levy pursuant to Neb. Rev. Stat. § 77-1601.02," the school district was entitled to receive $150,000 from appellees.

On December 23, 2002, appellees filed a demurrer to the amended petition. Appellees claimed that the amended petition failed to state a cause of action and that appellees were immune from liability. In support of their demurrer, appellees relied upon § 13-910, which provides, in pertinent part, that "[t]he Political Subdivisions Tort Claims Act . . . shall not apply to . . . (5) Any claim arising with respect to the assessment or collection of any tax or fee . . . ."

A hearing was held on appellees' demurrer. In a journal entry filed February 4, 2003, the district court sustained the demurrer, stating that "the [school district] seeks to impose liability for an act which falls within the ambit of the 'assessment and collection' of taxes. Sovereign immunity as to such acts has been preserved and no suit against . . . Meysenburg in her official capacity or the county can be sustained . . . ." The district court dismissed the school district's amended petition without leave to replead, concluding, "there is no reasonable possibility that further pleading will cure the defect." The school district appeals.

ASSIGNMENT OF ERROR

On appeal, the school district assigns one error, which, restated, claims that the district court erred in sustaining appellees' demurrer and dismissing the school district's amended petition without leave to replead.

STANDARDS OF REVIEW

[1,2] 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. *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). 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. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004).

ANALYSIS

[3,4] At issue in this case is whether the school district's amended petition states a cause of action against appellees. If the amended petition fails to state a cause of action, we consider whether the district court should have granted leave to the school district to replead. In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action. *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

[5,6] A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244

(2003). In determining whether a cause of action has been stated, the petition is to be construed liberally, and if, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled. *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002).

[7,8] When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Id.* Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion. *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000).

The district court sustained the demurrer on the basis that appellees were immune under § 13-910(5) of the Political Subdivisions Tort Claims Act which exempts "[a]ny claim arising with respect to the assessment or collection of any tax or fee . . . ." In support of its argument that the district court erred in sustaining appellees' demurrer, the school district essentially claims that Meysenburg's purported negligence as alleged in the amended petition is not exempt under the Political Subdivisions Tort Claims Act. We disagree.

In its amended petition, the school district alleges that after the school board passed the resolution setting the special building fund levy, the board filed the necessary levy form with Meysenburg. The school district further alleges that under state law, Meysenburg "had a legal duty to accurately record and transcribe the levy amount . . . in the 2000 Abstract of Levies." The amended petition describes Meysenburg's duties and refers to § 77-1601.02 and Neb. Rev. Stat. § 23-1302 (Reissue 1997). Meysenburg's duties as alleged in the amended petition are not inconsistent with these statutes.

Paragraph 9 of the amended petition refers to and incorporates exhibit D. As noted above, exhibit D is a document entitled "2000 Abstract of Levies," which lists Butler County governmental subdivisions and their corresponding levy amounts. The document bears Meysenburg's signature and contains her certification as follows: "I, Christine Meysenburg, County Clerk in and for Butler County, Nebraska, do hereby certify the above tax

levies for Butler County taxing districts as set by the political subdivisions and approved by the County Board of Supervisors on October 13, 2000." Exhibit D does not contain an entry for the school district's special building fund levy. In paragraph 9, the school district alleges that contrary to the certification contained in exhibit D, Meysenburg "failed to properly record or transcribe" in the 2000 abstract of levies the special building fund levy set by the school district's school board. The school district claimed that as a result of Meysenburg's negligence, the school district had been harmed in the amount of $150,000, an amount which we observe is equal to the sum which was to have been generated by the special building fund levy.

[9,10] As indicated above, in sustaining the demurrer, the district court relied on § 13-910, entitled "Act and sections; exemptions," which provides that "[t]he Political Subdivisions Tort Claims Act . . . shall not apply to . . . (5) Any claim arising with respect to the assessment or collection of any tax or fee . . . ." We have stated that statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver. *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003). A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction. *Id.*; *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). See *King v. State*, 260 Neb. 14, 614 N.W.2d 341 (2000). Our analysis of the Political Subdivisions Tort Claims Act is guided by its plain language and the presumption against a waiver.

Referring to § 13-910(5) and the amended petition, appellees assert that any claim the school district may have as a result of Meysenburg's failure to record the school district's special building fund levy is a " 'claim arising with respect to' " the county's assessment or collection of taxes, and thus is exempt under § 13-910(5). Brief for appellee at 10. In support of their claim that they are immune from suit, appellees also rely, in part, on federal cases.

With respect to appellees' reliance on federal cases, we note that the language in Nebraska's Political Subdivisions Tort

Claims Act is modeled after the Federal Tort Claims Act and that § 13-910(5) is similar to 28 U.S.C. § 2680(c) (2000), the latter of which excludes "[a]ny claim arising in respect of the assessment or collection of any tax . . . ." We have previously referred to federal case law under 28 U.S.C. § 2680(c) in applying § 13-910(5). See *Nash v. City of North Platte*, 198 Neb. 623, 255 N.W.2d 52 (1977), *overruled on other grounds, Knight v. H & H Chevrolet*, 215 Neb. 166, 337 N.W.2d 742 (1983). As noted by appellees, the federal courts have repeatedly stated, albeit in different factual contexts, that the language "in respect of" found in 28 U.S.C. § 2680(c) should be interpreted broadly, thereby preserving immunity. See, e.g., *Perkins v. U.S.*, 55 F.3d 910, 915 (4th Cir. 1995) (stating "exemption immunizes the [Internal Revenue Service] from suit for activities that are even remotely related to . . . tax assessment or collection"); *Capozzoli v. Tracey*, 663 F.2d 654, 658 (5th Cir. 1981) (stating that language "*in respect of* . . . is broad enough to encompass any activities of an [Internal Revenue Service] agent even remotely related to his or her official duties"). The federal analysis is consistent with our approach construing immunity statutes in favor of the sovereign and against waiver.

[11] Examining the school district's allegations in relation to the language of § 13-910(5), and reading this statute in favor of the sovereign and against waiver, we determine that Meysenburg's acts of recording, transcribing, and certifying the tax levies, as alleged in the school district's amended petition, are acts performed "with respect to the assessment and collection of taxes," and as a result are exempt under the Nebraska Political Subdivisions Tort Claims Act. It is apparent from the allegations in the school district's amended petition and exhibits that Meysenburg's duties generally with regard to transcribing and recording levies, and in particular her act in this case of certifying levies set by Butler County governmental subdivisions are acts undertaken to assist in the assessment and collection of taxes and are immune from liability under § 13-910(5). See *LaBarge v. City of Concordia*, 23 Kan. App. 2d 8, 17, 927 P.2d 487, 493 (1996) (interpreting Kansas Tort Claims Act which excepts claims involving "the assessment or collection of taxes"

and stating that "[i]t is obvious that the County cannot be held liable in damages resulting from the preparation of its tax assessment rolls . . . . These rolls were prepared to assist in the assessment and collection of taxes, and the County is specifically immune from liability [under tort claims statute]"). Accordingly, the school district did not state a cause of action against appellees based upon Meysenburg's alleged failure to record, transcribe, and certify the special building fund levy, and the district court did not err in sustaining appellees' demurrer to the amended petition. See § 13-910(5).

Given the allegations in the amended petition and the terms of § 13-910(5), there is no showing of a legal liability of appellees to the school district, and no reasonable possibility exists that amendment will correct the defect. See *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002). Accordingly, the district court did not abuse its discretion in granting appellees' demurrer without leave to replead. We affirm.

CONCLUSION

The district court correctly sustained appellees' demurrer to the amended petition and did not abuse its discretion in denying leave to replead. We affirm the district court's order.

AFFIRMED.

STATE OF NEBRASKA ON BEHALF OF L.L.B., A MINOR CHILD, APPELLANT, V. MARQUISE S. HILL, APPELLEE.

682 N.W.2d 709

Filed July 16, 2004. No. S-03-225.

1. **Judgments: Equity: Time.** A litigant seeking the vacation or modification of a prior judgment after term may take one of two routes. The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2002) or under the district court's independent equity jurisdiction.
2. **Judgments: Equity: Proof.** To be entitled to equitable relief from a judgment, a party must show that the situation is not due to his or her fault, neglect, or carelessness.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed.

Anthony R. Medina for appellant.

Thomas C. Riley, Douglas County Public Defender, and Robert M. Williams for appellee.

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

CONNOLLY, J.

In 1996, the district court entered a default decree determining that Marquise S. Hill was the father of L.L.B. and ordering him to pay child support. Although Hill moved to set aside the decree within the same court term, the motion was dismissed for lack of prosecution. In 2002, DNA tests showed that Hill was not L.L.B.'s father, and Hill moved to vacate the paternity decree. The court granted the motion and vacated the decree, as well as child support arrearages.

The State on behalf of L.L.B. does not contest the vacation of the paternity determination and concedes that Hill should not be liable for future child support. But it argues that the court erred in vacating the arrearages. Because of Hill's inexcusable delay in invoking the district court's equity powers, we reverse.

BACKGROUND

In May 1996, the State on behalf of L.L.B. filed a petition for establishment of paternity and support. At the same time, the State moved for genetic testing. The transcript shows that a civil process server personally served Hill at Idelman Telemarketing with the petition, a notice of right to counsel, a notice of hearing, and a motion for genetic testing. Hill does not deny that he received these materials, but claims that he was in prison at the time. Hill failed to appear for the scheduled hearing. On July 18, 1996, the court entered a decree determining that Hill was L.L.B.'s father and ordering him to pay child support.

An attorney subsequently entered an appearance for Hill, and on August 15, 1996, Hill moved to set aside the decree and to file an answer out of time. Hill made the motion during the same term that the court had entered the paternity decree.

On May 23, 1997, the court administrator sent a letter to "Marquise S. Hill (C/O Idelman Telemarketing, 7415 Dodge

Street, Omaha, Nebraska 68114)." The letter warned Hill that his motion to set aside the default decree would be dismissed within 30 days unless further action was taken. Hill appears to have been in prison at the time, and it is unclear whether he received the notice.

The motion to set aside the default decree was dismissed on June 26, 1997, for failure to prosecute. Notice was sent to a residential address in Omaha. But it appears Hill was still in prison at the time, and it is unclear whether he received notice of the dismissal.

Hill was released from prison in 1998. In December 2001, Hill's driver's license was suspended for delinquent child support payments. On January 28, 2002, the State filed an application for a show cause order. The court granted the application and ordered Hill to show cause why he should not be held in contempt for failure to pay child support. In response to the show cause order, Hill filed a motion for genetic testing and child support suspension. The court granted the motion, and the testing showed that Hill was not L.L.B.'s father. Hill then filed a motion to terminate.

At a hearing before a referee, Hill testified that when he first received the petition for establishment of paternity, he spoke with the counselor at his housing unit at the penitentiary. He also claimed that he and members of his family had spoken with the "child support department" and told them that he was not L.L.B.'s father. Concerning the attorney who had filed the motion to set aside the paternity decree, he testified, "I tried to hire her to represent me on this and her lawyer abilities just wasn't [sic] up to par. She accepted my money and never called me back. She never said anything, ever." Hill also testified that both while he was in prison and after he was released, the State garnished his wages.

The referee recommended that the court enter an order vacating the paternity determination and terminating Hill's future child support obligations. However, the referee also recommended that the court not vacate the arrearages, reasoning:

> [Hill] does not dispute valid service of process, including the notification of his right to counsel. Instead, he did not legally defend the suit and judgment was entered in default. To now vacate that valid decree would be inequitable to the child. For the last six years, [the child and the State]

> reasonably relied upon the valid judgment thereby precluding pursuit of another. [Hill], not the child, should bear the burden of the failure to defend the case from the outset.

Hill filed an objection to the referee's recommendation. The court disagreed with the referee's recommendation and vacated the arrearages.

ASSIGNMENTS OF ERROR

The State on behalf of L.L.B. assigns that the district court erred in (1) finding that Hill was not liable for any child support arrearages that had accrued from the time that the decree was entered to the time when it was established that he was not the father, (2) using its equitable powers to sustain Hill's motion to terminate, and (3) failing to apply the doctrine of laches to the motion to terminate.

STANDARD OF REVIEW

It would unduly lengthen the opinion to set out the details of this confusing procedural history. However, on appeal, the parties proceed as though Hill had petitioned the district court to use its independent equity power to set aside the paternity decree and to vacate the child support arrearages. We agree that this is the best characterization of the proceedings. On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

ANALYSIS

Here, the substantive issue is narrow. The State did not oppose Hill's request to vacate the paternity decree or his request to terminate his future child support payments. The sole issue is whether the court erred in vacating the child support arrearages.

[1] A litigant seeking the vacation or modification of a prior judgment after term may take one of two routes. The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2002) or under the district court's independent equity jurisdiction. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). Hill has invoked the court's independent equity jurisdiction.

In *Gress v. Gress*, 257 Neb. 112, 117, 596 N.W.2d 8, 13 (1999), we said:

> Child support payments become a vested right of the payee in a dissolution action as they accrue. . . . While a past-due child support arrearage is already accrued and vested, a future payment is not. . . . A court may, therefore, modify the amount of child support due in the future but may not forgive or modify past-due child support.

(Citations omitted.) We have not addressed whether this rule precludes a court from using § 25-2001 or its independent equity power to vacate child support arrearages after the underlying paternity determination has been vacated. We need not decide that issue, however, because we conclude that Hill's lack of diligence precludes him from invoking equity.

[2] To be entitled to equitable relief from a judgment, a party must show that the situation is not due to his or her "fault, neglect, or carelessness." 49 C.J.S. *Judgments* § 435 at 600 (1997). "[T]he party seeking relief in equity from a judgment at law must show clearly that the judgment complained of is . . . not of his own negligence." *Shufeldt v. Gandy*, 34 Neb. 32, 36, 51 N.W. 302, 303 (1892). See, also, *Koehler v. Reed*, 1 Neb. (Unoff.) 836, 96 N.W. 380 (1901) (tracing history of rule); Restatement (Second) of Judgments § 67 at 162 (1982) ("a judgment by default may be avoided if . . . (2) The applicant for relief acted with due diligence in ascertaining that the judgment had been rendered and with reasonable promptness in seeking relief").

Here, Hill does not deny that he received notice of the 1996 petition to establish paternity and the State's motion for DNA testing. Instead of having the testing done, he failed to appear, resulting in a default judgment. Within a month, Hill hired an attorney who filed a motion to vacate the decree and child support award. However, neither Hill nor his attorney prosecuted the motion, and it was dismissed. Hill complains that he should not be blamed for the dismissal because it was the result of his attorney's negligence. The soundness of this argument is questionable. See *Roemer v. Maly*, 248 Neb. 741, 746, 539 N.W.2d 40, 45 (1995) ("litigant has a duty to follow the progress of the case, rather than to merely assume that counsel is doing everything necessary and proper"). But even if we were to accept the argument,

the dismissal of his motion to vacate in term occurred almost 5 years before Hill invoked the court's equitable jurisdiction. Hill testified that during this period, the State was garnishing his wages. Thus, he must have known that the arrearages were accruing. Yet even though he firmly believed that he was not the child's father, he did nothing until the State commenced contempt proceedings in 2002, almost 5 years after the dismissal of his motion to vacate in term. It was Hill's inexcusable lack of diligence which led to the accumulation of the arrearages, and as a result, equity will not aid him in vacating those arrearages. See *CSEA v. Guthrie*, 84 Ohio St. 3d 437, 705 N.E.2d 318 (1999).

CONCLUSION

The court erred in vacating the child support arrearages owed by Hill.

REVERSED.

TERLE SLANSKY, APPELLANT, V. NEBRASKA STATE PATROL, APPELLEE.

685 N.W.2d 335

Filed July 16, 2004. No. S-03-747.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. ____: ____: ____. 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 not arbitrary, capricious, or unreasonable.
5. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
6. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.

7. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
8. **Statutes: Constitutional Law: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
9. **Constitutional Law: Criminal Law: Other Acts.** Under the Ex Post Facto Clause, the retroactive application of civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited.
10. **Due Process.** Procedural due process limits the government's ability to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause. Due process requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
11. **Constitutional Law: Due Process.** When an individual claims he or she is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there is a liberty interest at stake. In the second stage, the court must determine what procedural safeguards are required. Finally, the facts of the case are examined to ascertain whether there was a denial of that process which was due.
12. **Due Process: Notice.** Due process does not guarantee an individual any particular form of state procedure. Instead, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it.
13. **Administrative Law.** As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties.
14. ____. An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Jon Bruning, Attorney General, and Mark D. Starr for appellee.

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

GERRARD, J.

In 1985, Terle Slansky was convicted pursuant to jury verdict of, inter alia, rape and attempted rape, and was sentenced to a term of 15 to 20 years' imprisonment in Kansas. After his release

from prison, Slansky moved to Nebraska and the Nebraska State Patrol (NSP), pursuant to the Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2000), determined that Slansky was at a high risk to reoffend sexually and classified him as a Level 3 sex offender. Slansky appealed, and the district court affirmed the NSP's determination. On appeal, Slansky contends that SORA is unconstitutional, the risk assessment instrument used by the NSP to classify sex offenders is invalid, and the evidence was insufficient to classify him as a Level 3 sex offender. For the following reasons, we affirm the judgment of the district court.

I. SORA

Because Slansky challenges numerous aspects of SORA, we begin by outlining some of its pertinent features, as well as the applicable rules and regulations that implement SORA. Similarly, because Slansky questions the validity of the risk assessment instrument that was developed to classify offenders, we briefly set forth its contours.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, see 42 U.S.C. § 14071 et seq. (2000), which conditioned certain federal funding on a state's adoption of sex offender registration laws within 3 years. See, *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999). In response, the Legislature enacted SORA in 1996. Although there have been a number of amendments to SORA since 1996, see § 29-4001 et seq. (Cum. Supp. 1998 & 2002) and 2004 Neb. Laws, L.B. 943, 98th Leg., 2d Session (2004), we review SORA as it existed at the time the NSP conducted Slansky's assessment in January 2000.

In enacting SORA, the Legislature stated that it was attempting to protect communities by assisting law enforcement agencies in identifying potential repeat sex offenders. See § 29-4002. In this regard, SORA applies to any person who on or after January 1, 1997, (1) pleads guilty to or is found guilty of one of a number of enumerated offenses, most of which are sexual in nature; (2) enters the State of Nebraska after having pled guilty to or been found guilty of any offense in another state that is

substantially equivalent to one of the enumerated offenses; or (3) is incarcerated or is under probation or parole as a result of pleading guilty to or being found guilty of a registrable offense under (1) or (2). See § 29-4003.

Any person subject to SORA must register with the sheriff of the county in which he or she resides within 5 days of becoming subject to SORA. § 29-4004. Registration requires a person to provide, inter alia, his or her name, aliases, date of birth, Social Security number, photograph, fingerprints, current address, place of employment or vocation, any school he or she is attending, a listing of registrable offenses the individual has pled guilty to or been found guilty of, the jurisdiction where the offense was committed, and the name and location of each jail or penal facility in which the person was incarcerated. § 29-4006(1). Such information is then forwarded to the NSP, which must maintain a central registry of persons obligated to register under SORA. § 29-4004.

Although information obtained under SORA was at one time restricted to law enforcement agencies and their authorized personnel, see § 29-4009(1) (Cum. Supp. 1996), this restriction was eliminated in 1998. Under the amendments passed in 1998, in addition to disclosing information obtained under SORA to law enforcement agencies for law enforcement purposes and governmental agencies conducting confidential background checks, the NSP and any law enforcement agency authorized by the NSP may release relevant information concerning the person if it is necessary to protect the public. § 29-4009(1) through (3).

Whether to release information concerning a person subject to SORA to the public is essentially a question about the person's risk of recidivism. See § 29-4013. Generally speaking, the NSP is required to assign a notification level, based on the risk of recidivism, to every person subject to SORA. § 29-4013(2)(e). If the risk of recidivism is low, the person is classified as a Level 1 offender and law enforcement officials who are likely to encounter the offender must be notified. § 29-4013(2)(c)(i). If the risk of recidivism is moderate, the person is classified as a Level 2 offender and schools, daycare centers, and religious and youth organizations must also be notified. § 29-4013(2)(c)(ii). If the risk of recidivism is high, the person is classified as a Level

3 offender and notice must be given to members of the public who are likely to encounter the offender, in addition to those groups that are required to be notified if a person is classified as a Level 1 or 2 offender. § 29-4013(2)(c)(iii).

In order to determine an offender's appropriate classification level, SORA directs the NSP to adopt rules and regulations that identify and incorporate factors that are relevant to a sex offender's risk of recidivism. See § 29-4013. SORA states in part:

> Factors relevant to the risk of recidivism include, but are not limited to:
>
> (i) Conditions of release that minimize the risk of recidivism, including probation, parole, counseling, therapy, or treatment;
>
> (ii) Physical conditions that minimize the risk of recidivism, including advanced age or debilitating illness; and
>
> (iii) Any criminal history of the sex offender indicative of a high risk of recidivism, including:
>
> (A) Whether the conduct of the sex offender was found to be characterized by repetitive and compulsive behavior;
>
> (B) Whether the sex offender committed the sexual offense against a child;
>
> (C) Whether the sexual offense involved the use of a weapon, violence, or infliction of serious bodily injury;
>
> (D) The number, date, and nature of prior offenses;
>
> (E) Whether psychological or psychiatric profiles indicate a risk of recidivism;
>
> (F) The sex offender's response to treatment;
>
> (G) Any recent threats by the sex offender against a person or expressions of intent to commit additional crimes; and
>
> (H) Behavior of the sex offender while confined.

§ 29-4013(2)(b).

Relying on these factors, the NSP's rules and regulations, adopted and promulgated pursuant to § 29-4013, identify factors that mitigate against the risk of recidivism, as well as factors that increase the risk of recidivism. Factors which were determined to reduce the risk of recidivism included (1) conditions of release such as supervised probation or parole; (2) counseling, therapy, or treatment following release; and (3) physical conditions such as advanced age or debilitating illness. 272 Neb.

Admin. Code, ch. 19, § 012.03(A) through (C) (2000). Factors that were identified as increasing the risk of recidivism included (1) criminal history of the offender; (2) repetitive or compulsive behavior including the number of sex-related charges and convictions and offenses committed while confined or on supervised release; (3) age of the victim; (4) age at which the offender was first charged with a sex offense; (5) relationship of the offender to the victim; (6) convictions for sex offenses in jurisdictions other than Nebraska; (7) control of the victim through the threat or use of weapons, force, or violence, or the infliction of serious injury; (8) indications of a risk of recidivism in psychological or psychiatric profiles; (9) the offender's response to treatment; and (10) behavior of the offender while confined. 272 Neb. Admin. Code, ch. 19, § 012.04(A) through (J) (2000). Moreover, the following four factors were determined to be so indicative of a high risk of recidivism that their presence should always result in a Level 3 classification: (1) torture or mutilation of the victim or the infliction of death, (2) abduction and forcible transportation of the victim to another location, (3) threats to reoffend sexually or violently, and (4) recent clinical assessment of dangerousness. 272 Neb. Admin. Code, ch. 19, § 012.05(A) through (D) (2000).

Under the NSP's rules and regulations, the aforementioned factors were to be incorporated into a risk assessment instrument. 272 Neb. Admin. Code, ch. 19, § 012.02 (2000). Thereafter, every offender in the registry was to be evaluated using the risk assessment instrument based upon all records and data available concerning the offender. *Id.* In order to develop a risk assessment instrument, the NSP collaborated with Mario Scalora, Ph.D., of the law-psychology program at the University of Nebraska-Lincoln. To determine what factors best correlate to sexual recidivism, Scalora and a group of researchers tracked 1,300 sex offenders who had either been released from incarceration or placed on community-based probation. Based on this research and a review of the relevant literature, Scalora crafted a risk assessment instrument which scores the risk of recidivism by examining 14 factors. This risk assessment instrument has been used by the NSP to classify every offender in the registry, including Slansky. See § 012.02.

The 14 factors or "Items" in the risk assessment instrument are as follows: (1) number of convictions for sex or sex-related offenses (including current offenses); (2) number of convictions for other offenses, besides traffic infractions; (3) other sex or sex-related charges not resulting in conviction; (4) age at arrest for first sex or sex-related conviction; (5) relationship of offender to victim; (6) prior sex offense in jurisdictions other than from the State of Nebraska; (7) victim's gender; (8) age of sex crime victim(s); (9) use of force (includes current and previous sexual assaults); (10) release environment; (11) disciplinary history while incarcerated; (12) treatment (considers incarceration, court-ordered, or postrelease); (13) mental and cognitive functioning; and (14) calculation of time elapsed from previous release from court-ordered confinement or supervision to arrest for felony or Class I or Class II misdemeanor(s) for which the offender was convicted or while under court-ordered conditions.

If a certain factor is present, the offender is assigned a distinct number of points. For example, in regard to item 1 (number of convictions for sex or sex-related offenses), if the offender has been convicted of one sex-related offense, he or she is assessed 0 points; if the offender has been convicted of two sex-related offenses, he or she is assessed 40 points; and if the offender has been convicted of three or more sex-related offenses, he or she is assessed 60 points. We note that the number of points assigned for each item depends on its correlation with recidivism; items with the highest statistical relationship with recidivism have relatively higher point values on the risk assessment instrument. Once all 14 items have been examined, the offender's score is totaled. If the offender scores below 70 points, he or she is considered a low risk and classified as a Level 1 offender. If the offender scores between 75 and 125 points, he or she is considered a moderate risk and classified as a Level 2 offender. If the offender scores 130 points or higher, he or she is considered a high risk and classified as a Level 3 offender.

We note that the risk assessment instrument, pursuant to § 012.05, includes a list of four factors which, if present, automatically, and regardless of the offender's overall score, results in the offender's being classified as a Level 3 offender. They are as follows: (1) victim tortured or acts resulted in death; (2) victim

abducted and forcibly transported to another location; (3) perpetrator articulates to officials or treatment professionals an unwillingness to control future sexually assaultive behavior or plans to reoffend violently or sexually; and (4) recent clinical assessment of dangerousness by a sex offender treatment or doctoral level professional asserting perpetrator presents a significant risk to reoffend. Conversely, the risk assessment instrument also contains two factors—debilitating illness and advanced age—which automatically result, regardless of the offender's overall score, in the offender's being classified as a Level 1 offender. In addition, the instrument allows the investigator conducting the assessment to depart from the presumptive risk category, if such departure is warranted. If a departure is granted, the investigator must explain the basis for the departure.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1985, at the age of 19, Slansky was charged with and convicted of, inter alia, the crimes of rape and attempted rape in Kansas. *State v. Slansky*, 239 Kan. 450, 720 P.2d 1054 (1986). As a result, Slansky was sentenced to a term of 15 to 20 years in prison. While incarcerated, Slansky refused to participate in mental health counseling and sex offender treatment because he thought it would have interfered with a number of his prison-time activities, including his work as an electrician within the prison.

On May 4, 1995, after serving approximately 10 years, Slansky was released from prison and placed on parole for the remaining 10 years of his sentence. Upon his release from prison, Slansky moved to Kearney, Nebraska. Pursuant to an interstate compact on parolees, Slansky signed a parole agreement with the State of Nebraska which required him to obtain counseling. After a number of sessions, this requirement was discontinued because Slansky's counselor, Anne Buettner, determined that he had readjusted to the community and did not pose a threat to public safety. On July 20, 1998, Slansky was discharged from parole.

On January 6, 2000, an investigator for the NSP completed the risk assessment instrument for Slansky. Slansky scored 150 points and was classified as a Level 3 sex offender. Thereafter, on March 17, the NSP sent Slansky a letter, notifying him that

the NSP Sex Offender Registry had determined he was at a high risk to reoffend sexually and that therefore, he had been classified as a Level 3 sex offender. The letter stated that a Level 3 classification requires the NSP to provide information concerning him to the public, appropriate law enforcement officials, schools, daycare centers, and youth and religious organizations, and that such notification would be done through news releases and other avenues as deemed appropriate. In addition, the letter notified Slansky that if he disagreed with the NSP's determination, he could request a hearing to contest his classification as a Level 3 offender. Five days later, Slansky gave notice of his intent to contest the classification and the grounds therefor.

Slansky's administrative hearing was held on August 28, 2002. Two days later, the hearing officer issued his decision recommending that the NSP's decision classifying Slansky as a Level 3 sex offender be upheld. The same day, the superintendent of the NSP issued an order adopting the recommended decision of the hearing officer in full and making it the final decision of the NSP.

On September 26, 2002, pursuant to the Administrative Procedure Act (APA), see Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Supp. 2003), Slansky filed a petition in the district court for Lancaster County appealing his classification as a Level 3 sex offender. See 272 Neb. Admin. Code, ch. 19, § 014.02 (2000). On May 29, 2003, the district court entered its order affirming the decision of the NSP. Slansky filed a timely notice of appeal, which we moved to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

III. ASSIGNMENTS OF ERROR

Slansky assigns, restated, that the district court erred in affirming the NSP's decision to classify him as a Level 3 offender because (1) the NSP's decision is unsupported by the evidence and contrary to law; (2) the risk assessment instrument is invalid, flawed, and inaccurate as applied to him; (3) the risk instrument does not include a number of relevant mitigating factors; (4) the NSP failed to find that he had presented mitigating factors which justified a downward departure from his presumptive classification; (5) SORA violates the Ex Post

Facto Clause of the federal and state Constitutions; (6) SORA violates the constitutional prohibition against double jeopardy; (7) SORA violates his procedural and substantive due process rights, as well as his right to equal protection under the law; (8) the NSP's decision is based on speculation, guess, and conjecture; (9) SORA's release-of-information provision is overbroad and violates his due process rights; (10) the NSP's current practice of posting information concerning Level 3 sex offenders on its Web site is not authorized by SORA; and (11) SORA violates the constitutional prohibition against imposing cruel and unusual punishment.

IV. STANDARD OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

[3-6] 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. *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003). 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 not arbitrary, capricious, or unreasonable. *Stejskal, supra.* Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

V. ANALYSIS

1. NSP's Decision and Risk Assessment Instrument

After being notified of his classification as a Level 3 offender, Slansky requested a hearing to challenge his classification level.

The hearing officer rejected Slansky's challenge and upheld Slansky's classification as a Level 3 offender. The NSP adopted the hearing officer's decision. On appeal to the district court, Slansky made a number of arguments concerning the NSP's decision and the risk assessment instrument. In upholding Slansky's classification as a Level 3 offender, the district court determined, inter alia, that the NSP's decision was based upon sufficient evidence and that Slansky's challenges to the risk assessment instrument were without merit.

On appeal to this court, Slansky's first through fourth and eighth assignments of error challenge the district court's decision to uphold the NSP's classification and the court's approval of the risk assessment instrument. These assignments of error, however, can be consolidated into three main arguments: (1) Slansky's score was unsupported by the evidence because it did not account for a number of mitigating factors; (2) to the extent the risk assessment instrument does not account for certain mitigating factors, it fails to accurately reflect an offender's true risk of recidivism; and (3) the risk assessment instrument is invalid, flawed, or inaccurate because it has "a rate of error of 12%." Brief for appellant at 44. Because the district court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable, we reject Slansky's arguments.

First, Slansky contends that his classification as a Level 3 offender is not supported by the evidence because it fails to account for a number of mitigating factors that he presented. We disagree.

As an initial matter, we note that Slansky did not contest his risk assessment score in regard to items 1 through 9, 11, 13, and 14. Therefore, the district court was presented with undisputed evidence establishing that Slansky had a risk assessment score of 150 points, or 20 points more than were needed to classify him as a Level 3 offender. Slansky did contest his score in regard to items 10 and 12; however, the record contains competent evidence to support the district court's decision to uphold the NSP's score for these two items.

In regard to item 10 (release environment), Slansky was assessed 10 points because he was not under supervision at the

time of the assessment. The evidence adduced at the hearing established that Slansky had been released from supervision more than 4 years prior to the hearing, and the district court's decision to affirm the assessment of 10 points is supported by competent evidence.

With respect to item 12 (treatment), Slansky was assessed 20 points because he did not participate in court-ordered or professionally recommended treatment. At the hearing, Slansky admitted to refusing to undergo sex offender treatment while incarcerated in Kansas. Upon his release from prison, Slansky attended counseling sessions with Buettner, who had been recommended to him by his parole officer.

At his prenotification hearing, Slansky argued that these counseling sessions were tantamount to professionally recommended treatment. However, his own expert witness, Sandra Hale Kroeker, a clinical social worker who specializes in sex offender treatment, testified that the counseling sessions with Buettner did not meet the requirements of sex offender specific treatment. Therefore, the effectiveness of the counseling sessions with Buettner were put into question and the district court's affirmance of the NSP's decision not to deviate from the instrument is supported by competent evidence and is not arbitrary, capricious, or unreasonable.

Slansky contends, however, that the hearing officer should have deviated from the presumptive classification because he presented a number of mitigating factors. For example, Slansky testified that since his release, he has been an emotionally stable, married man, with a small child and a good job. In addition, he notes that after his release, he completed counseling with Buettner, as required by his parole agreement, and that he had been unsupervised, without incident, for over 4 years. Moreover, Slansky contends that expert testimony established that certain life experiences, such as a number of those he experienced, reduce an offender's risk of recidivism.

As the district court noted, however, the record is not as conclusive as Slansky asserts. In fact, the clinical director of the NSP Sex Offender Registry, Shannon Black, Ph.D., testified that a number of these alleged mitigators have either unknown or unquantifiable effects, or bear adversely on an offender's risk of

recidivism. For example, Slansky argues that the fact that he has been unsupervised for over 4 years without incident shows that he is at a low risk to reoffend. Black testified, however, that offenders who are not under supervision, even if they have successfully completed a period of unsupervised release, are at a high risk to reoffend. Black's testimony was echoed by Kroeker, who stated that the risk of recidivism is higher for offenders who are unsupervised, including those who have successfully completed a period of supervision. Moreover, Black's and Kroeker's testimonies are supported by appendix C of the risk assessment manual, which notes that "[m]ultiple studies on recidivism and treatment using long-term follow-ups indicate that sexual offenders may continue to be at risk for recidivism for many years after release or supervision, possibly up to 20 . . . ."

Similarly, Slansky contends that numerous life experiences, such as marriage and child-rearing, decrease an offender's risk to reoffend. However, Black testified that for some offenders, marriage does not decrease their risk of reoffending. In addition, Black testified that these life experiences were not included in the instrument because they are too dynamic and affect individuals differently. Thus, although Slansky presented evidence of a number of positive life experiences, additional evidence concerning the unknown effect of such experiences leads us to conclude that the district court's affirmance of the NSP's decision not to depart from Slansky's presumptive classification is supported by the evidence and is not arbitrary, capricious, or unreasonable.

Second, Slansky contends that to the extent that the risk assessment instrument does not account for a number of life experiences and alleged mitigators, it does not accurately reflect a registrant's true risk of recidivism and, therefore, is contrary to the mandate of SORA. Again, Slansky focuses his challenge on items 10 and 12 of the instrument.

With regard to item 10 (release environment), Slansky argues that the instrument is invalid because item 10 does not account for the fact that he had not reoffended in the 4 years since his release from supervision. However, we again note that item 10 assigns 10 points for offenders who are no longer under supervision because they remain at a high risk to reoffend. Therefore, although Slansky's behavior during the 4 years after his release

from supervision is commendable, it does not provide a basis from which a downward departure in score must be made.

In regard to item 12 (treatment), Slansky argues that the instrument is invalid because it does not account for the fact that he received counseling while on parole. At his prenotification hearing, Slansky presented two witnesses who discussed the adequacy of his counseling sessions with Buettner. Buettner testified that her sessions with Slansky were the equivalent of a specific sex offender treatment program. Kroeker, however, questioned the utility of Slansky's sessions with Buettner and stated that Slansky still needed to undergo sex offender specific treatment. Therefore, Slansky's failure to receive a downward departure for attending counseling did not stem from the instrument's inability to grant such a departure, but, rather, from questions concerning the effectiveness of the counseling sessions.

Slansky also argues that the Legislature intended the instrument to contain more than two mitigating factors—debilitating illness and advanced age—which justify a downward departure in score. As Slansky notes, § 29-4013(2)(b)(i) and (ii) instructs the NSP to incorporate, as relevant factors, conditions of release that minimize the risk of recidivism, including probation, parole, counseling, therapy, or treatment, as well as advanced age and debilitating illness. See, also, § 012.03. Contrary to Slansky's suggestion, however, nothing in SORA mandates that points should be deducted from the score of an offender who has successfully completed treatment or is released on parole. Instead, SORA merely instructs the NSP to take these factors into account when determining an offender's risk of recidivism. Although Slansky may not be satisfied with the way the instrument accounts for these factors, it undoubtedly considers them in determining an offender's risk of recidivism.

Next, Slansky argues that the instrument should include a number of specific mitigating factors, in addition to those referenced above. This argument is without merit. As an initial matter, we note that the instrument allows an investigator to depart from the presumptive risk category so long as such departure is warranted by the facts and the investigator explains the basis for such departure. Moreover, in regard to including additional mitigating factors within the instrument itself, the Legislature

clearly delegated decisionmaking power concerning which additional factors, if any, should be included in the risk assessment instrument. See § 29-4013(2).

Third, Slansky contends that the risk assessment instrument is invalid, flawed, or inaccurate because it has a statistical error rate of 12 percent. The record indicates that the researchers who developed the risk assessment instrument tracked approximately 1,300 sexual offenders who had been either released from incarceration or placed on community-based probation. In order to determine what factors correlated with recidivism, the researchers compared a sample of 190 sex offenders who reoffended after release with a randomly selected sample of 315 offenders who were released during the same time period and did not reoffend. Black testified that the researchers ultimately narrowed the items to those that make up the current risk assessment instrument and that these 14 items correctly classified the statistical samples 88 percent of the time.

Relying on the instrument's statistical error rate, Slansky argues that the NSP's determination that he is at a high risk to reoffend is no better than a speculative guess. Slansky's contention is incorrect. As an initial matter, we note that the instrument's 88-percent validation rate is not tantamount to an admission that 12 percent of the offenders in the registry have been misclassified. Instead, 12 percent simply represents the rate at which the instrument erred in classifying the sample groups. Moreover, the 12-percent statistical error rate represents both over- and under-classifications. Thus, to the extent the instrument erred in classifying the sample offenders, it occasionally did so in favor of the offender.

Furthermore, it is important that we recognize that no instrument will perfectly predict future conduct. As stated elsewhere: "[T]he non-existence of a perfect predictor of recidivism should not preclude legislative resort to a rationally based instrument of risk assessment, developed and validated by mental health professionals." *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997). In this regard, Black's testimony concerning the instrument establishes that it was carefully and rationally crafted. While acknowledging some of the instrument's shortcomings, Black testified that the instrument (1) is based on a significant

amount of empirical data, (2) utilizes factors that correlate with a registrant's risk of recidivism, (3) is valid and appropriate for its purpose, and (4) is consistent with other instruments that have been developed. Consequently, we conclude that the instrument is a rationally based risk assessment tool and that the grounds Slansky asserted to challenge the instrument are without merit.

2. Release of Information

At the time of Slansky's assessment, information obtained under SORA was to remain confidential except in three situations:

> (1) Information shall be disclosed to law enforcement agencies for law enforcement purposes;
>
> (2) Information may be disclosed to governmental agencies conducting confidential background checks; and
>
> (3) The Nebraska State Patrol and any law enforcement agency authorized by the patrol shall release relevant information that is necessary to protect the public concerning a specific person required to register, except that the identity of a victim of an offense that requires registration shall not be released. Release of such information shall conform with the rules and regulations adopted and promulgated by the Nebraska State Patrol pursuant to section 29-4013.

§ 29-4009. As previously mentioned, whether it is necessary to notify the public under § 29-4009(3) is essentially a question whether the offender is at a high risk to reoffend. See § 29-4013. If the offender has been determined to be at a high risk of reoffending, "the public shall be notified through means designed to reach members of the public likely to encounter the sex offender, which are limited to direct contact, news releases, or a system utilizing a telephone system which charges a fee for each use." § 29-4013(2)(c)(iii).

On appeal, Slansky argues that the dissemination of his personal information via the NSP's Web site violates SORA because neither SORA nor the NSP's rules and regulations provide authority for the NSP to release sex offender information through the Internet. Moreover, Slansky claims that by posting information concerning Level 3 sex offenders on its Web site, thereby making such information available worldwide, the NSP is acting contrary to SORA's

requirement that "the public shall be notified through means designed to reach *members of the public likely to encounter* the sex offender." (Emphasis supplied.) § 29-4013(2)(c)(iii).

We conclude that SORA permits the NSP to post information concerning Level 3 offenders on its Web site. Under § 29-4013(c)(iii), the NSP is directed to notify the public about Level 3 offenders through "direct contact, news releases, or a system utilizing a telephone system which charges a fee for each use." *Id.* By posting information concerning Level 3 offenders on its Web site, the NSP is merely disseminating news releases through an alternative medium, i.e., the Internet. This does not violate SORA. Cf. § 29-4013(3) (stating that nothing in subsection (2) "shall be construed to prevent law enforcement officers from providing community notification concerning any person who poses a danger under circumstances that are not provided for in the act").

Likewise, the NSP, by posting information concerning Level 3 offenders on its Web site, is not acting contrary to § 29-4013(2)(c)(iii), which states that notice is to be limited to persons "likely to encounter" Level 3 offenders. Obviously, by posting information concerning Level 3 sex offenders on its Web site, the NSP greatly expands the number of people that can access information concerning persons that have been classified as Level 3 offenders. However, this fact is substantially mitigated by the reality that the farther away a person lives from Nebraska, the less likely it becomes that they will have an interest in accessing the information. See, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000); *Meadows v. Board of Parole*, 181 Or. App. 565, 47 P.3d 506 (2002).

In addition, the possibility that information concerning Level 3 offenders will end up in the public domain already exists under the more established methods of dissemination. For example, Slansky does not challenge the NSP's authority to disseminate press releases to the media, despite the fact that many media outlets, such as newspapers and television stations, operate Web sites on which they reproduce their newspaper or television reports. Furthermore, the NSP's Web site fulfills the regulatory purpose of SORA because it allows persons who wish to visit or move to certain areas of the state to take appropriate precautions.

See, *A.A. ex rel. M.M. v. New Jersey*, 341 F.3d 206 (3d Cir. 2003) (noting Internet registry protects persons planning to move to or vacation in state by allowing them access to location of high-risk offenders); *Com. v. Williams*, 574 Pa. 487, 832 A.2d 962 (2003). In sum, by posting information concerning Level 3 offenders on its Web site, the NSP is not impermissibly exceeding SORA's notice restriction.

3. Ex Post Facto Clause

[7] Slansky argues that SORA violates the Ex Post Facto Clause of the U.S. Constitution and the Nebraska Constitution. Both U.S. Const. art. I, § 10, cl. 1, and Neb. Const. art. I, § 16, provide that no ex post facto law shall be passed. Although Slansky challenges SORA under both constitutional provisions, we will undertake only a single analysis because this court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution. See, *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

[8,9] Essentially, Slansky argues that SORA's registration and notification provisions violate the Ex Post Facto Clause because he was sentenced in 1985, prior to the operative date of SORA. In support of his argument, Slansky points to our oft-repeated rule that "[a] law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts." *State v. Gales*, 265 Neb. 598, 633, 658 N.W.2d 604, 629 (2003). Accord, *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000); *Urbano, supra*. However, the applicability of this rule depends on whether SORA operates as punishment. Stated otherwise, under the Ex Post Facto Clause, the retroactive application of civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited. *Worm, supra*, citing *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); and *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

Recently, in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the U.S. Supreme Court upheld a similar

sex offender registration statute against an ex post facto challenge. In *Smith*, the court stated that a two-step "intent-effects" test should be used to analyze whether a law constitutes retroactive punishment in violation of the Ex Post Facto Clause. See *Worm, supra.*

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is " 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' "

Smith, 538 U.S. at 92.

Thus, we must first determine whether the intent of the Legislature in enacting SORA was to establish a nonpunitive civil regulatory scheme for sex offenders. See *Smith, supra.* If so, we must then determine whether SORA is so punitive in nature as to negate the Legislature's intent to deem it civil. *Smith, supra.*

We have recently rejected a similar ex post facto challenge to SORA. See *Worm, supra.* In *Worm*, the appellant, James R. Worm, appealed his sentence for attempted first degree sexual assault on a child and the district court's finding that he was subject to SORA. Faced with an ex post facto challenge to the registration requirements of SORA, we turned to the two-part intent-effects test announced in *Smith*, concluding that (1) the Legislature, in enacting SORA, intended to establish a civil regulatory scheme to protect the public from the danger posed by sex offenders and (2) the effect of SORA was not so punitive in nature as to negate the Legislature's intent.

Our decision in *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004), however, dealt only with a challenge to SORA's registration requirements. Here, Slansky's appeal presents a different ex post facto challenge to SORA because he argues that both the registration and notification provisions violate the Ex Post Facto Clause. Therefore, although we are guided by our analysis in *Worm*, it is necessary to analyze SORA's notification provisions.

(a) Legislative Intent

In *Worm, supra*, we determined that the Legislature, in enacting SORA, intended to establish a civil regulatory scheme to

protect the public from the danger posed by sex offenders. Because we conclude that Slansky's arguments to the contrary are without merit, we reaffirm our determination in *Worm*.

On appeal, Slansky contends that the Legislature intended SORA to be criminal punishment because SORA has been placed in chapter 29, the "criminal procedure" chapter, of the Nebraska Revised Statutes. We disagree. As the U.S. Supreme Court has noted, although the manner of codification is probative of legislative intent, the "location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Smith v. Doe*, 538 U.S. 84, 94, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (determining that Alaska's sex offender registration statute's provisions were nonpunitive despite being codified in state's criminal procedure code). Here, a review of chapter 29 illustrates that it "contains many provisions that do not involve criminal punishment." See *Smith*, 538 U.S. at 95. For example, chapter 29 contains provisions relating to the testing of persons convicted of certain crimes for the human immunodeficiency virus, Neb. Rev. Stat. § 29-2290 (Cum. Supp. 2002); record keeping of criminal histories, Neb. Rev. Stat. § 29-3501 et seq. (Reissue 1995 & Supp. 2003); and state support for funding the defense of indigent defendants, Neb. Rev. Stat. § 29-3919 et seq. (Reissue 1995, Cum. Supp. 2002 & Supp. 2003). And "[a]lthough . . . these provisions relate to criminal administration, they are not in themselves punitive." *Smith*, 538 U.S. at 95. Therefore, the codification of SORA in Nebraska's criminal procedure code, by itself, is insufficient to support a conclusion that the Legislature's intent was punitive. See, *Smith, supra*; *State v. White*, 162 N.C. App. 183, 590 S.E.2d 448 (2004).

Slansky also contends that the Legislature evinced an intent for SORA to be criminal punishment because the Legislature found that the "efforts of law enforcement agencies to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of available information" concerning sex offenders "who live, work, or attend school in their jurisdiction." § 29-4002. According to Slansky, this legislative finding shows that SORA was intended to aid criminal enforcement rather than the civil administration of sex offenders.

We rejected this argument in *State v. Worm, ante* p. 74, 83, 680 N.W.2d 151, 160 (2004):

> Worm, however, argues that assisting law enforcement agencies with future investigations and prosecutions evidences a punitive purpose in enacting the law. But assisting future law enforcement efforts by monitoring an offender's whereabouts does not inflict punishment and furthers the legitimate goal of protecting the public and preventing crime.

In sum, like the overwhelming majority of courts that have examined similar sex offender registration statutes, we conclude that in enacting SORA, the Legislature intended to create a civil, nonpunitive regulatory scheme. See, e.g., *Smith, supra*; *Hatton v. Bonner*, 356 F.3d 955 (9th Cir. 2004); *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *Com. v. Williams*, 574 Pa. 487, 832 A.2d 962 (2003); *Haislop v. Edgell*, 593 S.E.2d 839 (W. Va. 2003); *State v. Mount*, 317 Mont. 481, 78 P.3d 829 (2003); *State v. Kelly*, 256 Conn. 23, 770 A.2d 908 (2001); *People v. Malchow*, 193 Ill. 2d 413, 739 N.E.2d 433, 250 Ill. Dec. 670 (2000); *Meinders v. Weber*, 604 N.W.2d 248 (S.D. 2000); *State v. Bollig*, 232 Wis. 2d 561, 605 N.W.2d 199 (2000); *Kellar v. Fayetteville Police Dept.*, 339 Ark. 274, 5 S.W.3d 402 (1999); *State v. Cook*, 83 Ohio St. 3d 404, 700 N.E.2d 570 (1998).

(b) Effects of SORA

Because we have determined that the Legislature intended SORA to be civil in nature, its intent will be rejected only if Slansky provides the clearest proof that SORA's notification provisions are so punitive in either purpose or effect as to negate the Legislature's intent. See *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("[b]ecause we 'ordinarily defer to the legislature's stated intent,' . . . ' "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty' "). See, also, *Worm, supra*, quoting in part *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001).

In making this determination, we consider the factors first set forth by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). See *Worm, supra*. They are as follows:

> "(1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as a punishment'; (3) 'whether it comes into play only on a finding of *scienter*'; (4) 'whether its operation will promote the traditional aims of punishment—retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.' "

Isham, 261 Neb. at 695, 625 N.W.2d at 515-16, quoting *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). Although "neither exhaustive nor dispositive," this list of factors provides a helpful starting point from which to determine whether a civil regulatory scheme "provide[s] for sanctions so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.' " *United States v. Ward*, 448 U.S. 242, 249, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980).

Ignoring the *Mendoza-Martinez* factors, Slansky sets forth two arguments as to why the effects of SORA are so punitive as to negate the Legislature's intent. First, Slansky argues that the potential release of his status as a sex offender will cause him and his family great emotional stress, and could adversely impact his and his wife's employment situations. Second, Slansky contends that by providing unlimited access to his information via its Web site, the NSP is simply compounding the aforementioned repercussions of community notification.

As an initial matter, it is obvious that community notification can have adverse effects on an offender's life. See, *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) ("[t]here can be no doubt that the indirect effects of . . . notification on the registrants involved and their families are harsh"). However, "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.' "

Department of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 777 n.14, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994).

Here, although SORA's notification provisions may be the "but for" cause of some of the effects Slansky complains of, these effects are not consequences that SORA contemplates or condones, and are the result of independent actions by private third parties. See *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997). See, also, *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) (noting that burdens on sex offenders do not stem from notification, but from abuse of registry by public); *Verniero, supra.* In fact, the risk of emotional stress and other adverse effects stem "essentially from the fact of the underlying conviction." *Pataki*, 120 F.3d at 1280. See, also, *Smith v. Doe*, 538 U.S. 84, 101, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("consequences flow not from [a sex offender registration act's] registration and dissemination provisions, but from the fact of conviction"); *Verniero*, *supra.*

Furthermore, although the "[d]issemination of . . . criminal activity has always held the potential for substantial negative consequences for those involved in that activity," "[d]issemination of such information . . . has never been regarded as punishment when done in furtherance of a legitimate governmental interest." *Verniero*, 119 F.3d at 1099-1100. See, also, *Hyatt v. Com.*, 72 S.W.3d 566 (Ky. 2002). Similarly, we note that much of the information that subjects offenders to these alleged burdens is already in the public realm. See, *Smith, supra*; *Pataki, supra*; *Verniero, supra.*

In addition, it is important to recognize that public notification serves one of the fundamental purposes behind SORA; it allows persons who have been notified to take action to protect themselves and their families. See, § 29-4002; *Pataki, supra.* As the U.S. Supreme Court stated: "The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Smith*, 538 U.S. at 99. Therefore, although the burdens that offenders incur as a result of notification are unwelcome to the offender, they are not so excessive as to exceed SORA's

remedial purpose. See *State v. Bollig*, 232 Wis. 2d 561, 605 N.W.2d 199 (2000).

Moreover, although we recognize that the NSP's Web site may compound the adverse effects experienced by Slansky, we conclude that its effects are limited and not so punitive as to negate the Legislature's intent to enact a civil regulatory scheme. In this regard, we find the recent analysis by the U.S. Supreme Court to be persuasive:

> The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. . . .
>
> . . . .
>
> . . . Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment.

Smith v. Doe, 538 U.S. 84, 99-105, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). See, also, *Haislop v. Edgell*, 593 S.E.2d 839 (W. Va. 2003); *State v. Mount*, 317 Mont. 481, 78 P.3d 829 (2003). Slansky's ex post facto challenge is without merit.

4. Double Jeopardy

Slansky argues that SORA punishes him twice for the same offense in violation of the Double Jeopardy Clause of the U.S. Constitution. U.S. Const. amend. V. In the past, we have recognized that the intent-effects test applies to both double jeopardy and ex post facto challenges to a statutory scheme. *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). In light of our ex post facto analysis, we conclude that SORA merely constitutes a nonpunitive civil regulatory scheme. Therefore, because SORA does not impose punishment, the Double Jeopardy Clause is not implicated, and Slansky's assignment of error is without merit.

5. Due Process

(a) Procedural Due Process

Next, Slansky argues that the public disclosure of information concerning his status as a sex offender violates his right to procedural due process. See, U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 3. Specifically, Slansky argues that SORA infringes upon his right to privacy without providing him sufficient due process.

[10,11] Procedural due process limits the government's ability to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause. Due process requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004). When an individual claims he or she is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there is a liberty interest at stake. In the second stage, the court must determine what procedural safeguards are required. Finally, the facts of the case are examined to ascertain whether there was a denial of that process which was due. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001).

Although Slansky asks us to recognize that he has a constitutional right to keep his registry information private, we need not reach this issue because even if we assume Slansky has a liberty interest in not having such information released, the process afforded to him before public dissemination was surely adequate.

[12] This court has stated that due process does not guarantee an individual any particular form of state procedure. *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995). Instead, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

Under SORA, the NSP was charged with adopting and promulgating rules and regulations concerning community notification. See § 29-4013(2)(a) through (d). Pursuant to the rules and regulations adopted by the NSP, persons required to register

under SORA are to be notified of their classification as a Level 1, 2, or 3 offender by registered mail or personal contact. 272 Neb. Admin. Code, ch. 19, § 014.01 (2000). Once contacted, registrants then have 5 working days in which to notify the Sex Offender Registration Program that they wish to contest the classification level assigned by the NSP. *Id.* If a hearing is requested, it is to be held pursuant to the APA and the Nebraska State Patrol rules and regulations pertaining to administrative hearings. § 014.02. After the hearing, a decision is to be rendered by the hearing officer within 10 days. *Id.* Appeals from that decision are to be filed in Lancaster County District Court in accordance with the APA. *Id.* Community notification is prohibited until after the hearing, and all subsequent appeals are final. See 272 Neb. Admin. Code, ch. 19, § 014.03 (2000).

In the instant case, Slansky received a letter from the NSP that notified him of (1) his classification as a Level 3 sex offender, (2) SORA's public notification provisions for Level 3 offenders, and (3) his ability to contest his classification as a Level 3 offender prior to public disclosure. Furthermore, we note that Slansky had the opportunity to conduct discovery prior to his hearing and the right of compulsory process. Moreover, Slansky was represented by counsel at the hearing, who put on evidence in favor of Slansky and cross-examined the NSP's witnesses. Clearly, Slansky was afforded notice and a meaningful opportunity to contest the NSP's decision.

Nonetheless, Slansky argues that his prenotification review hearing was illusory and constituted insufficient process because (1) he was not allowed to challenge the psychological basis of the classification instrument, (2) the burden of proving his classification as a Level 3 offender should have been on the State, (3) he was not allowed to challenge the NSP's definition of persons "likely to encounter" him, and (4) he was not allowed to challenge the NSP's use of the Internet as a medium for dispensing information concerning Level 3 sex offenders.

Slansky's first argument is without merit because it is based on inaccurate facts. As Slansky contends, the original scope of a prenotification review hearing was limited to a review of the accuracy of the information used in making the classification assessment, and persons challenging their classification level

were not allowed to challenge the psychological basis of the classification instrument. See § 014.02. However, prior to Slansky's hearing, this rule was changed. Cf. 272 Neb. Admin. Code, ch. 19, § 015.02C (2004). In fact, not only did Slansky receive notice of his ability to challenge the risk assessment instrument, he acknowledged this change by giving notice of his intent to challenge the instrument. Moreover, Slansky did in fact challenge the instrument at his hearing.

Next, Slansky contends that the NSP had the initial burden of proving he should have been classified as a Level 3 offender. Assuming, arguendo, that this is true, Slansky did not contest his risk assessment score in regard to items 1 through 9, 11, 13, and 14. Consequently, the hearing officer was presented with undisputed evidence establishing that Slansky had a risk assessment score of 150 points, or 20 points more than were needed to classify him as a Level 3 offender, and the NSP produced sufficient evidence to support its proposed classification.

[13,14] In regard to his two remaining arguments, Slansky fails to recognize the limited nature of an administrative hearing. As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998). Here, under the rules and regulations adopted pursuant to SORA, registrants such as Slansky are granted a limited review hearing to contest their classification. Importantly, these hearings are limited to the appropriateness of a registrant's classification; they do not provide a forum to challenge the consequences of that classification. See 272 Neb. Admin. Code, ch. 19, § 014 (2000). The hearing officer was without the authority to question the NSP's authority to disseminate information concerning Level 3 offenders or to challenge the NSP's interpretation of the statutory phrase "likely to encounter." See *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994) (administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish plain purpose of act).

This is not to say, however, that these issues are not appropriate for review. Rather, Slansky, as he did with his other constitutional objections to SORA, was entitled to make these arguments

for the first time before the district court. See *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993), *modified* 243 Neb. 419, 499 N.W.2d 548.

(b) Substantive Due Process

In *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), the U.S. Supreme Court held that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment. Therefore, according to Slansky, the risk assessment instrument, by adding 20 points to his sex offender classification score for failing to complete sex offender treatment while incarcerated, infringes upon his fundamental right to refuse medical treatment.

The record illustrates that while incarcerated in Kansas, Slansky refused to participate in mental health counseling and sex offender treatment because he felt it would have interfered with a number of his prison-time activities. Contrary to Slansky's assertion, however, the risk assessment instrument, by taking note of the fact that he did not undergo treatment, did not punish him for his choice. Rather, the instrument merely accounted for the absence of such treatment in determining whether he is at a risk to reoffend. Therefore, SORA does not implicate Slansky's right to refuse medical treatment, and this assignment of error is without merit.

6. Equal Protection

Next, Slansky contends that SORA violates his right to equal protection under the law. See, U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 3. Although somewhat unclear, Slansky appears to argue that if he had remained in Kansas until he was discharged from parole in 1998, he would not have been required to register under SORA. Therefore, according to Slansky, SORA treats out-of-state offenders who move to Nebraska prior to the completion of their sentence differently from out-of-state offenders who move to Nebraska after the completion of their sentence.

Slansky's argument is without merit. Under SORA, it is utterly irrelevant that Slansky was discharged from parole in Nebraska, rather than Kansas. See § 29-4003(1). Slansky was required to register as a sex offender because he had been convicted of a registrable sex offense and moved to Nebraska.

See § 29-4003(1)(b). Therefore, even if, as Slansky's hypothetical suggests, he had remained in Kansas until he was discharged from parole in 1998, he would have still been subject to SORA's registration requirements upon his arrival in Nebraska. *Id.*

7. Cruel and Unusual Punishment

In his final assignment of error, Slansky contends that SORA violates the Eighth Amendment's prohibition against cruel and unusual punishment. Slansky's "argument" in this regard, however, merely consists of a reformulation of the assigned error and, therefore, does not constitute the required argument in support of the assigned error. See *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

VI. CONCLUSION

For the foregoing reasons, we conclude that Slansky's challenges to SORA, the risk assessment instrument, and the NSP's classification determination are without merit. The judgment of the district court was correct in all respects and is affirmed.

Affirmed.

Wright, J., not participating.

Diversified Telecom Services, Inc., a Nebraska corporation, appellant, v. David L. Clevinger, Jr., an individual, et al., appellees.

683 N.W.2d 338

Filed July 16, 2004. No. S-03-808.

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: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion.

5. **Motions for New Trial: Pleadings: Time: Notice: Appeal and Error.** The running of the time for filing a notice of appeal is not only terminated by a motion for new trial, but also by a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002).
6. **Pleadings: Judgments: Time.** 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.
7. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
8. **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.
9. **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.
10. **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.
11. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection the party may have had thereto, and the evidence is in the record for consideration the same as other evidence.
12. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.
13. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
14. **Constitutional Law: Due Process.** The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.
15. **Due Process: Jurisdiction: States.** To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
16. ____: ____: ____. 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.
17. **Due Process: Jurisdiction.** A personal jurisdiction analysis requires a court to consider the quality and nature of the defendant's activities in order to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process.
18. **Jurisdiction: States.** Under a personal jurisdiction analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.

19. ____: ____. When considering the issue of personal jurisdiction, 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 within the forum state, thus invoking the benefits and protections of its laws.
20. ____: ____. 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 or herself 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.
21. **Jurisdiction.** Mail and telephone communications sent by a defendant into a forum may count toward the minimum contacts that support jurisdiction.
22. **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.
23. ____: ____. When weighing the facts to determine whether the exercise of personal jurisdiction would comport with fair play and substantial justice, a court may consider (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.
24. ____: ____. Where a defendant who has purposefully directed his or her activities at forum residents seeks to defeat jurisdiction, the defendant must present a compelling case that the presence of some other consideration would render jurisdiction unreasonable.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard L. Rice, of Crosby, Guenzel, L.L.P., for appellant.

Mark A. Fahleson, Brian S. Kruse, and Troy S. Kirk, of Rembolt, Ludtke & Berger, L.L.P., for appellees.

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

MCCORMACK, J.

I. NATURE OF CASE

The primary issue raised by this case is whether personal jurisdiction exists in Nebraska over David L. Clevinger, Jr., and Jerold J. Hawkins, both Michigan residents, and Skyline Services, L.L.C. (Skyline), a Michigan limited liability company (collectively the

appellees). The district court concluded that it did not have personal jurisdiction and sustained the appellees' special appearance. We reverse the order of the district court in part, concluding that Nebraska's jurisdiction extends over Clevinger and Hawkins.

II. BACKGROUND

Diversified Telecom Services, Inc. (Diversified), filed this action against the appellees on November 1, 2002. Diversified is a Nebraska corporation engaged in the business of construction and site improvement for cellular telephone transmission towers and other communications equipment throughout the United States. Its principal office is located in Waverly, Nebraska. Clevinger and Hawkins were former employees of Diversified who provided project management services to Diversified during their employment. Clevinger was employed with Diversified from November 2001 to October 2002 and was responsible for a region that included Michigan, Indiana, Ohio, and points to the east. Hawkins was employed by Diversified from November 2001 to June 2002, and was responsible for managing sites in Michigan. In February 2002, Clevinger and Hawkins formed Skyline. Diversified alleged that Skyline was formed to also engage in the business of construction and site improvement of transmission towers and communications equipment; in essence, Skyline was to directly compete with Diversified. The petition articulated four causes of action against the appellees: breach of the duty of loyalty, tortious interference, fraud and/or misrepresentation, and conversion.

The appellees filed a special appearance challenging the district court's personal jurisdiction over them. In support of their special appearance, the appellees offered the affidavits of Clevinger and Hawkins. Both affidavits stated that neither Clevinger nor Hawkins played any role in the operations of Skyline until each was terminated by Diversified. The affidavits also stated, in short, that the appellees have never had any contacts with Nebraska, with one exception. Both men admitted that they were in Nebraska on December 3 and 4, 2001, for the purpose of meeting the staff of Diversified.

Diversified offered the affidavit of Amy Grady, a collections specialist and administrative assistant with Diversified. Grady's

affidavit stated that Clevinger and Hawkins were formerly employed by Diversified and, as such, received compensation from Diversified, including rent Clevinger received from Diversified for an office in his Michigan home. The affidavit also contained evidence of the communications that Clevinger and Hawkins had with Diversified's Waverly office. Telephone billing statements included in the record indicate that from November 19, 2001, to July 26, 2002, Clevinger and Hawkins made approximately 326 and 279 telephone calls to Nebraska, respectively. Finally, Grady's affidavit also averred that Clevinger and Hawkins came to Nebraska on December 3 and 4, 2001, to formally accept employment with Diversified, complete paperwork, obtain information regarding their new jobs, and attend meetings with Diversified's personnel.

On May 15, 2003, the district court sustained the appellees' special appearance and dismissed Diversified's petition. On May 22, Diversified filed a motion which stated in full:

> COMES NOW the Plaintiff, Diversified Telecom Services, Inc. and moves this Court pursuant to NEB. REV. STAT. § 25-1142, *et seq.* (Reissue 2000) for an order granting a new trial in this matter. Plaintiff's Motion is directed at a reexamination of this Court's findings and decision in its Order dated May 14, 2003.
>
> Plaintiff contends the Court's decision is not sustained by sufficient evidence, or is contrary to the law (Neb. Rev. Stat. § 25-1142[6]).

On June 13, 2003, the district court denied Diversified's motion. Diversified filed its notice of appeal on July 9. We later moved the case to our docket.

III. ASSIGNMENT OF ERROR

Diversified's four assignments of error can be more succinctly restated as one: The district court erred in finding that it had no personal jurisdiction over the appellees and sustaining the appellees' special appearance.

IV. STANDARD OF REVIEW

[1,2] 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. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). 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.*

V. ANALYSIS

1. Appellate Jurisdiction

[3] We begin by addressing the appellees' argument that this court does not have jurisdiction over Diversified's appeal. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). The appellees characterize Diversified's May 22, 2003, motion as a motion for new trial, as it was titled, and then argue that the hearing on the appellees' special appearance was not a "trial" from which a motion for new trial could be filed. See Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002) (providing in part that "[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"). Thus, the appellees conclude that Diversified's notice of appeal was not timely filed because the May 22 motion did not terminate the 30-day appeal period after the district court sustained the appellees' special appearance.

[4-6] Whether a motion for new trial is a proper motion to file after a defendant's special appearance is sustained is an issue we need not address because the appellees' initial premise—that the May 22, 2003, motion is a motion for new trial—is one we need not accept. A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion. *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra.* The running of the time for filing a notice of appeal is not only terminated by a motion for new trial, but also by a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002). *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra.* 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. *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra*; *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). Diversified's May 22 motion, remarkably similar to the motion at issue in *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, requested a "reexamination" of the district court's May 15 decision on the basis that it was contrary to law. Therefore, the motion sought substantive alteration of the judgment and can be characterized as a motion to alter or amend a judgment, which terminated the 30-day appeal period. See *id.* Diversified's notice of appeal was filed within 30 days of the overruling of its motion to alter or amend a judgment; thus, its notice of appeal was timely and we have jurisdiction over this matter.

2. Personal Jurisdiction

[7-10] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). Under the statutory pleading rules in effect when this action was filed, 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. *Id.* Confronted with a special appearance, a plaintiff has the burden to establish facts which demonstrate the court's personal jurisdiction over the defendant. *Id.* 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. *Id.*

We digress for a moment to note that during oral arguments before this court, Diversified conceded that the district court correctly concluded that no personal jurisdiction exists over Skyline. Thus, our analysis below deals only with the issue of whether Nebraska's assertion of jurisdiction extends over Clevinger and Hawkins.

Addressing that issue first requires us to determine what evidence we may consider. As noted, Diversified had the burden to establish facts demonstrating the court's personal jurisdiction

over the appellees. To satisfy that burden, Diversified offered into evidence the affidavit of Grady. The appellees objected to the offer. The district court stated that it would reserve ruling on the objection, and the hearing on the appellees' special appearance promptly concluded. Thus, the court never expressly received the affidavit into evidence, although the court did refer to it in its order sustaining the appellees' special appearance.

[11] The appellees argue that Grady's affidavit may not be considered on appeal because " '[u]nless the [exhibit] is marked, offered, **and** accepted, it does not become part of the record and cannot be considered . . . as evidence in the case.' " Brief for appellees at 29, quoting *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003). Diversified counters the appellees' argument with a quotation from *R.W. v. Schrein*, 264 Neb. 818, 821, 652 N.W.2d 574, 578 (2002) (supplemental opinion), where we stated:

> " ' "If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, *or to insist upon a ruling on an objection to the introduction of the evidence*, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, *and the evidence is in the record for consideration the same as other evidence*." ' "

(Emphasis in original.)

[12] Diversified argues that the appellees waived any objection to Grady's affidavit when they failed to insist upon a ruling on their objection. See *id.* (it is well established that a party who fails to insist upon a ruling to a proffered objection waives that objection). Although we did not consider the exhibit at issue in *R.W. v. Schrein, supra*, because we could not determine whether it had been received into evidence, we cautioned parties that when they fail to insist upon rulings to their objections, they do so at their own peril. Having been forewarned, the appellees in this case did not insist upon a ruling to their objections. Those objections are therefore waived, and Grady's affidavit is available to us as we consider whether personal jurisdiction exists over Clevinger and Hawkins.

[13] Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. See § 25-536(2); *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). Thus, we need only consider whether Nebraska's exercise of jurisdiction over the appellees would be consistent with due process.

[14,15] The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations. *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend "'traditional notions of fair play and substantial justice.'" *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *Kugler Co. v. Growth Products Ltd., supra*. Thus, the determination whether the court has jurisdiction is a two-step process. First, we must determine whether the appellees had the necessary minimum contacts with Nebraska, and second, if such minimum contacts have been established, the 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. See *Kugler Co. v. Growth Products Ltd., supra*.

(a) Minimum Contacts

[16,17] 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. *Quality Pork Internat. v. Rupari Food Servs., supra*. This analysis requires that we consider the quality and nature of the defendant's activities in order to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process. *Kugler Co. v. Growth Products Ltd., supra*.

[18,19] Under such an analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *Id.* Rather, 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 within the forum state, thus invoking the benefits and protections of its laws. *Id.* This requirement ensures that a defendant will not be subject to litigation in a jurisdiction solely due to random, fortuitous, or attenuated contacts. *Id.*

The scope of Clevinger's and Hawkins' contacts with Nebraska is predicated on several facts established by Grady's affidavit. Each was employed by Diversified, a Nebraska corporation—Clevinger for approximately 11 months and Hawkins for approximately 7 months. By virtue of the employment relationship, Clevinger and Hawkins provided management services to Diversified and were compensated for those services. More importantly, Clevinger and Hawkins came to Nebraska on December 3 and 4, 2001, to meet Diversified's staff and also made hundreds of telephone calls to Nebraska from November 2001 to July 2002.

[20,21] 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 or herself 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. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). Clevinger and Hawkins argue that their December 2001 visit to Nebraska and their hundreds of telephone calls with Nebraska were requirements of their employment and that, therefore, they were merely responding to Diversified's unilateral acts. We do not agree. The employment relationship between Diversified and Clevinger and Hawkins by definition includes various *mutual*, rather than unilateral, promises and obligations. While such an employment relationship might not, by itself, provide the necessary contacts for personal jurisdiction in this state, our

record also contains evidence of Clevinger's physical presence in Nebraska and the hundreds of telephone calls they made here. The U.S. Supreme Court has stated that "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). In addition, this court has stated that mail and telephone communications sent by a defendant into a forum may count toward the minimum contacts that support jurisdiction. *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998). Considering all of the facts before us, we conclude that Clevinger and Hawkins have sufficient minimum contacts with Nebraska that they should reasonably anticipate being haled into court here.

(b) Fair Play and Substantial Justice

[22,23] 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. v. Rudzewicz*, 471 U.S. at 476; *Quality Pork Internat. v. Rupari Food Servs., supra*. These considerations include (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Burger King Corp. v. Rudzewicz, supra*; *Quality Pork Internat. v. Rupari Food Servs., supra*. Such considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. See, *Burger King Corp. v. Rudzewicz, supra*; *Quality Pork Internat. v. Rupari Food Servs., supra*.

[24] Where a defendant who has purposefully directed his or her activities at forum residents seeks to defeat jurisdiction, the defendant must present a compelling case that the presence of some other consideration would render jurisdiction unreasonable. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474,

675 N.W.2d 642 (2004). We conclude that Clevinger and Hawkins have failed to present such a case in light of the above considerations. With the ease of modern transportation and communications, it is difficult to see the burden on Clevinger and Hawkins of defending this action in a state where they have had contacts and whose laws they have availed themselves of. See *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). In their brief, Clevinger and Hawkins speculate that many of the witnesses that will testify are located in Michigan and also argue that the business Diversified has conducted in Michigan in the past evidences a minimal burden on it to litigate the action in Michigan. However, Nebraska also has a significant interest in adjudicating a suit brought by a Nebraska corporation based on actions by defendants who have availed themselves of the benefits and protections of the laws of Nebraska. In short, Nebraska's exercise of jurisdiction over Clevinger and Hawkins would not offend notions of fair play and substantial justice.

VI. CONCLUSION

This court has jurisdiction over the matter before it because Diversified's May 22, 2003, motion to alter or amend a judgment terminated the appeal period and Diversified's notice of appeal was timely filed following that motion's denial. With regard to the issue of personal jurisdiction over the appellees, Diversified has conceded that no such jurisdiction extends over Skyline, and that portion of the district court's order is affirmed. However, we conclude that Nebraska's exercise of jurisdiction extends over Clevinger and Hawkins. Thus, we reverse the district court's order sustaining the special appearance in part and remand the cause for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

GERALD G. WELVAERT, JR., APPELLANT, V. NEBRASKA STATE PATROL, APPELLEE.

683 N.W.2d 357

Filed July 16, 2004. No. S-03-1006.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. ____: ____: ____. 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 not arbitrary, capricious, or unreasonable.
5. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
6. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
7. **Constitutional Law: Criminal Law: Other Acts.** Under the Ex Post Facto Clause, the retroactive application of civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited.

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

Donald L. Schense, of Law Office of Donald L. Schense, for appellant.

Jon Bruning, Attorney General, and Mark D. Starr for appellee.

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

GERRARD, J.

Between 1994 and 1996, Gerald G. Welvaert, Jr., had sexual intercourse and/or sexual contact with four underage females. Welvaert was charged and pled guilty to four sex-related offenses, and was sentenced to a term of 18 to 24 months' imprisonment.

After his release from prison, the Nebraska State Patrol (NSP), pursuant to the Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2000), determined that Welvaert was at a high risk to reoffend sexually and classified him as a Level 3 sex offender. Welvaert appealed, and the district court affirmed the NSP's determination. On appeal, Welvaert contends that the NSP's risk assessment instrument is invalid and that SORA violates the Ex Post Facto Clause of the U.S. Constitution. For the following reasons, we affirm the judgment of the district court.

I. SORA

Welvaert's appeal represents the third recent challenge to SORA. See, *Slansky v. Nebraska State Patrol, ante* p. 360, 685 N.W.2d 335 (2004); *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004). In *Slansky* and *Worm*, we discussed, at length, the pertinent features of SORA and the rules and regulations that implement SORA. In *Slansky*, we also discussed the risk assessment instrument that was developed to classify sex offenders under SORA. Therefore, it is unnecessary to repeat our review of SORA's features and the risk assessment instrument, and we direct the reader to *Slansky* and *Worm* for such background information.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1994, when he was 25 years old, Welvaert had sexual intercourse with his 13- or 14-year-old cousin. During the next 2 years, Welvaert had sexual intercourse and/or sexual contact with three other young females, ages 14 to 16. As a result, four sex-related charges—three Class II felony counts and one Class IV felony count—were brought against Welvaert. Welvaert testified that in July 1996, he pled guilty to the four felonies and was sentenced to serve 18 to 24 months' imprisonment and 5 years' probation. In July 1997, Welvaert was released from prison; he remained on probation through 2001.

On January 26, 2000, an investigator for the NSP completed a risk assessment for Welvaert using the NSP's risk assessment instrument. Welvaert scored 185 points on the instrument and was classified as a Level 3 sex offender. Thereafter, on March 14, the NSP sent Welvaert a letter, notifying him that the NSP

Sex Offender Registry had determined that he was at a high risk to reoffend sexually and that therefore, he had been classified as a Level 3 sex offender. The letter stated that a Level 3 classification requires the NSP to provide information concerning him to the public, appropriate law enforcement officials, schools, daycare centers, and youth and religious organizations, and that such notification would be done through news releases and other avenues as deemed appropriate. In addition, the letter notified Welvaert that if he disagreed with this determination, he could request a hearing to contest the classification. Soon thereafter, Welvaert gave notice of his intent to contest the classification and the grounds therefor.

At the administrative hearing, the NSP stipulated that 10 points should be deducted from Welvaert's score in regard to item 10 (release environment) because he was on probation, i.e., under supervision, at the time the instrument was scored. In addition, the hearing officer determined that 10 points should be deducted in regard to item 11 (disciplinary history while incarcerated) because prior to Welvaert's hearing, the instrument was revised to eliminate the assessment of points for nonviolent disciplinary infractions. Accordingly, the hearing officer reduced Welvaert's overall score by 20 points. Despite this reduction, Welvaert's amended score was still 165, or 35 points more than needed to classify him as a Level 3 offender. Noting Welvaert's score and stating that Welvaert failed to present sufficient mitigating evidence to support a downward departure, the hearing officer recommended that the NSP's decision classifying Welvaert as a Level 3 sex offender be upheld. Thereafter, on August 13, 2002, the superintendent of the NSP issued an order adopting the recommended decision of the hearing officer in full and making it the final decision of the NSP.

On September 12, 2002, pursuant to the Administrative Procedure Act, see Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Supp. 2003), Welvaert filed a petition in the district court for Lancaster County, appealing his classification as a Level 3 sex offender. See 272 Neb. Admin. Code, ch. 19, § 014.02 (2000). On July 30, 2003, the district court entered its order affirming the decision of the NSP.

Welvaert filed a timely notice of appeal, and the NSP, noting that Welvaert's appeal challenged the constitutionality of SORA, filed a petition to bypass the Nebraska Court of Appeals. We granted the NSP's petition based on our exclusive jurisdiction to decide cases involving the constitutionality of a statute. See Neb. Rev. Stat. § 24-1106(1) (Reissue 1995).

III. ASSIGNMENTS OF ERROR

Welvaert assigns that the district court (1) erred in affirming the decision of the NSP and (2) abused its discretion in affirming the decision of the NSP.

IV. STANDARD OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Slansky v. Nebraska State Patrol, ante* p. 360, 685 N.W.2d 335 (2004). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

[3-6] 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. *Id.* 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 not arbitrary, capricious, or unreasonable. *Id.* Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

V. ANALYSIS

Under these broad assignments of error, Welvaert makes two arguments: (1) The NSP's risk assessment instrument is invalid because it is a flawed indicator of a sex offender's risk of recidivism and (2) SORA violates the Ex Post Facto Clause of the U.S. Constitution.

1. RISK ASSESSMENT INSTRUMENT

Welvaert argues that the risk assessment instrument is invalid because it is a flawed indicator of recidivism. Welvaert raises seven general complaints concerning the risk assessment instrument and the assessment process.

First, Welvaert contends that the instrument is invalid because "[t]oo much variability presently exists between the states so that no uniformity [or] consistency exists in this classification process." Brief for appellant at 5. Welvaert does not explain, however, how the absence of nationwide uniformity in sex offender registration statutes makes the NSP's risk assessment instrument invalid. We decline to speculate on possible arguments in this regard and find Welvaert's first contention to be without merit.

Second, Welvaert contends that the instrument is invalid because NSP investigators score the instrument, "lending to yet more subjective scoring and classification." *Id.* The record does not support Welvaert's contention. During Welvaert's prenotification hearing, the clinical director of the NSP Sex Offender Registry, Shannon Black, Ph.D., under questioning by Welvaert's attorney, testified regarding the reliability of assessments completed by investigators. For example, Black noted that the instrument's author tested it for "inter-rater reliability" prior to allowing the investigators to do assessments individually. In addition, Black stated that prior to completing assessments, the investigators attend training specific to the risk assessment of sex offenders and that she is available to help investigators with questions during the completion of an assessment. Moreover, Black stated that she no longer reviews every assessment because the investigators score the instrument consistently. Furthermore, we note that even if an investigator errs during the completion of an assessment, the offender has the opportunity to correct these errors by contesting his or her classification level to a hearing officer and then to the courts if necessary.

Third, Welvaert contends that the instrument is invalid because the investigators do not conduct interviews prior to assigning offenders their presumptive classifications. However, Welvaert fails to explain why the absence of a preclassification interview invalidates the instrument. In any event, we note that

Welvaert was given the opportunity to put on evidence and testify at his prenotification hearing. Therefore, prior to the public dissemination of his registry information, Welvaert was given a meaningful opportunity to contest his classification, and his argument is without merit. See *Slansky v. Nebraska State Patrol, ante* p. 360, 685 N.W.2d 335 (2004) (determining that SORA's prenotification hearing comports with due process).

Fourth, Welvaert contends that the instrument is invalid because it "never takes into account the particulars of the crime in terms of the counting of convictions or the occasion of the acts that led to the convictions." Brief for appellant at 5. Similarly, in his fifth "argument," Welvaert states that it is "[t]roublesome . . . that the offender is never offered an opportunity to offer any mitigation in this process of classification." *Id.* These arguments are without merit. As an initial matter, an investigator doing the initial classification has the authority to depart from an offender's presumptive classification if the records that he or she reviews justify such a departure. Moreover, if offenders choose to contest their classification, they may present evidence of mitigation, including the circumstances surrounding the underlying crime, during the hearing. Therefore, offenders not only have an opportunity to rebut the facts that led to their presumptive classification level, but they also have the opportunity to present mitigating facts which may justify a downward departure.

Sixth, Welvaert contends that the instrument is invalid because "definitions used by the [NSP] in this classification process also allows [sic] the assessor to double score an individual for the same behavior." *Id.* Essentially, Welvaert's argument stems from his disagreement with his score for item 9 (use of force). Item 9 explores the nature of the sexual assault and is broken down into seven subcategories. Relevant here, Welvaert was assessed 5 points for fondling and 25 points for using physical violence or force against a victim.

At Welvaert's prenotification hearing, the investigator for the NSP was questioned about the assessment of 5 points for fondling and 25 points for physical force or violence. The investigator testified that Welvaert was assigned 5 points for fondling because a police report states that Welvaert fondled two of the victims. A review of the record reveals that the main victim

stated that Welvaert tickled and fondled her, and fondled a second underage girl. Similarly, the investigator discussed a different police report wherein a third victim reported that Welvaert " 'got on top of her and pulled her pants down around her knees. He was also placing his hand under her shirt and fondling her breasts.' " When asked why Welvaert was assessed 25 points for physical violence or force, the investigator again pointed to the third victim's statement that Welvaert " '[g]ot on top of her and pulled her pants down around her knees.' "

On appeal, Welvaert argues that the instrument's vague definitions allowed the instructor to improperly assign him 5 points for fondling and 25 points for physical force for the exact same conduct, i.e., getting on top of and pulling down the pants of the third victim. As an initial matter, we note that Welvaert does not explain why the same conduct could not lead to multiple assessments of points under different items or subcategories. Moreover, because the presence of conduct that corresponds with an item or subcategory correlates to an increased risk of recidivism, it is only logical that conduct that falls under multiple items or subcategories should be scored accordingly. In any event, the record shows that the assessment of 25 points for the use of physical violence or force was not justified solely on the basis of the aforementioned statement concerning pulling down the third victim's pants. The record reveals that after Welvaert got on top of the third victim and pulled her pants down, she " 'placed both hands on his chest and attempted to push him off.' " At this time, the victim is reported to have told Welvaert " ' "no," ' " to "get off," and to " ' "Stop it." ' " In sum, the district court's decision to uphold the NSP's assessment of points under item 9 is supported by competent evidence and is not arbitrary, capricious, or unreasonable.

Seventh, Welvaert contends that the instrument is invalid because it has a statistical error rate of 12 percent. This argument was analyzed and rejected in *Slansky v. Nebraska State Patrol*, *ante* p. 360, 685 N.W.2d 335 (2004). No further discussion is warranted in the present appeal.

2. Ex Post Facto Clause

Welvaert also contends that SORA violates the Ex Post Facto Clause of the federal Constitution. U.S. Const. art. I, § 10, cl. 1.

We have rejected this argument on two separate occasions, and we do so again. See, *Slansky, supra*; *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004).

[7] Essentially, Welvaert argues that SORA violates the Ex Post Facto Clause because it was not enacted until after he was sentenced and incarcerated. The NSP, on the other hand, asserts that SORA is not a penal statute because neither the registration nor notification provisions are "punishment" so as to raise ex post facto concerns. Stated otherwise, the NSP contends that SORA is a civil regulatory scheme and that therefore, the Ex Post Facto Clause is not implicated. See, *Slansky, ante* at 377, 685 N.W.2d at 350 ("under the Ex Post Facto Clause, the retroactive application of civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited"). See, also, *Worm, supra.*

Recently, in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the U.S. Supreme Court, in rejecting a similar ex post facto challenge to Alaska's sex offender registration statute, stated that a two-step "intent-effects" test should be used to analyze whether a law constitutes retroactive punishment in violation of the Ex Post Facto Clause. See, *Slansky, supra*; *Worm, supra*. Under this test, "we must first determine whether the intent of the Legislature in enacting SORA was to establish a nonpunitive civil regulatory scheme for sex offenders. . . . If so, we must then determine whether SORA is so punitive in nature as to negate the Legislature's intent to deem it civil." *Slansky, ante* at 378,685 N.W.2d at 351.

(a) Legislative Intent

On two occasions, we have determined that the Legislature, in enacting SORA, intended to establish a civil regulatory scheme to protect the public from the danger posed by sex offenders. See, *Slansky, supra*; *Worm, supra*. Because these cases are dispositive of the issue and Welvaert does not contend that the Legislature had a punitive intent in enacting SORA, it is unnecessary to discuss this prong any further.

(b) Effects of SORA

Because the Legislature intended SORA to be civil in nature, its intent will be rejected only if Welvaert provides the clearest

proof that SORA is so punitive in either purpose or effect as to negate the Legislature's intent. See, *Smith, supra*; *Slansky v. Nebraska State Patrol, ante* p. 360, 685 N.W.2d 335 (2004); *Worm, supra*. In making this determination, we consider the factors first set forth by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). See *Slansky, supra*. They are as follows:

> "(1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as punishment'; (3) 'whether it comes into play only on a finding of *scienter*'; (4) 'whether its operation will promote the traditional aims of punishment—retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.' "

State v. Isham, 261 Neb. 690, 695, 625 N.W.2d 511, 515-16 (2001), quoting *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

Relying on these factors, Welvaert argues that SORA (1) imposes an affirmative disability; (2) operates to promote the traditional aims of punishment, retribution, and deterrence; (3) applies to behavior that is already a crime; and (4) is excessive in relation to its nonpunitive purpose. In *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004), we determined that SORA's registration provisions are not so punitive in effect as to negate the Legislature's stated intent. Therefore, only SORA's notification provisions are at issue in the following analysis.

(i) Affirmative Disability or Restraint

In order to determine whether SORA's notification provisions impose an affirmative disability or restraint on registered sex offenders, we must "inquire how the effects of [a sex offender registration act] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith v. Doe*, 538 U.S. 84, 99-100, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). As an initial matter, we note that although registered sex offenders are subject to public notification, they

remain free to live and work where they want without supervision. See *Worm, supra.*

Nonetheless, Welvaert argues SORA imposes an affirmative restraint because "[t]here are no statutory safeguards as to the extent to which the information may be disclosed and released to the public." Brief for appellant at 8. This is not accurate. The extent to which an offender is subject to public notification under SORA has been tailored to mirror the level of risk an offender presents to their community. See § 29-4013. If the risk of recidivism is low, only law enforcement officials who are likely to encounter the offender must be notified. § 29-4013(2)(c)(i). If the risk of recidivism is moderate, the circle of notification is broadened to include schools, daycare centers, and religious and youth organizations. § 29-4013(2)(c)(ii). If the risk of recidivism is high, notification must also be given to members of the public who are likely to encounter the offender. § 29-4013(2)(c)(iii).

Welvaert contends that the release of such information may have a debilitating effect on an offender's search for housing and employment. However,

> these consequences flow not from [a sex offender registration act's] registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant.

Smith, 538 U.S. at 101.

SORA's public notification provisions impose no restraint whatsoever upon the activities of Welvaert, and his argument is without merit. See, *Hatton v. Bonner*, 356 F.3d 955 (9th Cir. 2004) (determining sex offender registration and notification scheme did not impose affirmative disability or restraint); *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000) (same); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) (same); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997) (same); *Com. v. Williams*, 574 Pa. 487, 832 A.2d 962 (2003) (same).

(ii) Traditional Aims of Punishment

Welvaert also contends that SORA promotes the traditional aims of punishment, retribution, and deterrence. However, Welvaert's

argument is confined to SORA's registration provisions and, therefore, is without merit under *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004).

(iii) Criminal Behavior

Next, Welvaert contends that SORA imposes punishment because the behavior to which it applies is already a crime. As we noted in *Worm, supra*, the U.S. Supreme Court in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), concluded that this factor received little weight in analyzing the effect of Alaska's registry statute because the statute's concern was recidivism, and therefore, the offender's past criminal conduct was a necessary starting point. Relying on the Court's determination in *Smith*, we concluded that the criminal behavior factor was not relevant to determining whether a criminal registration statute imposes punishment. *Worm, supra*. Because Welvaert's past criminal conduct is also the necessary starting point for SORA's notification provisions, we again conclude that this factor is not relevant for such a determination.

(iv) Excessiveness

Finally, Welvaert argues that SORA's notification provisions are excessive because SORA does not set forth the type of information concerning the registrant which may be released and it contains "no limitation to the geographical area in which the information may be released." Brief for appellant at 10. This argument is without merit. Under SORA, the NSP and any law enforcement agency authorized by the NSP are required to release "*relevant information* that is necessary to protect the public concerning a specific person required to register." (Emphasis supplied.) § 29-4009(3). By limiting dissemination to information that is relevant to public safety, SORA shields offenders from the publication of irrelevant personal information. See 272 Neb. Admin. Code, ch. 19, § 013.05 (2000).

Additionally, the extent of dissemination is further limited by the severity of the risk the offender is determined to present to the community, see § 29-4013, and even for the high risk offenders like Welvaert, public notification is limited. See, § 29-4013(2)(c)(iii); *Slansky v. Nebraska State Patrol, ante* p.

360, 685 N.W.2d 335 (2004) (rejecting challenge to breadth of SORA's notification provisions).

In sum, SORA's notification provisions represent a reasonable regulatory scheme in light of its nonpunitive objective. See *Smith, supra* (stating question in excessiveness inquiry is not whether legislature has made best choice possible to address problem it seeks to remedy, but whether regulatory means chosen are reasonable in light of nonpunitive objective). Applying the factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), we conclude that SORA is not so punitive as to negate the Legislature's intent to create a valid civil regulatory scheme.

VI. CONCLUSION

For the foregoing reasons, we conclude that Welvaert's challenges to SORA and the risk assessment instrument are without merit. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
BILLY R. AGUILAR, APPELLANT.

683 N.W.2d 349

Filed July 16, 2004. No. S-03-1120.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the trial court's discretion and will not be disturbed on appeal in the absence of an abuse of discretion.
3. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Trial: Courts: Expert Witnesses.** Trial courts are entitled to broad discretion concerning hearings under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

5. ____: ____: ____. A trial court has the discretion to hold a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), hearing during trial when the need for one arises.
6. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
7. **Criminal Law: Statutes.** Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
8. **Jurors: Words and Phrases.** A "regular juror" for purposes of Neb. Rev. Stat. § 29-2004 (Cum. Supp. 2002) is a juror who takes an oath and is seated, erroneously or not.
9. **Trial: Rules of Evidence: Expert Witnesses.** Under 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.
10. **Trial: Expert Witnesses.** Whether a witness is qualified as an expert is a preliminary question for the trial court.
11. **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.
12. **Expert Witnesses.** Firsthand knowledge is not always required as the only source of information for an expert's opinion.
13. **Expert Witnesses: Evidence.** An expert does not need to have additional expertise in the science or theory underlying instruments used in his or her field. That the expert is trained to operate a device is sufficient foundation for admitting evidence produced by the device.
14. **Rules of Evidence: Witnesses.** When a witness demonstrates familiarity with handwriting and the familiarity was not acquired for the purposes of litigation, the requirements of Neb. Rev. Stat. § 27-901 (Reissue 1995) are met.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, and John C. Jorgensen for appellant.

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

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

CONNOLLY, J.

Billy R. Aguilar appeals his convictions and sentences for first degree assault, burglary, attempt to commit first degree murder, and two counts of use of a weapon to commit a felony.

He contends that the court improperly held a hearing during trial under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and that he was entitled to a mistrial when a stricken juror was inadvertently placed on the jury but later was replaced by an alternate juror. He also raises numerous evidentiary assignments of error.

We conclude that a trial court may, in its discretion, hold a *Daubert* hearing during trial. We also determine that he was not entitled to a mistrial. We further determine that the remaining assignments of error are without merit. Accordingly, we affirm.

BACKGROUND

Billy and his cousin, Mario Aguilar had been good friends during elementary school, but over the years they drifted apart. Still, they remained friends until Billy started behaving in a bizarre manner.

In October 2002, Billy's behavior began to deteriorate. While Mario was exercising at the YMCA, Billy came in and unexpectedly said to Mario, " 'You're everywhere' " and " 'I can hear you in the air and in the vents in my house, and just all over. You're everywhere.' " Other witnesses stated that Billy told people that he heard Mario's voice in his head and that Billy was heard laughing and talking to himself.

On several occasions in December 2002, Mario saw Billy drive by his place of employment. On January 20, 2003, a man wearing a mask approached Mario as he was opening his place of employment. The man asked, " 'How you doing?' " and then jabbed a knife toward Mario's stomach, laughed, and began swinging the knife. He said, " 'Come here, come here,' " and Mario backed away. The man then left. Mario identified the man as Billy, stating that he recognized his voice, body, movements, and laugh. Mario called the police, but initially did not tell them Billy was the perpetrator because he wanted to work things out with Billy and "didn't want him to get in trouble." After he was unable to contact Billy, Mario called the police again and reported that Billy was the perpetrator. The record is silent on what action the police took after the knife incident.

After the knife incident, early in the morning of February 20, 2003, a person knocked on Mario's door in a distinctive pattern.

Mario asked who was there; the person responded " 'Primo,' " the word for cousin in Spanish. Mario stated that he recognized the voice as Billy's and that he looked out the window and saw Billy with his back turned. He called to him, but Billy did not respond and ran away.

At 9 o'clock that night, Mario and his wife heard the same distinctive knock on the door. Mario told his family to stay in a bedroom while he went to the door. A masked man pounded on the door and then shot and kicked it in; the intruder then shot Mario three times. Mario stated that he easily recognized Billy as the shooter.

Later, Billy's sweatshirt was tested for gunshot residue. The State's expert, Joseph Morris, an employee in the forensic department of R.J. Lee Group, testified that he was trained in gunshot residue analysis. He also testified about his experience and the quality control standards that were obtained from another company, Fisher Scientific. Billy objected to the testimony on *Daubert* grounds. The court admitted the testimony; Morris testified that he found residue on Billy's sweatshirt.

The jury found Billy guilty of first degree assault, burglary, attempt to commit first degree murder, and two counts of use of a weapon to commit a felony. The jury acquitted him of a stalking charge. The court sentenced him to varying terms of imprisonment on each count, some running concurrently and some consecutively. Billy appeals.

ASSIGNMENTS OF ERROR

Billy assigns, consolidated and rephrased, that the district court erred by (1) holding a *Daubert* hearing during trial, (2) overruling his motion for a mistrial, (3) allowing Morris to testify about the standards from Fisher Scientific, (4) allowing Mario's testimony about Billy's handwriting, (5) allowing testimony about the cost of further testing, (6) allowing testimony from Billy's brother about writing on a piece of paper, (7) allowing testimony about Billy's meeting with Mario at the YMCA, (8) allowing testimony about the assault on January 20, 2003, (9) overruling a form of the question objection about Billy's not returning a wave, (10) allowing testimony from several witnesses about Billy's looking for a gun, (11) allowing testimony

from another cousin of Billy about a meeting with Billy, (12) allowing a 911 emergency dispatch service tape into evidence, (13) allowing evidence that Mario's wife saw Billy on her way to daycare, (14) allowing evidence about Billy's laughing, (15) allowing impeachment testimony, and (16) allowing testimony from certain police officers.

STANDARD OF REVIEW

[1] 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. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

[2] The decision whether to grant a motion for mistrial is within the trial court's discretion and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

[3] Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

ANALYSIS

TIMING OF *DAUBERT* HEARING

Billy argues that it is improper to defer *Daubert* determinations until trial.

Neb. Rev. Stat. § 27-104 (Reissue 1995) provides:

> (1) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subsection (2) of this section.
>
> (2) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> (3) . . . Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness, if he so requests.

Section 27-104 is silent about the timing of a hearing to determine the admissibility of expert opinion testimony. Although we have not specifically addressed when a hearing may be held, we have indicated that a hearing before trial is not mandatory. When we adopted the *Daubert* standard, we noted that a court's decision about the admissibility of expert opinion evidence entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether it can properly be applied to facts in issue. But we also stressed that in making this preliminary assessment, the trial judge has the discretion both to avoid unnecessary hearings and to require hearings when needed. *Schafersman v. Agland Coop.*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[4] Also, the U.S. Supreme Court has emphasized that trial courts are entitled to broad discretion concerning *Daubert* hearings. See, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). In addition, federal courts have determined that a *Daubert* hearing may be appropriate during trial. See, e.g., *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775 (11th Cir. 2004); *U.S. v. Alatorre*, 222 F.3d 1098 (9th Cir. 2000).

In *Alatorre, supra*, the Ninth Circuit addressed whether a *Daubert* hearing must take place before trial. The court noted that the U.S. Supreme Court has not mandated the form that an inquiry into relevance and reliability must take. Although the Court stated in *Daubert* that the inquiry is a "preliminary" one, to be made "at the outset," the Ninth Circuit concluded that those terms did not mean that the inquiry must be made in a separate pretrial hearing. The court reasoned:

> "The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable. . . . Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted,

> and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises."

Alatorre, 222 F.3d at 1102. The court concluded that a pretrial hearing was not a requirement and was consistent with the court's broad discretion. The 11th Circuit has agreed, holding that "a trial court has broad discretion in determining how to perform its gatekeeper function, and nothing prohibits it from hearing a *Daubert* motion during trial." *Club Car, Inc.*, 362 F.3d at 780.

[5] We also agree that the trial court has the discretion to hold a *Daubert* hearing during trial when the need for one arises. We conclude that the court did not abuse its discretion when it held the *Daubert* hearing during trial.

JURY COMPOSITION

Before trial, the district court clerk incorrectly read the jurors' names that had been excused. As a result, the clerk failed to read a juror's name who had been stricken by the State and that juror sat through part of the trial before the mistake was discovered. Another juror who had not been stricken was mistakenly excused. The court gave Billy the option to discharge the juror, which he accepted; the juror was replaced by an alternate juror. Billy moved for a mistrial, which was denied.

Billy contends that he was entitled to a mistrial when, because of an error, an excused juror was improperly allowed to sit through part of the trial and was replaced by an alternate juror when the mistake was discovered. Billy argues that the alternate juror was improperly used and that he was prejudiced by the change.

Neb. Rev. Stat. § 29-2004 (Cum. Supp. 2002) addresses the use of alternate jurors and provides in part:

> The alternate jurors shall take the proper oath or affirmation and shall be seated near the regular jurors with equal facilities for seeing and hearing the proceedings in the cause, and shall attend at all times upon the trial of the cause in company with the regular jurors. They shall obey all orders and admonitions of the court, and if the regular jurors are ordered to be kept in the custody of an officer during the trial of the cause, the alternate jurors shall also be kept with the

> other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the cause to the jury. If, before the final submission of the cause a regular juror dies or is discharged, the court shall order the alternate juror, if there is but one, to take his or her place in the jury box.

According to Billy, under § 29-2004, the juror who was mistakenly allowed to sit through part of trial was not a "regular juror" and could not be replaced with an alternate. We disagree.

[6,7] In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001). Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

[8] Here, the use of the term "regular juror" in § 29-2004 is used to delineate between the initially seated members of the jury and any alternates that were seated. Thus, we conclude that a "regular juror" for purposes of § 29-2004 is a juror who took an oath and was seated, whether erroneously or not.

The court allowed Billy the choice of keeping the stricken juror, who was stricken by the State, or replacing the juror with an alternate; Aguilar chose replacing the juror. We conclude that the district court did not abuse its discretion in replacing the juror with an alternate.

Morris' Familiarity With Fisher Scientific

Billy contends that Morris was not qualified to testify because he was not personally familiar with Fisher Scientific, the source of the standards used by the R.J. Lee Group. A standard is a known substance, like copper or lead, with a known amount being analyzed. Morris' company obtained the standards from Fisher Scientific. Billy does not argue that Morris' reasoning or methodology was invalid or unreliable, or that it could not properly be applied to facts in issue.

Morris testified extensively at trial about his background and qualifications concerning gunshot residue analysis. As part of

the analysis, Morris' company uses standards to confirm that their instruments are operating correctly. By using a "standard" consisting of a known substance with a known amount, Morris is able to verify the instrument's accuracy for gunshot residue.

[9-11] Neb. Rev. Stat. § 27-702 (Reissue 1995) 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." Under § 27-702, 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. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). 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.*

[12] Under Neb. Rev. Stat. § 27-703 (Reissue 1995):

> 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.

Thus, firsthand knowledge is not always required as the only source of information for an expert's opinion. See *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

[13] The Nebraska Court of Appeals has noted that an expert does not need to have additional expertise in the science or theory underlying instruments used in his or her field. That the expert is trained to operate a device is sufficient foundation for admitting evidence produced by the device. See, *State v. Ford*, 1 Neb. App. 575, 501 N.W.2d 318 (1993), citing *State v. Estill*, 13 Kan. App. 2d 111, 764 P.2d 455 (1988). Courts have also held that a certification of calibration solution used in blood alcohol testing is unnecessary to establish foundation for the admissibility of the test. See *Barna v. Commissioner of Public Safety*, 508 N.W.2d 220 (Minn. App. 1993).

Thus, it is unnecessary that Morris be personally familiar with the manner in which Fisher Scientific manufactures or supplies calibration substances or standards. It is enough that Morris is qualified to operate the devices and interpret the results.

Here, Morris testified about his personal knowledge of gunshot residue testing and his qualifications and ability to accurately perform the tests. Had Billy wished to challenge the test's accuracy based on a theory that the quality control substances were inaccurate, he could have explored that theory through cross-examination. The court did not err by allowing Morris to testify as an expert witness.

Testimony About Billy's Handwriting

Billy contends that the district court erred when it allowed Mario to testify about Billy's handwriting. During trial, Mario identified Billy's writing on a page in a small notebook with information about types of guns to show that Billy was seeking to purchase a gun. Mario testified that he was familiar with Billy's handwriting from the years they went to school together. He also stated that he did not become familiar with Billy's handwriting for the purposes of litigation.

Neb. Rev. Stat. § 27-901 (Reissue 1995) provides:

> (1) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (2) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> . . . .
>
> (b) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

[14] We have held that it was not error to permit a motel clerk to testify that initials on a motel register were written by her coworkers when the clerk testified that she was familiar with their handwriting from the course of the employment. Because the familiarity with the handwriting was not acquired for the purposes of litigation, the requirements of § 27-901 were met,

and the testimony was properly admitted. *State v. Schwartz*, 239 Neb. 84, 474 N.W.2d 461 (1991). We have also held that testimony from a former spouse about familiarity was admissible. *State. v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002).

Billy contends that *Schwartz* is distinguishable. He argues that the motel clerk in *Schwartz* had current familiarity with the handwriting at issue, while in this case, Mario stated his familiarity with Billy's handwriting was based on observations when they were in school together. But the only restriction of § 27-901 is that the familiarity was not acquired for litigation purposes. Here, Mario testified about his familiarity with Billy's handwriting and that he did not acquire the familiarity for litigation purposes. Thus, the requirements of § 27-901 were met and the court did not err in receiving the testimony.

Remaining Assignments of Error

Billy raises many remaining assignments of error that are generally evidentiary in nature. We have reviewed the record and determine that the remaining assignments of error either are without merit or have not caused prejudice.

CONCLUSION

We determine that the court did not abuse its discretion when it held a *Daubert* hearing during trial; Billy is not entitled to a mistrial. We further determine that the court did not err in finding Morris qualified as an expert. Nor did the court err by allowing Mario to identify Billy's handwriting. We further determine that Billy's remaining assignments of error are either without merit or not prejudicial.

Affirmed.

Wright, J., participating on briefs.

DONA R. ZIMMERMAN, APPELLANT, V. NEDRA J. POWELL, APPELLEE.

684 N.W.2d 1

Filed July 23, 2004. No. S-02-1356.

1. **Trial: Rules of Evidence: Expert Witnesses.** Neb. Rev. Stat. § 27-702 (Reissue 1995) requires that the trial court act as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
2. ____: ____: ____. In performing its gatekeeping duty, 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 applied the methodology in a reliable manner. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
3. ____: ____: ____. The objective of the trial court's gatekeeping responsibility is to ensure that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
4. ____: ____: ____. In performing its gatekeeping duty, the trial court has considerable discretion in deciding what procedures to use in determining if an expert's testimony satisfies *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). See Neb. Rev. Stat. § 27-702 (Reissue 1995).
5. ____: ____: ____. In performing its gatekeeping duty, the trial court's discretion extends to deciding what factors are reasonable measures of reliability in each case. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
6. ____: ____: ____. Once a party opposing an expert's testimony has sufficiently called into question the testimony's factual basis, data, principles, or methods, or their application, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
7. ____: ____: ____. The trial court does not have the discretion to abdicate its gatekeeping duty imposed by Neb. Rev. Stat. § 27-702 (Reissue 1995).
8. ____: ____: ____. A trial court, when faced with an objection under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), must adequately demonstrate by specific findings on the record that it has performed its duty as a gatekeeper. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
9. **Trial: Rules of Evidence: Expert Witnesses: Appeal and Error.** In performing its gatekeeping duty, the trial court must explain its choices so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
10. **Trial: Rules of Evidence: Expert Witnesses.** A trial court adequately demonstrates that it has performed its gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability

that the court relied on in reaching its determination. See Neb. Rev. Stat. § 27-702 (Reissue 1995).

11. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
12. ____: ____: ____. When the trial court has not abdicated its gatekeeping function under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), an appellate court reviews the trial court's decision to admit or exclude the evidence for an abuse of discretion.
13. **New Trial: Verdicts: Appeal and Error.** Not every error justifies a new trial; only an error which is prejudicial to the rights of the unsuccessful party does so. In the absence of such an error, the successful party, having sustained the burden and expense of trial, may keep the benefit of the verdict.
14. **Trial: Rules of Evidence: Expert Witnesses.** Only if the admission or exclusion of the expert's testimony did not affect the result of the trial unfavorably for the party against whom the ruling was made will a court's abdication of its gatekeeping duty be deemed nonprejudicial. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
15. **New Trial: Appeal and Error.** Partial retrials are permissible if it clearly appears from the record that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. If the issues are so interwoven that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, then a retrial on all interwoven issues is required.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed as modified.

John P. Weis for appellant.

Ronald R. Kappelman, of Banks, Johnson, Colbath, Sumner & Kappelman, for appellee.

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

CONNOLLY, J.

The appellant, Dona R. Zimmerman, alleged that she was injured in an automobile collision caused by the negligence of the appellee, Nedra J. Powell. Over Zimmerman's objection, the court allowed Powell's accident reconstructionist, Jubal D. Hamernik, Ph.D., to testify that Zimmerman was driving above the speed limit when the vehicles collided. The jury determined that Zimmerman had suffered $17,851.18 in damages, but also determined that she bore 49 percent of the responsibility for the collision and reduced the damages to $9,104.10.

Under Neb. Rev. Stat. § 27-702 (Reissue 1995), the trial court must act as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). The issue is whether the court made adequate findings on the record to show that it had performed its gatekeeping duty when it allowed Hamernik to testify. Because the court's findings were inadequate, we determine that it failed to perform its gatekeeping duty. However, because Hamernik's testimony did not taint the issue of damages, we do not remand for a new trial. Instead, in accordance with concessions made by Powell in her appellate brief, we modify the verdict so that Zimmerman recovers 100 percent of the amount of her damages.

FACTUAL BACKGROUND

The collision occurred at an intersection in Scottsbluff, Nebraska. A yield sign at the intersection required east-west traffic to yield to north-south traffic. As Powell approached the intersection from the west, Zimmerman approached from the south. Although Powell claims that she looked to the south before entering the intersection, she admitted that she did not see Zimmerman. Powell proceeded into the intersection without yielding. Zimmerman slammed on her brakes, but was unable to stop. She struck Powell's vehicle in the center of the passenger's side.

The main focus of this appeal is whether Zimmerman was driving above the 25-m.p.h. speed limit before braking. According to Zimmerman, she approached the intersection at 15 to 20 m.p.h. She testified that before entering the intersection she slowed down and looked both ways. She noticed Powell's vehicle approaching from the left. Zimmerman claims that she could tell that Powell had not seen her and that Powell was not slowing down. Zimmerman then slammed on her brakes, leaving 20 feet of tread marks.

To contradict Zimmerman's claim that she was traveling below the speed limit, Powell relied on Hamernik's testimony. Hamernik has a master's degree in civil engineering from the University of Connecticut and a doctorate in computational mechanics from the University of Colorado. He is employed by a private engineering firm and has analyzed over 2,000 accidents.

Hamernik testified that before braking, Zimmerman was traveling 30 to 35 m.p.h. He also testified that at impact, Zimmerman was traveling at 15 m.p.h. and Powell was traveling at 20 to 22 m.p.h.

Because of our ruling, we need not recite in detail Hamernik's testimony on how he arrived at his opinions. Instead, we include only what is necessary to provide context.

Generally, two well-accepted methods for determining the speed of a vehicle involved in a collision are used within the engineering community: the conservation of momentum method and the conservation of energy method. Hamernik claims to have relied on both methodologies. However, to provide reliable results, each method must have reliable underlying data. Despite 160 pages of testimony, it is not clear what data Hamernik needed to make his calculations reliable, nor is it clearly explained where he got the data that he used. Apparently, some of the data were derived from simulations he ran using a "state-of-the-art" computer program called Human Vehicle Environment (HVE).

PROCEDURAL BACKGROUND

Before trial, Zimmerman moved to prevent Hamernik from testifying at trial. In the motion, Zimmerman argued that Hamernik's opinions were unreliable under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (*Schafersman I*). In *Schafersman I*, we adopted the framework for evaluating expert testimony set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny.

Seven days before trial, the court held a hearing under Neb. Rev. Stat. § 27-104 (Reissue 1995), i.e., a *Daubert* hearing, to determine whether to admit Hamernik's opinions. After both parties presented evidence, the court took the motion under advisement.

Before opening statements, the court told the parties that it was still unsure whether Hamernik's testimony concerning the vehicles' speeds would be admissible. Specifically, the court noted that it was not convinced that either the HVE software or the manner in which Hamernik had used it was reliable. The court, as we understand it, ruled that Hamernik could not give

his opinions on the vehicles' speeds at trial unless Powell first established the methodology's reliability.

At trial, Hamernik offered further explanation of the methodologies he used to determine how fast the vehicles were going before the collision. This testimony is set out later in our opinion. The court, over Zimmerman's objection, then allowed Hamernik to testify about Zimmerman's speed before braking. In overruling the objection, the court did not explain why it had determined that Hamernik's trial testimony had led it to conclude that his opinions were admissible under *Daubert/Schafersman I*.

We note that in addition to testifying about the vehicles' speeds, Hamernik had intended to offer opinions on the magnitude of force Zimmerman would have experienced in the collision and how this force compared to other forces experienced in human volunteer testing. Before trial, the court specifically ruled that Hamernik could not compare the force Zimmerman experienced to forces experienced in human volunteer testing. Furthermore, although the court did not preclude Hamernik from giving his opinion as to the magnitude of force experienced by Zimmerman, Hamernik did not give any such testimony at trial. Thus, we are concerned only with Hamernik's testimony about the vehicles' speeds.

The jury determined that both Powell and Zimmerman had been negligent and that Zimmerman had suffered $17,851.18 in damages from the collision. In determining the negligence of the parties, the jury concluded that Zimmerman bore 49 percent of the responsibility for the collision and reduced the damages that she could recover by that percentage. Zimmerman appealed.

ASSIGNMENTS OF ERROR

Zimmerman assigns, reordered and consolidated, that the court erred in (1) failing to find that Hamernik's opinions were unreliable under *Daubert/Schafersman I*, (2) refusing to exclude Hamernik's testimony as a sanction for Powell's filing of untimely discovery disclosures, (3) setting the *Daubert* hearing 7 days before trial, (4) placing the burden on Zimmerman at the *Daubert* hearing to show that Hamernik's testimony was unreliable, (5) refusing to allow Zimmerman's counsel to fully explore the basis for the assumptions made by Hamernik at the

Daubert hearing, (6) failing to announce its ruling on the *Daubert* motion until the trial's commencement, and (7) allowing the jury to view computer-generated simulations of the collision prepared by Hamernik.

Zimmerman also assigns as error that the jury's verdict is contrary to the evidence. However, this assignment of error is not argued and therefore we do not consider it on appeal. See *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003).

STANDARD OF REVIEW

The standard of review is discussed in the analysis portion of our opinion.

ANALYSIS

DAUBERT/SCHAFERSMAN I GATEKEEPING DUTY

Section 27-702 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."

Until our decision in *Schafersman I*, we had employed the *Frye* test to evaluate the admissibility of an expert's testimony. Under the *Frye* test, when an expert relied on a scientific principle or discovery, the proponent of the expert's testimony had to prove that the principle or discovery had "'gained general acceptance in the particular field in which it belongs.'" *Schafersman I*, 262 Neb. at 222, 631 N.W.2d at 870 (2001) (quoting *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

[1,2] In *Schafersman I*, however, we abandoned the *Frye* test and, in its place, adopted the framework 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). Under the *Daubert/Schafersman I* framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Carlson v. Okerstrom*, 267 Neb. 397,

675 N.W.2d 89 (2004). 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 I.* In addition, 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. *Carlson, supra.*

Both the *Daubert/Schafersman I* framework and the *Frye* framework seek to exclude unreliable expert testimony, but they go about this in significantly different ways. The *Frye* framework relies on the expert's field to weed out unreliable testimony. The focus is on whether " 'an asserted expertise [i]s believed valid by enough asserted experts. If enough of them [think] so—that is, if the asserted expertise enjoys "general acceptance"— then a court [i]s justified in concluding that the proffered testimony [i]s valid.' " *Schafersman I*, 262 Neb. at 229, 631 N.W.2d at 875 (quoting Michael J. Saks, *The Aftermath of* Daubert*: An Evolving Jurisprudence of Expert Evidence*, 40 Jurimetrics J. 229 (2000)).

By contrast, under the *Daubert/Schafersman I* framework, the burden to weed out unreliable expert testimony is placed directly on the trial court. While general acceptance remains a valid factor to be considered, the trial court cannot "piggyback" its decision onto someone else's judgment. *Schafersman I*, 262 Neb. at 229, 631 N.W.2d at 875. The trial court must ultimately determine whether the expert has presented enough "rational explanation and empirical support" to justify admitting his or her opinion into evidence. *Id.* at 231, 631 N.W.2d at 876. In short, the *Frye* framework relies exclusively on the assessment of the testifying expert's field; the *Daubert/Schafersman I* framework relies on the trial court.

[3] We recognize that the *Daubert/Schafersman I* framework will frequently require trial judges to grapple with unfamiliar scientific principles. Our recent decisions involving *Daubert/Schafersman I* have shown that this can be a daunting task. Accord *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995). However, a trial court need not discover the "essence of 'science' " each time it is confronted

with expert testimony. *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996). Rather, the objective of the trial court's gatekeeping responsibility is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Schafersman v. Agland Coop*, 268 Neb. 138, 681 N.W.2d 47 (2004).

[4,5] The trial court's task is also eased by the *Daubert/Schafersman I* framework, which recognizes a range of reasonable methods exists for distinguishing reliable expert testimony from false expertise. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (Scalia, J., concurring). Thus, the trial court has considerable discretion in deciding what procedures to use in determining if an expert's testimony satisfies *Daubert/Schafersman I*. See, *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003); *Elsayed Mukhtar v. Cal. State University, Hayward*, 299 F.3d 1053 (9th Cir. 2002), *amended* 319 F.3d 1073 (2003). The trial court's discretion further extends to deciding what factors are reasonable measures of reliability in each case. See, *Kumho Tire Co., supra*. Cf. *Schafersman I*, 262 Neb. at 233, 631 N.W.2d at 877 (setting out factors that might bear on gatekeeping determination but noting "[t]hese factors are . . . neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances").

[6,7] The trial court's discretion, however, is not boundless. As we have discussed, the *Daubert/Schafersman I* framework relies on trial courts to determine whether an expert's testimony is reliable. Once a party opposing an expert's testimony has sufficiently called into question "the testimony's factual basis, data, principles, [or] methods, or their application . . . the trial judge *must* determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." (Emphasis supplied.) *Schafersman I*, 262 Neb. at 233, 631 N.W.2d at 877. In other words, the trial court does not have the discretion to abdicate its gatekeeping duty. See, *Kumho Tire Co., supra* (Scalia, J., concurring); *Elsayed Mukhtar, supra*;

Goebel v. Denver and Rio Grande Western R.R. Co., 215 F.3d 1083 (10th Cir. 2000).

[8] A necessary component of this rule is that a trial court, when faced with a *Schafersman I* objection, "must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." *Goebel*, 215 F.3d at 1088. See, also, *Elsayed Mukhtar, supra*; 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.02[6][c] (2d ed. 2004); 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6266 (Supp. 2002). After a sufficient *Daubert/Schafersman I* objection has been made, the losing party is entitled to know that the trial court has engaged in the " 'heavy cognitive burden' " of determining whether the challenged testimony was relevant and reliable, as well as a record that allows for meaningful appellate review. *Schafersman I*, 262 Neb. at 229, 631 N.W.2d at 875. "Without specific findings or discussion on the record, it is impossible . . . to determine whether the [trial] court ' "carefully and meticulously" review[ed] the proffered scientific evidence' or simply made an off-the-cuff decision to admit expert testimony." *Goebel*, 215 F.3d at 1088 (quoting *U.S. v. Call*, 129 F.3d 1402 (10th Cir. 1997)).

[9] This does not mean, however, that trial courts must " 'recite the *Daubert* standard as though it were some magical incantation.' " *Goebel*, 215 F.3d at 1088 (quoting *Ancho v. Pentek Corp.*, 157 F.3d 512 (7th Cir. 1998)). Nor does it infringe on the discretion that the trial court has in making the *Daubert/Schafersman I* determination. But it does mean that the trial court "must explain its choices" so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise. Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, in Reference Manual on Scientific Evidence 29 (Federal Judicial Center 2d ed. 2000).

[10] Thus, the record must include more than a recitation of the *Daubert/Schafersman I* boilerplate and a conclusory statement that the challenged evidence is or is not admissible. A trial court adequately demonstrates that it has performed its

gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination. See 29 Wright & Gold, *supra*. When the court fails to make these findings, it abdicates its gatekeeping function. *Goebel, supra*.

STANDARD OF REVIEW

[11,12] We digress momentarily to discuss our standard of review. Generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). But an abuse of discretion standard is only applicable where the trial court has discretion to act or refrain from acting. As noted previously, a trial court does not have the discretion to abdicate its gatekeeping function. Thus, an appellate court reviews the record de novo to determine whether a trial court has abdicated its *Schafersman I* gatekeeping function. See *Goebel v. Denver and Rio Grande Western R. Co.*, 346 F.3d 987 (10th Cir. 2003). When the trial court has not abdicated its *Schafersman I* gatekeeping function, an appellate court reviews the trial court's decision to admit or exclude the evidence for an abuse of discretion.

TRIAL COURT'S INADEQUATE *DAUBERT/SCHAFERSMAN I* RULING

Here, the trial court held a *Daubert* hearing to determine whether to admit Hamernik's opinions. At the hearing, both parties offered evidence on the admissibility of Hamernik's testimony, and the trial court took under advisement Zimmerman's motion to exclude the testimony. Before opening statements, the court told the parties:

> I am concerned because of the way Dr. Hamernik did [his analysis] was that he used simulation software to try to replicate the actual action in the accident, and the Court is told virtually nothing about the simulation software except that its name is HVE and it's software manufactured by General Dynamics, but its reliability I know nothing about.

> . . . I am not satisfied that Dr. Hamernik is absolutely precluded from having sufficient basis to do this scientifically validly [sic] just because I don't know yet about this simulation software, whether it was reliable and whether it will accomplish some deficiencies that Dr. Hamernik had on inputs . . . . Although it's my suspicion that this simulation software was used and that is how he came up with the numbers that he did for things like the angle of the cars after the impact, the distance traveled after impact and so forth.
>
> So what I'm going to do is I'm going to exercise the discretion in [Neb. Evid. R.] 705, which requires that the expert disclose the underlying facts or data before I will allow his opinion. And some things that I am deficient in the underlying facts or data to make it scientific is any explanation about this software, how the simulations work, whether it's reliable and whether it's reliable enough information for Dr. Hamernik to fill in the variables that he is missing when he then seeks to reconstruct the accident.
>
> Some of those variables that he is missing is [sic], as a I said, what the angle the car was after impact, he's coming up with that from simulation software, in my opinion. Whether those will fill in the holes or not will just depend on his testimony at trial whether he'll be able to establish it. I am requiring that he give that underlying facts and data before I will allow his opinion.

Later, the following exchange occurred between the parties' counsel and the court:

> [Counsel for Powell]: Okay. Just so I'm understanding the Court's ruling, [Hamernik] can come in and testify about the speeds, it's the forces that you are needing more information about? In other words, the fact that he has calculated . . . Zimmerman going 30 miles an hour before she applied her brakes, the fact that he has calculated she was going 15 miles an hour at impact, those are fine opinions?
>
> THE COURT: I'm sure if you check, the 15-mile-an-hour impact comes from a myriad of assumptions through simulations that he ran, and he needs to establish that those

simulations were both reliably done and can furnish sufficient reliable information for him to conclude what that speed was at impact, because my hunch is that he is simply taking some photographs and estimating crush from photographs to get the speed at impact, and that may not be sufficiently reliable. That certainly is not sufficiently reliable according to some of these reconstructionists, you would need more information than a photograph of one car to come up with all of that.

. . . .

THE COURT: I don't know how he's doing it. I know he did not explain it at the hearing.

[Counsel for Powell]: You need for him to explain to you in more detail how he had done his calculations?

THE COURT: No, explain to the jury. I'm going under [rule] 705, so I am requiring that he furnish to the jury, quote, "the underlying facts and data," before I will let him give any opinions at all. I'm not precluding him from giving any opinions, I'm requiring that he'll have to establish the underlying facts and data to show that his opinion is scientifically valid and it's not just a product of a whole bunch of unreliable simulations.

[Counsel for Zimmerman]: I just have a little question. You don't want the information outside the presence of the jury before?

THE COURT: No, no, no. We've had plenty here. We spent almost a day and I still have no idea about this simulation software, not one word except the name.

. . . .

THE COURT: I think he's qualified as a witness, I'm not concerned about that, I'm concerned whether he had enough data to put into the formulas to get the conclusions he did.

. . . .

THE COURT: I'm not limiting his testimony, I'm just saying it's going to be done in a certain way. He'll just give his opinions and then go on, and in cross-examination to reveal its basis he'll have to establish the basis first, which is somewhat opposite from the way experts are allowed to testify many times.

> [Counsel for Powell]: Okay.
>
> THE COURT: If it doesn't work out to make it scientifically reliable . . . you will be in the spot of having to tell the jury in opening you think you'll get those opinions in and discover you were not able to, I can't prejudge that.

These pretrial discussions show that the court believed—and we think correctly—that it did not yet have enough information to determine whether Hamernik's opinions on the vehicles' speeds were admissible under *Daubert/Schafersman I*. Specifically, the court expressed concern whether the HVE software was reliable and whether the manner in which Hamernik used it was reliable. The court, as we understand it, ruled that before Hamernik could offer his opinions at trial, Powell would have to establish the reliability of Hamernik's methodology.

At trial, Hamernik gave the following explanation of the HVE program:

> There's software out there . . . produced by . . . Engineering Dynamics Corporation . . . . They've developed programs over the years to look at both energy and momentum for car crashes. This program was initially developed by . . . the National Highway Transportation Safety Administration, but now has evolved over the years into a program that they call HVE, which stands for Human Vehicle Environment.
>
> This program matches the physics associated with a car crash and it models both energy and momentum simultaneously at the same time. When you use this program, you produce something called a simulation. It looks like an animation, but it's a simulation, actually how the two cars interact and move and the damage that will result.
>
> So I've checked my hand calculations with HVE. In fact, I ran HVE to get a ball park idea of how the cars would likely move, conducted hand calculations, then subsequent to that I've done complete simulations of this accident.
>
> . . . .
>
> [HVE] is state of the art. It was first released in 1992. Engineering Dynamics has been producing software for, I think, 25 years now. HVE is the latest and greatest of their software, it's well-validated. They've ran hundreds of tests that actually take cars and crash them at known

> speeds, measure the change in speed, the post-impact speeds and where the cars end up at rest. Their software matches all these values within 1 percent. It's a very scientific, very accurate program.
>
> You can recreate accidents with this program, but you cannot make it do whatever you want, you have to obey the law of physics. And the input will — in this accident, if you know how the cars roughly approach, you can calculate where the cars should end up, it will actually show you that. It will predict the damage, so you can modify the speeds until the damage matches and also that the cars end up where they're supposed to end up, roughly.
>
> . . . .
>
> . . . You can't violate the laws of physics. This program takes in account the entire forces of the roadway, the locations of what we call the center of gravity. . . .
>
> HVE takes into account the location of the [center of gravity], the weights of the vehicle and the tire forces with the roadway and the stiffnesses or the strength of the vehicles so you can account for the deformation and the post-impact movement, and they all have to match in order to get the right solution. I cannot simply say that I want the car to end up here and this car ends up here, it won't do that unless I obey the laws of physics.

Shortly after this testimony, Powell's counsel asked Hamernik what opinions he had reached as a result of his accident reconstruction. Zimmerman's counsel objected, and the court stated, "Overruled. You may give your opinions." The transcript also contains a written order, noting that Zimmerman's "*Daubert* Motion was . . . overruled in part."

The record, however, contains only the court's conclusion; there is no analysis. The court should have explained why Hamernik's trial testimony was sufficient to show that HVE and the manner in which he used it were reliable. For example, if the court believed that HVE was reliable because Hamernik suggested that it was widely accepted as quality software within the engineering community, it should have said so. Because the court failed to explain its reasoning, we conclude that it abdicated its gatekeeping duty.

PREJUDICE TO ZIMMERMAN

[13] Our conclusion that the trial court erred by failing to perform its gatekeeping duty does not, however, end our inquiry. Not every error justifies a new trial; only an error which is prejudicial to the rights of the unsuccessful party does so. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). In the absence of such an error, the successful party, having sustained the burden and expense of trial, may keep the benefit of the verdict. *Id.* Thus, the question is whether the court's failure to perform its gatekeeping duties resulted in prejudice to Zimmerman.

Some courts have held that when the trial court fails to make the required findings, the appellate court should conduct the *Daubert/Schafersman I* analysis on the appellate record. See, *Kinser v. Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999), *abrogated on other grounds, Weisgram v. Marley Co.*, 528 U.S. 440, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000); *Tanner v. Westbrook*, 174 F.3d 542 (5th Cir. 1999), *superseded on other grounds*, Fed. R. Evid. 103(a). If the appellate court concludes that the evidence in the appellate record justifies the admission or exclusion of the evidence, then, according to these courts, no prejudice results to the complaining party. See *Kinser, supra.*

But in our view, this improperly shifts the gatekeeping duty from trial courts to appellate courts. There is a reason that trial courts, rather than appellate courts, bear the gatekeeping duty. "Trial courts . . . have a much broader 'array of tools which can be brought to bear on the evaluation of expert testimony' . . . ." 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.02[6][c] at 702-29 (2d ed. 2004). An appellate court is limited to a cold record and thus is not in a position to perform the gatekeeping role in a manner that is fair to the parties. Cf., *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000); *Cortés-Irizarry v. Corporación Insular*, 111 F.3d 184 (1st Cir. 1997).

[14] Thus, when a trial court fails to make the requisite findings, the losing party will usually be prejudiced. Only if the admission or exclusion of the expert's testimony did not affect the result of the trial unfavorably for the party against whom the ruling was made will a court's abdication of its gatekeeping

duty be deemed nonprejudicial. See, *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003); *Elsayed Mukhtar v. Cal. State University, Hayward*, 299 F.3d 1053 (9th Cir. 2002), *amended* 319 F.3d 1073 (2003).

Here, Powell conceded that she failed to yield at the intersection, but argued that Zimmerman was contributorily negligent because she was driving above the speed limit as she approached the intersection. The jury agreed and concluded that Zimmerman bore 49 percent of the responsibility for the collision. Because Hamernik's testimony was the centerpiece of Powell's comparative negligence defense, we cannot say that the admission of his testimony did not affect the result of the trial.

REMEDY

Zimmerman contends that we should remand for a new trial on all issues. Powell argues that Hamernik's testimony was relevant only to the issues whether Zimmerman was contributorily negligent and the apportionment of damages and that therefore Zimmerman cannot relitigate her damages. We agree with Powell.

[15] Partial retrials are permissible if it clearly appears from the record that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999). If the issues are so interwoven that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, then a retrial on all interwoven issues is required. *Id.*

The jury verdict form specifically shows that the jury determined (1) both Powell and Zimmerman had been negligent, (2) Zimmerman incurred $17,851.18 in damages, and (3) Zimmerman was 49 percent responsible for the collision and thus could recover only 51 percent of her damages, or $9,104.10. Hamernik's testimony focused on whether Zimmerman was driving above the speed limit before she began braking. Thus, the court's failure to conduct its gatekeeping function tainted the jury's determination of Zimmerman's contributory negligence and the apportionment of damages. If we were to remand, these issues would have to be retried. Moreover, because a jury would be unable to apportion damages without an understanding of

Powell's negligence, the issue of Powell's negligence would also have to be retried.

Hamernik's testimony, however, did not taint the issue of Zimmerman's damages. Zimmerman and her family and friends testified about her injuries and how those injuries had affected her life. Medical personnel who had treated her also testified, and she introduced a summary of her medical bills into evidence. To counter Zimmerman's evidence on damages, Powell relied on cross-examination and a private investigator to rebut Zimmerman's evidence of damages. Hamernik's testimony did not touch on Zimmerman's damages; he focused only on how fast the vehicles were going before the collision.

Nor can we say that if we were to grant a retrial, the issue of damages would be so interwoven with the negligence and apportionment damages issues that a partial retrial would be unfair to either party. We fail to see how knowledge of the nature and extent of Zimmerman's injuries would be necessary to resolve those issues.

Thus, were we to remand, we would limit the issues to be tried to the parties' negligence and the apportionment of damages. Partial remand, however, is not required. Because of our conclusion that Zimmerman cannot relitigate damages, the most she could recover at a new trial would be $17,851.18. In her brief, Powell conceded that if we were to decide that the court erred in allowing Hamernik to testify, "there is no reason to retry the case and this Court can modify the Judgment . . . so as to allow [Zimmerman] the sum of $17,851.18, the sum awarded by the jury before any deduction for [Zimmerman's] contributory negligence." Brief for appellee at 45. In other words, instead of remanding for a new trial, Powell has asked us to modify the judgment so as to give Zimmerman the best possible result she could receive if the case were retried. Because of this concession, we choose not to remand for a new trial. Instead, we modify the judgment so that Zimmerman receives $17,851.18.

Zimmerman's Other Assignments of Error

Finally, it is necessary for us to comment on Zimmerman's other assignments of error. In each of these, she argued that the

court erred in allowing Hamernik to testify. As a result, if we were to conclude that any of these assignments of error had merit, the remedy would be the same as what we have already granted to Zimmerman. As a result, we need not address Zimmerman's remaining assignments of error.

CONCLUSION

We conclude that the trial court failed to perform its *Daubert/Schafersman I* gatekeeping function and that this error tainted the issues of contributory negligence and apportionment of damages, but not the amount of Zimmerman's damages. Because of the concessions made by Powell, however, we do not remand for a partial new trial. Instead, we modify the court's judgment so that Zimmerman receives $17,851.18.

AFFIRMED AS MODIFIED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT, AND PAUL STEENSON, APPELLANT, V. ALLSTATE INSURANCE COMPANY ET AL., APPELLEES AND CROSS-APPELLEES.

684 N.W.2d 14

Filed July 23, 2004. No. S-03-443.

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. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
3. ____: ____. Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong.
4. **Declaratory Judgments.** Whether to entertain an action for declaratory judgment is within the discretion of the trial court.
5. **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, 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.
6. **Service of Process: Notice.** In the case of substitute service by publication under Neb. Rev. Stat. § 25-519 (Cum. Supp. 2000), service is not "made" until the third

publication, and prior to the third publication, a defendant is "not served" under Neb. Rev. Stat. § 25-217 (Reissue 1995).

7. **Service of Process: Notice: Time.** Where service by publication has been approved, a defendant is not served within 6 months from the date the petition was filed under Neb. Rev. Stat. § 25-217 (Reissue 1995) unless the third publication under Neb. Rev. Stat. § 25-519 (Cum. Supp. 2000) has occurred within 6 months from the date the petition was filed.
8. **Declaratory Judgments.** Actions for declaratory judgment are not to be entertained where another equally serviceable remedy has been provided by law, nor are they to be used to create new causes of action or cumulative remedies.
9. ____. In declaratory judgment actions, relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Michael G. Reilly, of Reilly, Petersen, Hannan & Dreismeier, P.L.C., and Diana J. Vogt for appellant.

Waldine H. Olson, of Nolan, Olson, Hansen, Fieber & Lautenbaugh, L.L.P., for appellee Allstate Insurance Company.

Mark C. Laughlin and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee State Farm Mutual Automobile Insurance Company.

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

MILLER-LERMAN, J.

INTRODUCTION

This is an appeal from the March 19, 2003, order of the district court for Douglas County dismissing this declaratory judgment action. The action was brought by appellee and cross-appellant, State Farm Mutual Automobile Insurance Company (State Farm), against appellees Allstate Insurance Company (Allstate), H. Michael Harvey, and Gerald Campbell and appellant, Paul Steenson. Steenson was realigned with State Farm during the trial proceedings.

In its petition for declaratory relief, filed under Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995 & Cum. Supp. 2000) on

November 2, 2001, State Farm sought a declaration of the rights, duties, and obligations of the parties arising from an automobile accident which occurred on July 28, 1997, in Omaha, Nebraska. It is agreed that Campbell, driving a vehicle owned by Harvey and insured by Allstate, collided with a vehicle owned by Steenson and insured by State Farm. Campbell was uninsured. Allstate denied coverage on the basis that Campbell was driving without Harvey's permission.

In a separate personal injury action (the underlying action) filed on July 26, 2001, Steenson sought damages from Campbell or alternatively from State Farm under uninsured motorist insurance provisions. State Farm was served and appeared in the underlying action. Steenson published service on Campbell on January 16, 23, and 30, 2002.

In the instant declaratory judgment case, the district court concluded that service on Campbell had not been completed within 6 months of the filing of the petition in the underlying action, as required by Neb. Rev. Stat. § 25-217 (Reissue 1995), and that the underlying action stood dismissed. The district court reasoned that because there was "no viable claim" against Campbell and because Allstate had no obligation to defend or indemnify, there was no justiciable controversy involved in the instant declaratory judgment action. Based on this reasoning, the district court dismissed this declaratory judgment action. Steenson appealed, and State Farm cross-appealed.

For the reasons outlined below, we agree with the district court's legal conclusion that because Campbell was not served within 6 months of the date the petition was filed in the underlying action, the underlying action stood dismissed as to Campbell. However, given the fact of State Farm's appearance in the underlying action, we disagree with the district court's further determination that the entire underlying action stood dismissed. We disagree with the district court's reasoning that there are no justiciable issues among the parties, which reasoning was the basis for dismissal of this declaratory judgment action. In particular, whether Campbell was driving with Harvey's permission has not been adjudicated, and resolution of this issue bears on resolution of Steenson's claim for uninsured motorist coverage from State Farm, which claim remains an actual unresolved controversy.

However, because the pending underlying action between Steenson and State Farm provides an equally serviceable remedy for resolution of the remaining issues between the parties, we do not find error in the district court's dismissal of this declaratory judgment action. Thus, for reasons other than those asserted by the district court, we affirm.

BACKGROUND

On July 28, 1997, Steenson was involved in an automobile accident with Campbell. At the time of the accident, Campbell was driving a vehicle owned by Harvey. Steenson's vehicle was insured by State Farm, Harvey's vehicle was insured by Allstate, and Campbell had no automobile insurance. Steenson made a claim on Allstate for the injuries he received as a result of the accident. Allstate investigated the claim and determined that Campbell was driving Harvey's vehicle without permission. Allstate denied the claim. Steenson then made a claim against State Farm, asserting that Campbell was an uninsured motorist.

On July 26, 2001, Steenson filed the underlying action against Campbell in the district court for Douglas County, seeking damages for the personal injuries he received in the July 28, 1997, automobile accident. This lawsuit is governed by a 4-year statute of limitations. See Neb. Rev. Stat. § 25-207 (Reissue 1995). The parties agree that the underlying action was later amended to include Steenson's claim against State Farm for uninsured motorist coverage, and State Farm appeared in the action.

On November 2, 2001, State Farm filed the instant declaratory judgment action against Allstate, Harvey, Campbell, and Steenson, seeking judgment in its favor declaring the following:

> 1. That no State Farm automobile insurance coverage exists under the uninsurance provision of the State Farm Policy for Defendant Steenson in any way relating to or arising out of the collision;
>
> 2. That State Farm is under no duty to either defend or pay any judgment in regard to the [underlying action]; and
>
> 3. That the terms of the Allstate policy obligate Allstate to indemnify and defend Campbell;
>
> 4. That Allstate wrongfully denied liability under the terms of its policy with Harvey;

5. Any other further just and equitable relief which this Court deems necessary.

During the trial court proceedings, Steenson became realigned with State Farm.

On November 14, 2001, in the underlying action, Steenson filed a motion for order for substitute and constructive service of process upon Campbell, whom the parties could not locate. See Neb. Rev. Stat. § 25-519 (Cum. Supp. 2000). On November 16, the district court granted the motion and authorized service on Campbell by publication. Publication occurred on January 16, 23, and 30, 2002.

The declaratory judgment action was scheduled for trial on February 10, 2003. On February 8, Allstate filed a motion seeking dismissal of the declaratory judgment action. Allstate claimed that Steenson had not obtained service of process upon Campbell within 6 months of the filing of the underlying action and that by operation of law under § 25-217, the underlying action stood dismissed. Allstate claimed that the declaratory judgment action had become nonjusticiable as a result of the dismissal of the underlying action. In sum, Allstate asserted that as a result of the dismissal of the underlying action, the issues in the declaratory judgment action had been rendered moot and required dismissal.

The parties waived their right to a jury trial, and two evidentiary hearings were conducted. At the first hearing, certain documentary exhibits, including the insurance policies, were received into evidence. One exhibit shows that Harvey had become an incapacitated person and that letters of guardianship had been issued. No live testimony was offered. The deposition of Campbell was received in lieu of live testimony. The substance of his testimony was that Harvey had given Campbell permission to drive Harvey's vehicle on July 28, 1997. At the second hearing, Allstate offered and the court received into evidence several pleadings and other documents relating to service of process in the underlying action. Included in these exhibits were the petition filed in the underlying action, the motion for constructive service, the order on constructive service, and the affidavit of proof of service.

At the conclusion of the second hearing, the district court stated that Campbell had not been served within 6 months of the filing of the petition in the underlying action and that as a result, the underlying action "was automatically dismissed pursuant to Neb. Rev. Stat. 25-217." In its written order, the district court stated that the court in the underlying action "lost jurisdiction to make any further orders, except those orders necessary to formalize the dismissal of the action." The district court also observed that the statute of limitations on the potential action by Steenson against Campbell had run on July 28, 2001, 2 days after the petition in the underlying action was filed. The district court reasoned that because there was no longer any claim against Campbell in the underlying action for which Allstate could be obligated to defend or indemnify, the declaratory judgment action which, in part, sought a declaration of rights concerning Campbell and Allstate should be dismissed. The district court dismissed the declaratory judgment action.

Steenson appealed, and State Farm cross-appealed.

ASSIGNMENTS OF ERROR

Steenson assigns nine errors. We find no merit to any of the errors assigned. Our discussion below is limited to Steenson's claim, restated, that the district court erred when it concluded that when only two of the three publications required under § 25-519 had occurred within the 6 months' timeframe provided in § 25-217, Campbell had not been served.

State Farm, as appellee and cross-appellant, assigns four errors, all essentially claiming that the district court erred in dismissing the declaratory judgment action.

STANDARDS 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. *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003).

[2] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the

trial court. *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003).

[3] Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[4] Whether to entertain an action for declaratory judgment is within the discretion of the trial court. *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *Continental Western Ins. Co. v. Farm Bureau Ins. Co.*, 2 Neb. App. 527, 511 N.W.2d 559 (1994).

[5] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains 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. *Schafersman v. Agland Coop, ante* p. 138, 681 N.W.2d 47 (2004).

ANALYSIS

Appeal: Failure to Complete Service by Publication.

Referring to the underlying action, Steenson claims on appeal that service by publication on Campbell two times within 6 months from the date the petition was filed was satisfactory service and that the district court erred when it concluded that the underlying action stood dismissed under § 25-217. Contrary to Steenson's claim, we agree with the district court's legal conclusion that in order for service by publication to be complete, all three publications must be accomplished within 6 months from the date the petition was filed and that service on Campbell was not complete. However, because State Farm had appeared in the underlying action, that action stood dismissed only as to Campbell and was not entirely dismissed as the district court stated.

The underlying action was filed on July 26, 2001, and we, therefore, refer to the statutory pleading procedure in effect at that time. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2003). The following statutes control our resolution of the legal question at issue:

At the time the declaratory judgment action was filed, § 25-217 provided: "An action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed." Section 25-519 provided:

> The publication shall be made once in each week for three successive weeks in some newspaper printed in the county where the petition is filed if there is any printed in such county and, if there is not, in some newspaper printed in this state of general circulation in that county. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer.

We also refer to Neb. Rev. Stat. § 25-821 (Reissue 1995), since repealed, in our consideration of this case. See 2002 Neb. Laws, L.B. 876 (operative date January 1, 2003). Section 25-821 provided: "The answer or demurrer of the defendant shall be filed within thirty days after service of the summons and petition or completion of service by publication. The reply or demurrer of the plaintiff shall be filed within fifteen days after the filing of the answer."

It is undisputed that the petition in the underlying action was filed on July 26, 2001, and service by publication occurred on January 16, 23, and 30, 2002. Although the third publication occurred later than 6 months after the petition was filed, under a variety of theories such as tolling and liberal construction of statutory language, Steenson invites this court to conclude that service on Campbell was sufficient for purposes of § 25-217. We reject this invitation.

The controlling statutes allow for service by publication which "shall be made once in each week for three successive weeks," § 25-519, and that "[t]he action shall stand dismissed . . . as to any defendant not served within six months from the date the petition was filed," § 25-217. We read §§ 25-217 and 25-519 in pari materia. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004).

[6,7] Looking at the language in §§ 25-217 and 25-519, it is clear that service on a defendant is not an evolutionary process

as urged by Steenson, but, rather, an event accomplished at a definite point in time. In the case of substitute service by publication under § 25-519, service is not "made" until the third publication, and prior to the third publication, a defendant is "not served" under § 25-217. Our reading of these statutes is consistent with § 25-821, which, at the time the underlying case was commenced, provided for filing an answer or demurrer within 30 days after "completion of service by publication." Section 25-821 indicates that service must be completed, not partially completed, to be effective. In the case of service by publication, service is completed upon the third publication. Giving the controlling statutes their plain meaning, we conclude that where service by publication has been approved, a defendant is "not served within six months from the date the petition was filed" under § 25-217 unless the third publication under § 25-519 has occurred within 6 months from the date the petition was filed. The district court's conclusion to the same effect was correct, and Steenson's assignment of error challenging this conclusion is without merit.

Although the district court correctly concluded that Campbell had not been served in the underlying action, the district court further stated in its March 19, 2003, order that

> on January 26, 2002, the [underlying] action . . . was automatically dismissed pursuant to §25-217, Neb. Rev. Stat. After that date, said action was no longer pending and the District Court of Douglas County, Nebraska, lost jurisdiction to make any further orders, except those orders necessary to formalize the dismissal of the action.

The latter pronouncement by the district court in which it concluded that the underlying action in its entirety was no longer pending was error.

Under § 25-217, a case stands dismissed "as to any defendant not served within six months from the date the petition was filed." We read the expression "any defendant" to mean that dismissal is indicated as to that defendant who is "not served" but not all defendants in the action. See Webster's Third New International Dictionary of the English Language, Unabridged 97 (1993) (defining "any" as "one or some indiscriminately of whatever kind"). Referring to the underlying action, it is agreed that State

Farm had appeared in the underlying action and that although Campbell was not served, dismissal of State Farm was not warranted under § 25-217. Because the district court believed that the underlying action stood dismissed, it reasoned that there was no justiciable controversy among or between the parties in the declaratory judgment action and dismissed the instant declaratory judgment case. The district court's reasoning was flawed.

In the underlying personal injury action, Steenson sought to recover from Campbell, the driver of the other vehicle, who was allegedly at fault. Had Campbell been served and if it was established that he was negligent, and it was further established that Campbell was driving Harvey's vehicle with permission, recovery may well have been forthcoming from Harvey's insurance carrier, Allstate. If, however, it was established that Campbell was driving Harvey's vehicle without permission, then Steenson would seek recovery from his own carrier, State Farm, based on uninsured coverage. Because Campbell was not served within 6 months of the date the petition was filed in the underlying action, and given that the 4-year statute of limitations on Steenson's negligence claim against Campbell has run, Steenson cannot recover from Campbell on the basis alleged in his petition in the underlying action and Harvey's insurance carrier, Allstate, has no obligation to defend or indemnify. However, because the issue of whether or not Campbell was driving Harvey's vehicle with permission has not been determined, and the resolution of this issue impacts State Farm's obligation to Steenson, there remains a real controversy between Steenson and State Farm. The issue of whether Campbell was driving Harvey's vehicle with permission is implicit in the underlying action, and such action is still pending between Steenson and State Farm.

Cross-Appeal: Dismissal of Declaratory Judgment Action.

The district court dismissed the instant declaratory judgment action. On cross-appeal, State Farm claims that this ruling was error and asks this court to reverse the district court's order of dismissal so that the permission issue can be resolved herein. In this regard, State Farm notes that the issue of whether Campbell was driving Harvey's vehicle with permission awaits resolution and that the district court's statement that there were

no justiciable issues was error. We agree with State Farm that the permission issue remains viable. However, in view of the pendency of the underlying action between Steenson and State Farm, the resolution of this issue need not occur in the declaratory judgment action. Thus, for reasons other than those asserted by the district court, we reject State Farm's argument and affirm the district court's dismissal of this declaratory judgment action. See *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003) (stating that when record adequately demonstrates that trial court's decision is correct, although such correctness is based on ground or reason different from that assigned by trial court, appellate court will affirm).

[8] Section 25-21,154 provides as follows: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." We have long stated that this provision indicates discretionary rather than mandatory power. *Haynes v. Anderson*, 163 Neb. 50, 77 N.W.2d 674 (1956). Under Nebraska appellate authority, whether to entertain an action for declaratory judgment is within the discretion of the trial court. *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *Continental Western Ins. Co. v. Farm Bureau Ins. Co.*, 2 Neb. App. 527, 511 N.W.2d 559 (1994). We have said that actions for declaratory judgment are not to be entertained where another equally serviceable remedy has been provided by law, nor are they to be used to create new causes of action or cumulative remedies. *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *Continental Western Ins. Co. v. Farm Bureau Insurance Co., supra.*

[9] In *Sim v. Comiskey*, 216 Neb. 83, 85, 341 N.W.2d 611, 612 (1983), relying on *Strawn v. County of Sarpy*, 146 Neb. 783, 21 N.W.2d 597 (1946), we stated that the rule in declaratory judgment actions is that "relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action." In view of the failure of service on Campbell and the consequent relief afforded to Allstate in the underlying action, the controversy has been distilled to

Steenson and State Farm involving the permission issue. Because the underlying action was pending at the commencement of this declaratory judgment action and the availability of witnesses is comparable in both cases, the permission issue can be adjudicated in the underlying action and the declaratory judgment action should not be entertained. See *id.* Accordingly, the district court's dismissal of the declaratory judgment action, albeit for different reasons, was correct and is affirmed.

CONCLUSION

Finding no merit to the appeal or cross-appeal, the district court's dismissal of this declaratory judgment action is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

CHIEF INDUSTRIES, INC., A DELAWARE CORPORATION, APPELLANT AND CROSS-APPELLEE, V. GREAT NORTHERN INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

683 N.W.2d 374

Filed July 23, 2004. No. S-03-619.

1. **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 trial court.
2. **Insurance: Contracts.** An insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law. The nature of the duty to defend is defined by the insurance policy as a contract.
3. ____: ____. Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured.
4. **Insurance: Liability.** Because the duty to defend and the duty to indemnify are separate and distinct obligations, it is possible, if perhaps not commonplace, for an insurer to limit its duty to defend without simultaneously limiting its duty to indemnify.
5. **Insurance: Contracts.** Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed in part, and in part reversed and remanded with directions.

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

Cathleen H. Allen and Roger G. Steele, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Chief Industries, Inc. (Chief), filed a declaratory judgment action pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995) against Great Northern Insurance Company (Great Northern) in the district court for Hall County. Chief sought a declaration that Great Northern had an obligation pursuant to an insurance policy issued to Chief to provide coverage and to defend Chief in a lawsuit filed against Chief by Arabian Agricultural Services Company (ARASCO) in the U.S. District Court for the District of Nebraska (federal case). The district court found that Great Northern had no duty to defend Chief in the federal case. After judgment was entered against Chief in the amount of $1,466,507 in the federal case, the district court in the instant case determined that the Great Northern policy provided coverage in the sum of $87,927 for part of the damages but that the remaining damages were excluded from coverage under the policy. Chief appeals, and Great Northern cross-appeals. We determine that there is no merit to the appeal and that two aspects of one assignment of error in the cross-appeal have merit. Accordingly, we affirm in part, and in part reverse and remand with directions.

II. STATEMENT OF FACTS

Chief previously appealed, and Great Northern cross-appealed, a November 5, 1998, order in which the district court had determined that Great Northern had no duty to defend in the federal

case and that the Great Northern policy upon proper proof could provide coverage for unspecified damages not otherwise excluded. *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000) (*Chief Indus. I*). In our opinion in that appeal, we stated the facts of the case as follows:

> Chief is a Delaware corporation with its principal place of business in Grand Island, Nebraska. Great Northern is an insurance corporation organized and existing under the laws of the State of Minnesota and is authorized to do business in the State of Nebraska. The insurance policy at issue herein was issued to Chief by Great Northern for the period of July 1, 1995, to July 1, 1996.
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> In 1991, Chief Industries U.K. Ltd. (Chief U.K.), a wholly owned subsidiary of Chief's, entered into a contract with ARASCO to manufacture, sell, and supervise the construction of 16 grain bins and related equipment in Damman, Saudi Arabia. Chief U.K. subsequently fulfilled the terms of its contract with ARASCO.
>
> ARASCO alleges that the grain bins collapsed on October 10, 1995, causing damage to the grain bins, equipment attached to the grain bins, and the grain which was stored in the bins. On October 11, Chief notified its insurance agent of the occurrence, and Great Northern commenced an investigation. On October 24, ARASCO made written claims against Chief and Chief U.K. for the damages caused by the collapse of the grain bins.
>
> On November 17, 1997, Great Northern notified Chief of its position regarding coverage of the claims made by ARASCO. Great Northern acknowledged that there had been an "occurrence" during the policy period which resulted in "property damage." However, it concluded that the exclusions set forth in paragraphs 12 and 13 of the insurance contract applied to exclude property damage to the named insured's products arising out of such products or any part of such products. Great Northern's position was that since a large portion of the claim by ARASCO involved the value of the 16 grain bins, the value of the bins was excluded from coverage. Great Northern informed Chief that exclusion 13 precluded coverage for property damage to "work performed

by or on behalf of [Chief] arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." The letter stated that some of the damage alleged may have arisen out of work performed under the guidance of a foreman hired by Chief U.K. Great Northern also informed Chief that the insurance contract did not apply to suits brought in the United States. In addition, Chief was informed that "should Arasco pursue this claim further, or file suit on this matter in the United States, this amendment would be triggered and you would have to look to your domestic liability insurer for coverage."

On April 2, 1998, ARASCO sued Chief in the U.S. District Court for the District of Nebraska, asserting damages arising out of the collapse of the grain bins. The lawsuit set forth claims for breach of contract, breach of express warranties, and products liability. When Chief notified Great Northern of the lawsuit, Great Northern denied coverage and declined to investigate or defend Chief in the lawsuit.

On May 6, 1998, Chief commenced this action for declaratory judgment in the district court for Hall County, Nebraska. Pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995), Chief requested the trial court to declare the rights of the parties arising by virtue of the insurance contract. Specifically, Chief requested (1) that a judgment be entered declaring that Great Northern's insurance policy provides coverage for the claims that ARASCO asserts in its lawsuit against Chief; (2) that Great Northern be ordered to investigate and provide Chief a defense in that lawsuit and be ordered to pay any judgment entered against Chief in that lawsuit to the limits of coverage provided in the contract; (3) that Chief be awarded as damages the expenses, including attorney fees, it incurs in defending the lawsuit brought against it by ARASCO and in bringing the declaratory judgment action; and (4) such other relief as the trial court deemed proper.

Both parties moved for summary judgment. The trial court determined that there were two issues presented: whether the insurance contract provided coverage and whether Great Northern had a duty to defend.

The applicable portion of the policy provided: "The Company will pay on behalf of the **Insured** all sums which the **Insured** shall become obligated to pay as damages by reason of liability to which this insurance applies, imposed by law or assumed by the **Insured** under any written or oral contract, for **bodily injury** or **property damage**, caused by an **occurrence** and **personal injury** or **advertising injury** caused by an offense occurring during the policy period." The exclusions section of the policy provided: "**This insurance does not apply:** . . . . 12. to **property damage** to the **named insured's** products arising out of such products or any part of such products; 13. to **property damage** to work performed by or on behalf of the **named insured** arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith."

The trial court concluded there had been an "occurrence" during the policy period which resulted in "property damage" and that the policy applied to at least part of Chief's claims. Thus, the trial court found that Chief was entitled to partial summary judgment, declaring that coverage attached to losses, not otherwise excluded, from the occurrence on October 10, 1995.

Next, the trial court addressed whether Great Northern had a duty to defend. Amendment No. 4 to the insurance policy, entitled "Foreign Suits Only Amendment," stated in part: "This insurance applies anywhere in the world, except the United States of America, its territories and possessions, Puerto Rico and Canada. The settlement, investigation and defense provisions of this contract shall only apply to claims made or suits brought within the policy territory herein defined."

In interpreting the contract, the trial court relied upon the policy language which this amendment replaced. The original contractual provision stated: "This insurance applies anywhere in the world except the United States, its territories and possessions, Puerto Rico and Canada. The settlement, investigation and defense provisions of this contract shall apply to claims made or suits brought anywhere in the world provided such suit emanates from damages caused by an

occurrence or offense arising from the **Insured's** operations in the policy territory described above."

The trial court concluded that since the lawsuit had been filed outside the policy territory, i.e., within the United States, Great Northern had no duty to defend.

The trial court stated: "The end result is that although coverage attaches under the policy to any covered losses occurring as the result of the collapsed grain bins, defendant does not have a duty to defend lawsuits filed within the United States. Whether defendant will ultimately pay the claims of that lawsuit depends on whether such losses are covered under the policy. The Court at this time makes no determination at [sic] to the extent of losses which may be payable under the policy."

Chief Indus. I, 259 Neb. at 773-76, 612 N.W.2d 227-29.

We concluded in *Chief Indus. I* that the district court had not fully decided the issue of whether the insurance policy provided coverage and that the November 5 order was not a final, appealable order. We therefore dismissed Chief's appeal and Great Northern's cross-appeal. *Id.*

On February 5, 2001, the jury in ARASCO's federal case against Chief rendered a verdict in ARASCO's favor. The jury found damages in the following amounts:

A. The amount for damage to the silos themselves:
$1,378,580.00

B. The amount for damages incurred as a direct result of the collapse, such as clean-up and inspection, but excluding the damage to the silos themselves (as provided in A above) and to other property (as provided in C below):
$43,420.00

C. The amount for damages to other property incurred as a direct result of the collapse, such as to out-buildings damaged at the collapse site (excluding the amounts provided in A and B above);
$4500.00

D. The amount for increased business expenses:
$40,007.00

E. The amount of lost profits:
$0.00

Based on the jury verdict, the U.S. District Court for the District of Nebraska entered judgment in favor of ARASCO in the federal case in the amount of $1,466,507. The judgment was affirmed on appeal to the U.S. Court of Appeals for the Eighth Circuit. *Arabian Agri. Servs. Co. v. Chief Indus., Inc.*, 309 F.3d 479 (8th Cir. 2002).

On November 21, 2002, the parties in this case submitted evidence to the district court on the issue of the amount of damages determined in the federal case which may be covered under the insurance policy Great Northern issued to Chief. A set of 11 stipulated facts was entered. In an order filed April 7, 2003, the court reiterated its conclusion that the "Foreign Suits Only Amendment" relieved Great Northern of its duty to defend Chief in ARASCO's federal case, but the court concluded that the amendment did not exclude coverage for damages awarded to ARASCO unless that coverage was otherwise excluded under the policy.

With regard to coverage, the court determined that the damages of $1,378,580 under subparagraph A of the jury's verdict for "damage to the silos themselves" were excluded from coverage under the policy exclusion for "**property damage** to the **named insured's** products arising out of such products or any part of such products." The court rejected Chief's arguments that "the named insured's products" did not include: (1) component parts manufactured by third parties, which Chief asserted totaled $173,011 of the purchase price paid by ARASCO, and (2) component parts manufactured by Caldwell Manufacturing Co. (Caldwell), a division of Chief, which Chief asserted totaled $297,717 of the purchase price paid by ARASCO. The court noted that the policy defined "**named insured's** products" as "goods or products manufactured, sold, handled or distributed by the **named insured** or by others trading under [its] name." The court found that "all of the components manufactured by third parties were sold, handled and distributed to ARASCO by Chief or Chief U.K." and that "Caldwell's products are Chief's products and damages to products manufactured by either entity should be treated the same under the terms of the policy." In reaching this determination, the court focused on policy language to the effect that the exclusion was for property damage to

the named insured's products arising out of such products " '**or any part of such products**' " (emphasis supplied by district court) and therefore found that "[a]ll of the silos and all of the parts manufactured by [Chief's] Caldwell [d]ivision are the named insured's products for purposes of coverage" and concluded that damage to the Caldwell components was not covered under the policy.

The court found that the damages which were contained in the jury verdict and listed in subparagraphs B for resulting damages, C for damages to other property, and D for increased business expenses were covered under the policy. The court found that the $43,420 in damages listed in subparagraph B was composed of $7,100 for the cost of inspecting the wreckage and $36,320 for the cost of removing the silo wreckage from the site and that these amounts constituted covered consequential damages related to the property damage to the silos. The court found that the $4,500 in damages listed in subparagraph C was for damage to other property and consisted of damage to an outbuilding which was covered. The court found that the $40,007 in damages listed in subparagraph D for increased business expenses was composed of $29,871 for removing corn stored in the silos from the wreckage site and $10,136 in increased rail contract penalties and that these amounts were covered. The court therefore concluded that Chief should recover the sum of $87,927 and entered judgment against Great Northern and in favor of Chief in that amount. Chief appeals, and Great Northern cross-appeals.

III. ASSIGNMENTS OF ERROR

In its appeal, Chief asserts that the district court erred in (1) concluding that the foreign suits only amendment excused Great Northern from defending Chief in the federal case filed by ARASCO, (2) concluding that the policy excluded coverage for property damage to components that were manufactured by third parties, and (3) concluding that the policy excluded coverage for property damage to components manufactured by Caldwell.

In its cross-appeal, Great Northern asserts that the district court erred in (1) failing to conclude that the foreign suits only amendment precluded coverage for all damages and (2) concluding that the policy covered damages under subparagraph B

of the jury's verdict for inspection and removal of silo wreckage and under subparagraph D of the jury's verdict for removal of corn from the collapsed silo.

IV. STANDARD OF REVIEW

[1] 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 trial court. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

V. ANALYSIS

Both the appeal and cross-appeal raise issues regarding both the application of the foreign suits only amendment and the application of the coverage provisions of the policy. We, therefore, consider all arguments as to each of these two topics together.

1. Foreign Suits Only Amendment

(a) Chief's Appeal: Foreign Suits Only Amendment and Duty to Defend

Chief asserts that the district court erred in ruling that where the federal case was brought in the United States and thus outside the defined policy territory, Great Northern had no duty to defend. We conclude that the foreign suits only amendment excused Great Northern of its duty to defend once the federal case was brought in the United States and that the district court was correct in so ruling.

[2] An insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). The nature of the duty to defend is defined by the insurance policy as a contract. *Id.* Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning. *Id.*

The foreign suits only amendment states in part: "This insurance applies anywhere in the world, except the United States of America, its territories and possessions, Puerto Rico and Canada. The settlement, investigation and defense provisions of this contract shall only apply to claims made or suits brought within the policy territory herein defined." The district court noted that this

amendment replaced language which had previously provided, " 'The settlement, investigation and defense provisions of this contract shall apply to claims made or suits brought anywhere in the world provided such suit emanates from damages caused by an **occurrence** or offense arising from the **Insured's** operations in the policy territory described above.' " See *Chief Indus. I*, 259 Neb. at 775-76, 612 N.W.2d at 229.

Chief argues that the district court erred by focusing on the fact that ARASCO brought suit in the United States, which was admittedly outside the policy territory. Chief argues that the foreign suits only amendment comes into play under two scenarios, one of which occurred in this case and is the scenario which Chief asserts requires a duty to defend. For purposes of this case, Chief claims that under the policy, the duty to defend provisions become relevant where either a claim is made or, alternatively, a suit is brought. Chief argues that where a claim is first made inside the policy territory, a duty to defend arises, notwithstanding the fact that a suit is subsequently brought outside the policy territory, which suit in the absence of an antecedent claim made within the policy territory would not give rise to a duty to defend. Chief asserts that although in this case suit was brought in the United States, the defense provisions apply because a claim had been made either in Saudi Arabia, where the accident occurred, or in the United Kingdom, where Chief U.K. is located, and that both Saudi Arabia and the United Kingdom are within the policy territory. In this regard, we note that the parties stipulated that ARASCO made claims against Chief U.K. on October 24, 1995, and that the federal case was not filed until April 2, 1998.

We reject Chief's arguments. Whether or not a claim was made within the policy territory, the defense obligation that Great Northern sought to avoid through the policy language herein was the defense of a suit outside the policy territory, such as in this case where the suit was brought in the U.S. District Court for the District of Nebraska. For completeness, we note that the parties stipulated in this case that Great Northern undertook to investigate the claim originally made by ARASCO, and the costs of such investigation are not at issue herein.

In its November 5, 1998, order, the district court declared that Great Northern had "no duty to defend the lawsuit filed in

the United States District Court for the District of Nebraska." Although Chief argues that the federal case was a mere continuation of the claim that was made within the policy territory and that the investigation of the claim was tantamount to undertaking the defense, the district court correctly read the clear language of the foreign suits only amendment to provide that once the suit was filed outside the policy territory, Great Northern had no duty to defend. It is fundamental that a duty to defend arises when a lawsuit has been filed. See *Mapes Indus. v. United States F. & G. Co.*, 252 Neb. 154, 560 N.W.2d 814 (1997) (in determining whether defense duty exists, insurer's duty to defend action against insured must, in first instance, be measured by allegations of petition against insured). The language of the foreign suits only amendment is consistent with this principle. The district court did not err in concluding that Great Northern had no duty to defend in the federal case, and we reject Chief's first assignment of error.

(b) Great Northern's Cross-Appeal:
Foreign Suits Only Amendment and Coverage

Great Northern argues in its cross-appeal that because the federal case was brought in the United States, the foreign suits only amendment not only provides that Great Northern has no duty to defend, it also excludes coverage for all damages. Because the foreign suits only amendment pertains only to the duties to investigate, settle, and defend, we conclude that it does not limit the duty to indemnify for occurrences within the policy territory.

The foreign suits only amendment provides, "This insurance applies anywhere in the world, except the United States of America, its territories and possessions, Puerto Rico and Canada. The settlement, investigation and defense provisions of this contract shall only apply to claims made on suits brought within the policy territory herein defined." The losses at issue in the present case arose from an incident which occurred in Saudi Arabia. The incident therefore occurred within the policy territory, and the indemnification provisions of the insurance policy apply. The second sentence of the amendment limits only the duties to investigate, settle, and

defend claims made and suits brought outside the policy territory; it does not limit coverage for occurrences within the policy territory, and it does not nullify the duty to indemnify resulting from a court judgment.

[3,4] Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured. *R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002). We have observed that generally, an insurer's duty to defend is broader than its duty to indemnify. See *Ohio Cas. Inc. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). However, we have also stated that because contract terms govern the duty, an insurance policy may relieve the insurer of any duty to defend. *Id.* Because the duty to defend and the duty to indemnify are separate and distinct obligations, it is possible, if perhaps not commonplace, for an insurer to limit its duty to defend without simultaneously limiting its duty to indemnify. See *American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881 (9th Cir. 2003). We conclude that although the clear language of the policy in the present case relieved Great Northern of its duty to defend the federal case, nothing in the policy language simultaneously relieved Great Northern of its duty to indemnify Chief for losses otherwise within the coverage of the policy and established by a court judgment.

The district court did not err in concluding that the foreign suits only amendment did not exclude coverage otherwise provided under the policy, and we therefore reject Great Northern's first assignment of error in its cross-appeal.

2. Other Coverage Provisions

(a) Chief's Appeal: Coverage for Damage to Components Manufactured by Third Parties and by Caldwell

Chief asserts that the district court erred in declaring that the entire $1,378,580 awarded in the federal case for "damage to the silos themselves" under subparagraph A of the jury's verdict was excluded from coverage under the policy's exclusion for damage

to "the named insured's products arising out of such products or any part of such products." Chief specifically argues that the policy covered damage to two categories of components within the grain silo structure: (1) components manufactured by third parties, totaling $173,011 of the purchase price paid by ARASCO, and (2) components manufactured by Caldwell, totaling $297,717 of the purchase price paid by ARASCO. We note that under an amendment to the policy, "Caldwell Manufacturing Co." is a named insured. Upon review of the law and the facts, we reject Chief's arguments with respect to both categories and conclude that the district court did not err in concluding that property damage to such components was not covered under the policy.

With respect to components manufactured by third parties, Chief argues that because such components were not manufactured by Chief, they were not "the named insured's products." Chief asserts that such components were neither integral nor essential to the operation of the grain bin and could be used as distinct products apart from the Chief-manufactured product sold to ARASCO.

[5] Although such components were not manufactured by Chief, we note that the policy defined "**named insured's** product" to include products "manufactured, sold, handled or distributed by the **named insured** or by others trading under [its] name." Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001).

The district court noted that the Chief U.K. managing director testified that all of the component parts manufactured by third parties were " 'sold, distributed, and handled' " by Chief and Chief U.K. The evidence shows that Chief's arrangement with ARASCO was that Chief would assemble all the component parts to construct the grain bin structures and that ARASCO would pay Chief for all components used in the structures. We determine that the district court did not err in finding that under the definition provided in the policy, the components manufactured by third parties were "the named insured's products."

With respect to both the components manufactured by third parties and the components manufactured by Caldwell, Chief

further argues that damage to such components was not excluded from coverage because the policy excluded coverage for damage to the named insured's products only when the damage arose out of the specific products themselves. Chief argues that because the damage in this case arose out of problems in components manufactured by Chief itself and not out of those components manufactured by others, damage to those components manufactured by third parties and by Caldwell was not excluded from coverage.

In response to this argument, the district court noted that the policy language provided that the exclusion was for property damage to the named insured's product arising out of such products "'**or any part of such products**'" (emphasis supplied by district court). The district court determined that the exclusion applied to damage to all components because under the language of the policy, the exclusion applied whether the damage arose out of the components themselves or out of other components that were part of the named insured's products. It is evident that the district court found the entire structure to be Chief's products and therefore concluded that damage to the entire structure was excluded from coverage regardless of what specific component gave rise to the damage.

We find no error in the district court's findings that the components manufactured by third parties and by Caldwell were part of "the **named insured's** products" under the policy and that damage to such components was excluded under the policy exclusion for damage to the named insured's products arising out of such products or any part of such products. We therefore reject Chief's second and third assignments of error, and we affirm that portion of the district court's order in which it held that the entire $1,378,580 awarded for "damage to the silos themselves" under subparagraph A of the jury's verdict was excluded from coverage.

(b) Great Northern's Cross-Appeal: Coverage for Costs of Clean-up, Inspection, and Removal of Corn

Great Northern asserts in its cross-appeal that the district court erred in ruling that the following damages awarded by the jury in the federal case were covered under the policy: (1) costs

of $7,100 awarded under subparagraph B for inspection of the silo wreckage, (2) costs of $36,320 awarded under subparagraph B for removing the silo wreckage from the site of the silo collapse, and (3) costs of $29,871 awarded under subparagraph D for removal of corn from the wreckage site. Because we conclude that the items of damage under subparagraph B were excluded from coverage under the policy, we agree with Great Northern that the district court erred when it declared there was coverage for these items. We conclude, however, that the district court did not err in concluding that there was coverage for the costs of $29,871 awarded under subparagraph D for removal of corn.

The policy provides coverage for bodily injury or property damage and defines "property damage" as follows:

> 1. physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
>
> 2. loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an **occurrence** during the policy period.

Great Northern argues that damages for inspection of the silo wreckage, for removal of the silo wreckage, and for removal of the corn from the wreckage site were not "property damage" under the policy definition and therefore were not covered under the policy. Chief argues in response that such damages are covered because they are consequential damages of the property damage to the silo.

We note that, as discussed above, the policy excludes coverage for "property damage to the named insured's products arising out of such products or any part of such products." The silo was "the **named insured's** product" under the policy, and it follows that the categories of damage listed under subparagraph B, that is, inspection and removal of the silo wreckage, are damages necessarily related to the silo. Therefore, even if these damages are considered "property damage" under the policy definition, coverage would be excluded because such damage would be considered "property damage to the named insured's products." We conclude that the district court erred in holding that the policy covered these damages.

However, the cost to remove corn from the wreckage site, awarded under subparagraph D of the jury verdict in the federal case, was not an item of damage related to property damage to the named insured's product because the corn was not Chief's product. We determine that the district court could reasonably find that the dispersal of corn on the wreckage site, which necessitated the corn's removal, falls within the policy's definition of "property damage" either as "physical injury" to the corn or as "loss of use" of the corn. Therefore, the district court did not err in concluding that the policy issued by Great Northern covered the costs of $29,871 awarded under subparagraph D for removal of corn from the wreckage site.

Great Northern does not dispute the district court's decision that damages of $4,500 under subparagraph C of the jury award in the federal case for damage to an outbuilding and damages of $10,136 awarded under subparagraph D for increased rail contract penalties were covered under the policy and, therefore, these amounts were properly included in the district court's award. As discussed above, we also conclude that the district court did not err in concluding that there was coverage for the costs of $29,871 awarded under subparagraph D for the removal of corn. The awards for $4,500, $10,136, and $29,871 were properly ordered, and we therefore affirm the district court's award related to these three items of damage, but reverse the district court's decision that the remaining damages awarded under subparagraph B discussed above were covered under the policy. The award is, therefore, ordered reduced to $44,507.

VI. CONCLUSION

We conclude that the district court did not err in concluding that the foreign suits only amendment excused Great Northern of its duty to defend Chief once ARASCO brought suit in the United States and its further conclusion that the amendment did not excuse Great Northern of its duty to indemnify Chief for losses otherwise covered under the policy. We also conclude that the district court did not err in finding that the policy excluded coverage for damage to components manufactured by third parties and for damage to components manufactured by Caldwell. We further conclude that the district court did not err in finding

that the policy covered damages of $4,500 to the outbuilding, damages of $10,136 for the increase in rail contract penalties, and damages of $29,981 for removal of corn from the wreckage site. We therefore affirm the district court's rulings on these issues. However, we conclude that the district court erred in finding that the policy covered damages of $43,420 for inspection of the silo and associated cleanup costs. We reverse the district court's rulings in these respects. We affirm in part, and in part reverse and remand with directions to the district court to enter judgment in Chief's favor in the amount of $44,507, representing damage to the outbuilding, the increase in rail contract penalties, and the cost of removal of corn from the site.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

LORI PLOWMAN, APPELLANT, V.
LAURIE PRATT ET AL., APPELLEES.

684 N.W.2d 28

Filed July 30, 2004. No. S-02-1357.

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. **Animals: Landlord and Tenant: Liability: Negligence.** As a general rule, a landlord is liable for injuries caused by the attack of a tenant's dog only where the landlord had actual knowledge of the dangerous propensities of the dog and where the landlord, having that knowledge, nevertheless leased the premises to the dog's owner or, by the terms of the lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power.
4. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

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

G. Rosanna Moore, of the Law Offices of Ronald J. Palagi, P.C., for appellant.

Patricia McCormack, of Hillman, Forman, Nelsen, Childers & McCormack, and Michael W. Pirtle for appellee Joe Semin.

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

PER CURIAM.

In 1998, Lori Plowman was attacked and injured by Laurie Pratt's pit bull terrier. Seeking compensation for her injuries, Plowman filed an action against Pratt and Pratt's landlord, Joe Semin. Semin moved for summary judgment, and the district court granted Semin's motion. The court, relying on our decision in *McCullough v. Bozarth*, 232 Neb. 714, 442 N.W.2d 201 (1989), in which we held that a landlord is liable for injuries caused by the attack of a tenant's dog only when the landlord has "actual knowledge" of the dangerous propensities of that dog, determined that Semin did not have actual knowledge of the dog's dangerous propensities. On appeal, Plowman asks us to overrule our decision in *Bozarth* and adopt a standard wherein a landlord is liable for the injuries caused by the attack of a tenant's dog if the landlord "knew or should have known" of the dog's dangerous propensities. Because we believe that *Bozarth* continues to represent the better rule, we decline to do so.

FACTUAL AND PROCEDURAL HISTORY

At the time of the attack, Plowman was employed by the Metropolitan Utilities District (M.U.D.) as a meter reader in Omaha, Nebraska. Plowman's job required her to walk through certain assigned neighborhoods and record usage on gas and water meters. On December 2, 1998, Plowman was walking her route, reading meters. While in the yard of Pratt's neighbor, Plowman saw Pratt and her young daughter standing on their porch, and asked Pratt if she could come over and read the relevant meters. Pratt agreed, and Plowman began walking toward Pratt's house. At this time, Plowman noticed Pratt's dog. The dog, a 1½-year-old pit bull terrier, then jumped off the porch and began running toward Plowman. Pratt told Plowman not to worry because the dog was a puppy and would not do anything.

When the dog reached Plowman, it leapt toward her face. Plowman attempted to block the dog's attack with her right hand, and the dog bit Plowman's right hand, ripping a splint off Plowman's previously broken finger. The dog then attacked Plowman's left hand, pulling her onto the ground and dragging her toward Pratt's house. Screaming, Pratt ran toward Plowman. Eventually, Pratt was able to pull the dog off of Plowman and took it into the house. Plowman suffered serious injuries as a result of the attack and was taken to the hospital.

At the time of the attack, Pratt was renting the home she lived in from Semin. The rental agreement that Pratt signed prohibited pets on the premises without Semin's prior written consent. In November 1998, approximately 2 weeks prior to the attack, Pratt traveled to St. Joseph, Missouri, to pick up the dog. Pratt did not receive Semin's written consent concerning the dog prior to moving it into her home. In their deposition testimony, Pratt and her mother agreed that Pratt's mother called Semin, asking him if Pratt could temporarily house a dog until a permanent home for it could be found. According to the Pratts, Semin consented to the temporary arrangement. In his deposition, Semin did not remember receiving a call from Pratt's mother. However, Semin did acknowledge that he saw the dog while at the residence one day and stated that he understood that the dog would be living with Pratt on a temporary basis.

After the attack, Plowman sued Pratt, Semin, and M.U.D. Plowman alleged that Pratt was strictly liable for her injuries under Neb. Rev. Stat. § 54-601 (Reissue 1998) and that Semin was negligent in failing to (1) inspect the premises in order to determine that it was free of dangerous conditions, (2) maintain the premises in a reasonably safe condition, and (3) warn Plowman of the hazardous condition of which Semin knew or should have known about. Plowman included M.U.D. in the suit because it had a subrogated interest in her workers' compensation benefits.

Semin moved for summary judgment against Plowman. The district court granted Semin's motion, concluding that Semin did not have actual knowledge of the dog's dangerous propensities, and therefore, under *McCullough v. Bozarth*, 232 Neb. 714, 442 N.W.2d 201 (1989), could not be found liable for

Plowman's injuries. Thereafter, the court granted Plowman's motion for summary judgment against Pratt as to liability. After a trial on damages, the court entered a judgment against Pratt in the sum of $84,237.

Plowman filed a timely notice of appeal. Thereafter, Plowman filed a motion to bypass the Nebraska Court of Appeals. We granted Plowman's motion, and this appeal followed.

ASSIGNMENTS OF ERROR

Plowman assigns that the district court erred in (1) failing to apply a "known or should have known" standard of care, (2) granting Semin's motion for summary judgment, and (3) excluding exhibit 11.

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. *Tri-Par Investments v. Sousa, ante* p. 119, 680 N.W.2d 190 (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.*

ANALYSIS

ACTUAL KNOWLEDGE STANDARD

[3] In *McCullough v. Bozarth, supra*, the mother of a child who was bitten by a dog owned by a tenant brought an action against the tenant's landlord. The district court sustained the defendant landlord's motion for summary judgment and dismissed the plaintiff's action. *Id.* After noting that only the owner of a dog can be strictly liable under § 54-601, we reviewed a number of cases from other jurisdictions concerning when a landlord could be held liable for injuries caused by a tenant's dog. Based on our review, we held that

> as a general rule, a landlord is liable for injuries caused by the attack of a tenant's dog only where the landlord had *actual knowledge* of the dangerous propensities of the dog

> and where the landlord, having that knowledge, nevertheless leased the premises to the dog's owner or, by the terms of the lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power.

(Emphasis supplied.) 232 Neb. at 724-25, 442 N.W.2d at 208.

Plowman acknowledges that *Bozarth* represents the current state of our law. However, Plowman asks us to overrule *Bozarth* and lower the threshold for a finding of negligence on the part of a landlord. Specifically, Plowman asks us to hold that a landlord is liable for injuries caused by the attack of a tenant's dog if the landlord *knew or should have known* of the dangerous propensities of the dog. According to Plowman, such a standard would prevent landlords from blindly ignoring the unreasonable risks created by their tenants' dogs. Moreover, Plowman contends that lowering the standard for negligence under these circumstances would not be unfairly burdensome to landlords because landlords are already required to warn against other foreseeable dangers on their property. In other words, Plowman appears to be suggesting that our standard premises liability jurisprudence should extend to the instant case. See, e.g., *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004); *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

We decline Plowman's invitation. The standard announced in *Bozarth* is well supported in that it has been adopted in a number of other jurisdictions, and appears to represent the majority rule. See, e.g., *Twogood v. Wentz*, 634 N.W.2d 514 (N.D. 2001); *Strunk v Zoltanski*, 62 N.Y.2d 572, 468 N.E.2d 13, 479 N.Y.S.2d 175 (1984); *Batra v. Clark*, 110 S.W.3d 126 (Tex. App. 2003); *Giaculli v. Bright*, 584 So. 2d 187 (Fla. App. 1991); *Compagno v. Monson*, 580 So. 2d 962 (La. App. 1991); *Goddard by Goddard v. Weaver*, 558 N.E.2d 853 (Ind. App. 1990); *Gibbons v. Chavez*, 160 Ariz. 73, 770 P.2d 377 (Ariz. App. 1988); *Szkodzinski v Griffin*, 171 Mich. App. 711, 431 N.W.2d 51 (1988); *Lucas v. Kriska*, 168 Ill. App. 3d 317, 522 N.E.2d 736, 119 Ill. Dec. 74 (1988); *Vigil By and Through Vigil v. Payne*, 725 P.2d 1155 (Colo. App. 1986); *Palermo v. Nails*, 334 Pa. Super. 544, 483 A.2d 871 (1984); *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (1975); Annot., 87 A.L.R. 4th 1004 (1991).

We continue to believe that the actual knowledge standard is appropriate because it holds landlords responsible for failing to act against certain known, unreasonable risks, while recognizing that, as a general rule, tenants enjoy a level of privacy in their rental premises. As noted elsewhere:

> [A] duty of care may not be imposed on a landlord without proof that he knew of the dog and its dangerous propensities. Because the harboring of pets is such an important part of our way of life and because the exclusive possession of rented premises normally is vested in the tenant, we believe that *actual* knowledge and not mere constructive knowledge is required. For this reason . . . a landlord is under no duty to inspect the premises for the purpose of discovering the existence of a tenant's dangerous animal; only when the landlord has actual knowledge of the animal, coupled with the right to have it removed from the premises, does a duty of care arise.

(Emphasis in original.) *Uccello v. Laudenslayer*, 44 Cal. App. 3d at 514, 118 Cal. Rptr. at 748.

The actual knowledge standard represents the better rule, and nothing in our recent premises liability cases would alter the reasoning in *McCullough v. Bozarth*, 232 Neb. 714, 442 N.W.2d 201 (1989). Plowman's first assignment of error is without merit.

SUMMARY JUDGMENT

In her second assignment of error, Plowman argues that the district court erred in determining that there was no genuine issue of material fact as to whether Semin had actual knowledge of the dog's dangerous propensities. As Plowman notes, the record establishes that the dog "fiercely" barked at Semin one day while Semin repaired a ceiling fan in the rental property. However, "[i]t is not . . . reasonable to attribute vicious propensities to a dog merely because he barks at strangers . . . ." *Royer v. Pryor*, 427 N.E.2d 1112, 1117 (Ind. App. 1981). Normal canine behavior, such as a dog barking at a stranger, is not sufficient to infer that a landlord has actual knowledge of a dog's dangerous propensities. The district court did not err in concluding that Semin did not have actual knowledge of the dog's dangerous propensities.

EXHIBIT 11

At the hearing on Semin's motion for summary judgment, Plowman offered exhibit 11, which consisted of an affidavit by an employee of the law firm representing Plowman and a number of news articles from the Internet regarding the dangerousness of pit bull terriers. Semin objected to the admission of the attachments, claiming that they contained hearsay and lacked proper foundation. After taking the objection under advisement, the district court sustained Semin's objection. On appeal, Plowman argues that exhibit 11 should have been admitted into evidence.

[4] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). See, also, Neb. Rev. Stat. § 27-801(3) (Reissue 1995). Plowman contends that exhibit 11 was not offered for the truth of the matter asserted, but, rather, "to justify and support a change of public policy." Brief for appellant at 16. Although Plowman's brief is silent as to what policy change exhibit 11 supported, a review of the bill of exceptions makes it clear that exhibit 11 was offered in an attempt to persuade the court that it should not apply the actual knowledge standard enunciated in *Bozarth*.

In any event, that exhibit 11 was intended to support a change in public policy is irrelevant because Plowman admits that exhibit 11 was offered into the "record as further evidence [of] the danger of vicious dogs." Brief for appellant at 16. Thus, it is clear that exhibit 11 was offered to prove the truth of the matters asserted within the articles; namely, that pit bull terriers are vicious dogs. The articles constitute inadmissible hearsay, and the district court did not err in refusing to admit exhibit 11 into evidence.

CONCLUSION

For the foregoing reasons, the district court's order granting summary judgment in favor of Semin and against Plowman was correct and is hereby affirmed.

AFFIRMED.

McCORMACK, J., not participating.

JERRY J. WEBB, APPELLEE, v. AMERICAN EMPLOYERS GROUP, AN INSURANCE COMPANY AUTHORIZED AND DOING BUSINESS IN THE STATE OF NEBRASKA, APPELLANT.

684 N.W.2d 33

Filed July 30, 2004. No. S-03-954.

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. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
5. **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.
6. **Actions: Judgments: Final Orders.** For the purposes of Neb. Rev. Stat. § 25-1902 (Reissue 1995), a special proceeding includes every special statutory remedy which is not in itself an action. A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding within the meaning of § 25-1902. A special proceeding which affects a substantial right is, by definition, not part of an action.
7. **Trial: Evidence: Records: Appeal and Error.** The admission of evidence which is primarily duplicative of other evidence admitted into the record is not reversible error.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Roger R. Holthaus and Joseph L. Howard, of Holthaus Law Offices, P.C., L.L.O., for appellee.

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

STEPHAN, J.

Jerry J. Webb brought an action against American Employers Group (AEG), his health insurance provider, after AEG denied

coverage for surgery performed on Webb's right shoulder. After a bench trial, the district court for Douglas County entered judgment in favor of Webb. AEG filed this 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).

FACTS

In 1997, Webb began working as an installer for Office One, Inc. Office One was a "client company" of AEG, which provided payroll, health insurance, and workers' compensation services to Office One and its employees. Webb's duties with Office One involved heavy lifting. In early 2000, Webb experienced increasing discomfort in his right shoulder. On May 30, 2000, he had surgery on his shoulder at Immanuel Medical Center in Omaha, Nebraska.

AEG provided health insurance to Webb as an Office One employee. Webb paid for this insurance through an automatic payroll deduction of $35.12 every 2 weeks. Office One also contributed $20 a month to the premium. The health insurance was an "Omnea Group Health Care Plan" established by AEG for the benefit of its client companies and their eligible employees and dependents.

David Kavan, the president of Office One, testified that he granted Webb a leave of absence in early May 2000 so that Webb could have the surgery performed on his shoulder. The last day on which Webb actually performed labor for Office One was May 15. Kavan testified, however, that Webb did not terminate his employment with Office One until after the surgery, when he realized he would reinjure the shoulder if he continued performing his duties as an installer.

Sometime after Webb last performed labor for Office One, AEG asked Kavan to complete a termination record for Webb. Although AEG provided health insurance to Office One from 1996 to 2001 and other employees had left during that time period, Kavan had never before been asked to complete such a record on an employee. A termination record dated July 10, 2000, and signed by Kavan was offered and admitted at trial. Kavan testified that he remembered filling out part of the record,

but did not recall filling in "5/15/00" as the "LAST DAY WORKED" or "5/01/00" as the "Date notice was given." He testified that the last day worked and the date notice was given were not in his handwriting.

Office One also filled out a second termination record for Webb dated August 16, 2000. There is contradictory evidence whether this record was requested by Webb and Office One or by AEG. The August 16 record was completed by Kavan's partner, Kevin Jensen. This record indicated that Webb's last day of work was "6/20/00" and that the date he gave notice was "5/18/00." Kavan testified that he was familiar with Jensen's handwriting and that the dates for last day of work and the date notice was given were not written by Jensen. Kavan further testified that the dates on the August 16 termination record were incorrect. Office One did not receive a refund of any premiums it paid for Webb's health insurance.

On cross-examination, Kavan admitted that although the termination record contained a space in which he could have indicated that Webb was on a leave of absence, he did not fill in that section.

Webb testified that he requested and received a leave of absence from Kavan in early May 2000. He further testified that he obtained precertification for his surgery as required by his insurance plan by calling the number on the back of his insurance card in early May. He was familiar with the precertification process because he had utilized it on prior occasions. He testified that after calling the number on his insurance card and providing the requisite information, he was informed that the surgery would be covered.

Webb's last employee contribution to his health insurance premium was deducted from his May 25, 2000, paycheck. On July 12, Webb received a letter from AEG notifying him that his insurance coverage "will terminate" on May 15, 2000, at midnight and informing him of his option to continue coverage via COBRA. Subsequently, AEG mailed Webb a check dated October 13, 2000, in the amount of $32.43, which he understood was a return of his premium for the time period after May 15. Webb admitted cashing the check, but testified at trial that he did not understand that by doing so he would be retroactively canceling his insurance. He further testified that he would be

willing to return the money to AEG. On cross-examination, Webb admitted that he did not receive any type of authorization number for the surgery when he called to precertify. He also did not remember receiving a confirmation letter. An employee of the physician who performed Webb's surgery testified that on May 18, 2000, she called an "888" telephone number and spoke to a "Jo Ann" who gave her a precertification number of "1125" for Webb's surgery.

Sue Flanagan, the manager of secondary benefits at AEG, testified that she reviewed Webb's termination records. She testified that in the general course of business, AEG would complete certain information on the forms, but that the information regarding the last day worked and date notice was given would be provided and filled in by the client prior to AEG's receiving the form. She testified that the "last day worked" on the record was a significant date because "[i]t would indicate when the insurance coverage would end if premiums were not collected."

Flanagan testified that AEG contracted with a company called PPHA to provide precertification services. When precertification is granted, a precertification number is given. Flanagan testified that although she was not sure what PPHA's precertification numbers were, "normally it had letters in front of it and letters behind it." In addition, once precertification is given, a confirmation letter is mailed to the physician, the hospital, and the employee.

Flanagan also testified that she exchanged correspondence with Nebraska's Department of Insurance regarding Webb's claim. Although she wrote three letters to the department regarding Webb's claim, she could not recall ever raising the precertification issue. Flanagan further testified that on August 15, 2001, her position was that Webb should file a civil lawsuit to determine whether the surgery was covered.

On March 6, 2002, Webb filed this action in which he alleged that AEG was liable for the medical expenses he incurred in connection with the shoulder surgery under alternative theories of recovery, including breach of contract, estoppel, and intentional misrepresentation. On April 3, AEG filed a motion to dismiss and to compel arbitration. An evidentiary hearing on the motion was held on April 30, but the bill of exceptions from that hearing is

not included in the record before us on appeal. On May 15, the district court entered an order denying the motion to compel arbitration, concluding that AEG waived the arbitration provision in the insurance policy by indicating in correspondence with the Department of Insurance that Webb should file a civil lawsuit to resolve the controversy. Neither party filed an appeal from the May 15 order.

On May 31, 2002, AEG filed an answer generally denying the allegations in Webb's petition and alleging affirmative defenses. Following a bench trial, the court entered an order on July 24, 2003, in which it found that Webb was covered under the health insurance provided by AEG at the time of his shoulder surgery and that AEG was therefore obligated to pay the disputed medical expenses. The court entered judgment in favor of Webb in the amount of $7,449.74, together with an attorney fee of $2,500 pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1998). AEG perfected this appeal on August 15, 2003.

ASSIGNMENTS OF ERROR

AEG assigns, restated, that the district court erred in (1) failing to compel arbitration as provided for in the policy, (2) failing to find that Webb had not paid the premium for the period in which the surgery was performed, (3) failing to find that Webb's employment and thus his insurance coverage ended on May 15, 2000, (4) admitting medical bills into evidence over AEG's objection, and (5) awarding attorney fees.

STANDARD 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. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004); *In re Estate of Pfeiffer*, 265 Neb. 498, 658 N.W.2d 14 (2003).

[2] In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001); *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000).

ANALYSIS

We note as an initial matter that Webb's cause of action arises under the Employee Retirement Income Security Act of 1974 (ERISA). Because his claim is for recovery of benefits under the terms of an ERISA plan, it falls within the provisions of 29 U.S.C. § 1132(a)(1)(B) (2000), and thus, pursuant to 29 U.S.C. § 1132(e)(1), a state court of competent jurisdiction has concurrent jurisdiction with federal district courts to award any benefits due.

Denial of Motion to Compel Arbitration

AEG contends that the district court erred in refusing to enforce the arbitration clause in the insurance policy it issued to Webb. The policy provides in relevant part:

> After exhausting the ERISA Claims Review and Appeal procedures noted above, if the claimant is still dissatisfied with the Plan Administrator's decision, prior to any legal action being brought against the Plan or the Plan Administrator, the appeal shall be submitted to the American Arbitration Association pursuant to its rules. The decision of the arbitrator(s) shall be binding and final on AEG and the Covered Person, with the costs of the arbitration to be borne by the party or parties as determined by the arbitrator(s).

Although AEG's motion to compel arbitration did not identify the statutory authority upon which it sought to enforce the arbitration provision of the policy, its counsel stated during oral argument of the appeal that the federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (2000), provides the enforcement mechanism.

The FAA applies to "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. "Commerce" as defined by the Act includes "commerce among the several States." 9 U.S.C § 1. The U.S. Supreme Court has given the FAA an expansive scope by broadly construing the phrase " 'a contract *evidencing a transaction* involving commerce.' " *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) (cited in *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996)). The Court has held that the phrase " 'involving commerce' " requires a broad interpretation in order to give effect to the FAA's basic purpose, which is to put

arbitration provisions on the same footing as a contract's other terms. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. at 277. The Court has further noted that "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full." *Id.* The statutory phrase " 'evidencing a transaction' " has been construed by the Court to include transactions involving interstate commerce even where the parties did not contemplate an interstate commerce connection. *Id.*

Under this expansive interpretation of 9 U.S.C. § 2, we conclude that this case involves a transaction which would come within the scope of the FAA. During the relevant time period, Webb resided in and was employed in Douglas County, Nebraska, and AEG had an office in and regularly conducted business in Nebraska. However, the record reflects that AEG transacted business in other states and that portions of Webb's claim were processed outside of Nebraska. As directed in the insurance card issued to Webb, claim forms relating to his shoulder surgery were submitted to an address in Pewaukee, Wisconsin. The insurance card also provided that precertification was required for certain benefits and noted that precertification was administered by a company located in Concord, California. Flanagan explained at trial that AEG contracted with the California company to provide precertification services. Because the transaction at issue in this case falls within the scope of the FAA, the substantive issue of whether the motion to compel arbitration should have been granted is a question of federal law. See *Kelley v. Benchmark Homes, Inc., supra*. We note that claims arising under ERISA have generally been held to be arbitrable under the FAA. See *Eckel v. Equitable Life Assur. Soc. of the U.S.*, 1 F. Supp. 2d 687 (E.D. Mich. 1998) (citing cases).

[3,4] However, 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. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004). A jurisdictional question which does not involve a factual dispute is a matter of law. *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003); *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002). The district court's order denying AEG's motion to

compel was entered on May 15, 2002. This appeal was not filed until August 15, 2003, 15 months after the entry of the order and subsequent to trial on the merits in the district court. Thus, if the denial of AEG's motion to compel was a final, appealable order, we would lack jurisdiction to consider the assignment of error pertaining to that issue.

Section 4 of the FAA sets forth a procedure whereby a party may seek judicial enforcement of a contractual arbitration provision. Section 16 governs appeals and provides in part that "[a]n appeal may be taken from . . . (1) an order . . . (B) denying a petition under section 4 of this title to order arbitration to proceed." 9 U.S.C. § 16(a). However, this statute provides that except in specified circumstances, "an appeal may not be taken from an interlocutory order . . . (2) directing arbitration to proceed under section 4 of this title." 9 U.S.C. § 16(b). The FAA does not indicate whether its provisions relating to appeals are applicable in state court actions, such as the instant case, where a party seeks to enforce an arbitration clause under the FAA.

In *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 368, 550 N.W.2d 640, 642 (1996), we considered the merits of an appeal from the denial of a motion to stay judicial proceedings in favor of arbitration, characterizing it as "an interlocutory appeal pursuant to the [FAA]." However, we did not specifically analyze the jurisdictional issue. In addressing this issue, other jurisdictions have concluded that the FAA does not necessarily preempt state procedural rules with respect to appeals. See, *Muao v. Grosvenor Properties Ltd.*, 99 Cal. App. 4th 1085, 122 Cal. Rptr. 2d 131 (2002); *Simmons v. Deutsche Financial Services*, 243 Ga. App. 85, 532 S.E.2d 436 (2000); *Clayco Const. Co. v. THF Carondelet Dev.*, 105 S.W.3d 518 (Mo. App. 2003); *Superpumper, Inc. v. Nerland Oil, Inc.*, 582 N.W.2d 647 (N.D. 1998); *Toler's Cove Homeowners v. Trident Const.*, 355 S.C. 605, 586 S.E.2d 581 (2003); *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266 (Tex. 1992). As stated by the Supreme Court of South Carolina:

> The federal policy favoring arbitration, as expressed in the FAA, is binding in state courts and supersedes inconsistent state law and statutes that invalidate arbitration agreements. . . . However, the FAA contains no express

> preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. . . . The question is whether the state law would undermine the goals and policies of the FAA. There is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate.

Toler's Cove Homeowners v. Trident Const., 355 S.C. at 611, 586 S.E.2d at 584.

We conclude that in order to determine whether state law governs the finality for purposes of appeal of an order denying a motion to compel arbitration under the FAA, we must first apply our state procedural rules to determine if the order is final for purposes of appeal and then determine whether the result of that inquiry would undermine the goals and policies of the FAA. To the extent our opinion in *Kelly v. Benchmark Homes, Inc., supra*, conflicts with this analysis, it is disapproved.

[5] In Nebraska, 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. Neb. Rev. Stat. § 25-1902 (Reissue 1995). See *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004). In this case, the order denying the motion to compel clearly did not determine the action or prevent a judgment, and thus does not fall within the first category of final orders. See *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003). In addition, the order was not made on summary application in an action after judgment was rendered, and thus does not fall within the third category of final orders. See *id.* The question, therefore, is whether the denial of the motion to compel arbitration affected a substantial right and was made during a special proceeding.

[6] The denial of the motion to compel arbitration clearly affected a substantial right, as it prevented AEG from enjoying the contractual benefit of arbitrating the dispute between the parties as an alternative to litigation. For the purposes of § 25-1902, a special proceeding includes every special statutory remedy which

is not in itself an action. See *Mumin v. Dees, supra.* A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding within the meaning of § 25-1902. *Id.* A special proceeding which affects a substantial right is, by definition, not part of an action. *Id.*

The order denying AEG's motion to compel was not merely a step or a proceeding within the overall action. Instead, the motion sought to completely halt the pending lawsuit and "transfer" the dispute to a nonjudicial forum as a matter of contractual right. The motion to compel arbitration is a specific statutory remedy which is not in itself an action. Thus, we conclude that the denial of a motion to compel arbitration is a final, appealable order under Nebraska law because it affects a substantial right and is made in a special proceeding.

This conclusion is consistent with the goals and policies underlying the FAA, which implements a "'national policy favoring arbitration and [withdrawing] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *Cornhusker Internat. Trucks* v. *Thomas Built Buses*, 263 Neb. 10, 17, 637 N.W.2d 876, 882 (2002), quoting *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). In enacting the FAA, it was "Congress' clear intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). A direct appeal from an order denying a motion to compel arbitration furthers that purpose by permitting final resolution of the issue of arbitrability without having to first conclude a judicial proceeding on the merits, at which point the arbitral remedy would be rendered essentially meaningless. Our resolution of this issue under state law is consistent with the provision of the FAA which permits an appeal from an order of a U.S. District Court denying a motion to compel arbitration. 9 U.S.C. § 16(a)(1)(B). Accordingly, we conclude that the order denying AEG's motion to compel arbitration was a final, appealable order from which no timely appeal was taken, and we therefore have no jurisdiction to review that order in this appeal from the district court's subsequent determination on the merits.

PAYMENT OF PREMIUM

In its second assignment of error, AEG contends that the district court erred in entering judgment in favor of Webb because of the undisputed evidence that it refunded the premium paid by Webb for the period in which the surgery was performed. AEG argues that the absence of a premium payment for the applicable time period resulted in a termination of coverage under the terms of the policy.

In its brief, AEG relies on *Brouilette v. DBV Enters.*, 9 Neb. App. 757, 619 N.W.2d 482 (2000), for the proposition that the burden is on an insured to keep a policy in force by the payment of premiums and is not on the insurer to exert every effort to prevent the insured from allowing a policy to lapse through failure to make premium payments. While this is a correct statement of the law, see *Struve Enter. v. Travelers Ins. Co.*, 243 Neb. 516, 500 N.W.2d 580 (1993), it does not apply to the facts of this case. The evidence clearly reveals that the insurance premium for the applicable time period was automatically deducted from Webb's paycheck and had been paid at the time of the surgery. AEG's argument that Webb failed to pay the premium is based on the fact that in October 2000, nearly 5 months after the surgery, it refunded the applicable premium to Webb after denying his claim, and he cashed the refund check. This retroactive return of Webb's premium does not negate the coverage that existed at the time of the surgery. Moreover, there is undisputed evidence in the record that AEG never refunded the portion of Webb's premium paid by Office One for the applicable time period. Thus, the district court was not clearly wrong in concluding that all premiums due under the policy were paid through May 31 and that the health insurance was in force at the time of the May 30 surgery. The district court properly credited the purported premium refund received and retained by Webb against the amount of AEG's liability.

TERMINATION OF EMPLOYMENT

In its third assignment of error, AEG contends that the district court erred in failing to find that Webb's last day of work was May 15, 2000, and that his coverage terminated on that date pursuant to the terms of the policy. The policy provides that coverage

will terminate upon the earliest of several events, including "the last day of the month in which the Employee's employment" is terminated, and that ceasing active work is deemed termination of employment unless "cessation of work is due to a temporary layoff or approved leave of absence."

In support of this argument, AEG relies primarily upon the July 10, 2000, termination record. As noted, however, there was conflicting evidence at trial as to who completed the portion of the termination record which indicated the last day worked and the date notice was given. Moreover, both Kavan and Webb testified that while May 15 was the last day that Webb actually performed labor for Office One, his employment was not terminated until sometime after the surgery was performed. There is thus sufficient evidence to support the trial court's factual finding that Webb was employed by Office One and was on leave of absence status on the date of his surgery. This assignment of error is without merit.

Admissibility of Medical Bills

In its fourth assignment of error, AEG assigns that the district court erred in "admitting the medical bills without foundation and without qualifying as an exception to hearsay." At trial, AEG objected to the receipt of all the medical bills and to most of Webb's testimony regarding the amount of medical expenses for which he was obligated and sought recovery from AEG. On appeal, however, AEG does not assign error with respect to the overruling of its objections to Webb's testimony.

[7] The admission of evidence which is primarily duplicative of other evidence admitted into the record is not reversible error. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). Because the information in the medical bills themselves is primarily duplicative of Webb's testimony, and the rulings of the trial court with respect to Webb's testimony are not assigned as error on appeal, the district court could not have committed reversible error in admitting the bills into evidence. This assignment of error is therefore without merit.

Attorney Fees

The district court ordered AEG to pay Webb $2,500 in attorney fees pursuant to § 44-359. On appeal, AEG contends that the district court erred in doing so because it is not an insurance

company subject to § 44-359. This argument ignores the plain language of § 44-359, which provides in relevant part:

> In all cases when the beneficiary or other person entitled thereto brings an action upon *any type of insurance policy . . . against any company*, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs.

(Emphasis supplied.) Under this statute, a successful plaintiff in an action on an insurance policy against any company doing business in this state, whether or not the company meets the technical definition of an "insurance company," is entitled to recover an attorney fee. Because Webb obtained a judgment against AEG, a company doing business in this state, in an action on an insurance policy, the district court did not err in awarding Webb attorney fees under § 44-359.

CONCLUSION

For the reasons discussed, we do not reach AEG's contention that the district court erred in denying its motion to compel arbitration because no timely appeal was taken from that final, appealable order. We conclude that all other assignments of error are without merit and therefore affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN I. SUTTON, RESPONDENT.

684 N.W.2d 23

Filed July 30, 2004. No. S-03-1113.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

On September 29, 2003, formal charges containing two counts were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against John I. Sutton, respondent. Respondent's answer disputed the allegations. A referee was appointed. On April 8, 2004, the referee's hearing was held on the charges. Respondent appeared. Both the complainant, Ryan Weber, and respondent, testified. Twenty exhibits were admitted into evidence.

The referee filed a report on May 10, 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), DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 3, DR 3-101(B) (violating rules regarding practice of law); Canon 6, DR 6-101(A)(3) (neglecting legal matter); and Canon 9, DR 9-102(A)(2) (concerning obligation to deposit client funds in trust account), and DR 9-102(B)(4) (returning client funds or properties as requested). The referee further found that respondent had violated his oath of office as an attorney. Neb. Rev. Stat. § 7-104 (Reissue 1997). With respect to the discipline to be imposed, the referee recommended that respondent be suspended from the practice of law for a period of 1 year. The referee also recommended that following suspension, respondent's reinstatement be conditioned on respondent's demonstrated ability to practice law. 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 12, 1979. He has practiced in Douglas County, Nebraska.

Based upon respondent's testimony during the hearing, the referee concluded that the material facts in this case are generally not

in dispute. The substance of the referee's findings may be summarized as follows: As to count I of the formal charges, the referee found that respondent had been hired by Weber to file a lawsuit against two individuals and to incorporate a business. Weber paid respondent a total of $2,173 for costs and attorney fees, a portion of which, the record reflects, consisted of advanced costs and fees. Respondent failed to deposit these advanced funds in his attorney trust account. Further, respondent failed to file the lawsuit, despite representations to Weber that the suit had been filed. With regard to the business Weber hired respondent to incorporate, the referee found that "the only document ever given . . . to . . . Weber was a bare-bones set of articles of incorporation. . . . No bylaws or minutes on [sic] corporate minute book w[as] ever prepared or sent" to Weber by respondent. The referee found that respondent returned $400 of the advanced fees to Weber and promised "to work the balance off in free legal work, but [respondent] never followed through on that promise." The referee also found that respondent failed to respond to repeated inquiries from relator's office regarding respondent's representation of Weber, until he was advised that relator would seek temporary suspension if respondent failed to respond.

As to count II of the formal charges, the referee found that on or about May 13, 2002, respondent was notified that he had not paid his 2002 dues to the Nebraska State Bar Association. Respondent failed to reply to this letter, and on July 2, this court suspended respondent from the practice of law due to his failure to pay his annual dues. The referee found that respondent continued to practice law despite having been suspended. On November 12, following respondent's satisfaction of his bar dues, respondent was reinstated to practice law.

In his report filed May 10, 2004, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules as indicated above, as well as his oath of office as an attorney. The referee also found certain aggravating and mitigating factors present. As an aggravating factor, the referee found that respondent had previously received a private reprimand in a disciplinary matter involving allegations similar to the instant case. The mitigating factors noted by the referee included respondent's cooperation with relator, albeit "belated,"

his demeanor during the hearing, and "his recognition that he has a serious, longstanding problem which must be addressed." In this regard, we note that the record contains evidence of respondent's admitted misuse of prescription drugs and his treatment for depression. The record also contains evidence of certain health conditions from which respondent has suffered in the past or is presently suffering.

With respect to the sanction which ought to be imposed for the foregoing violations, and considering the aggravating and 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 1 year. The referee also recommended that following this suspension, the grant of respondent's application for reinstatement, if any, be conditioned on respondent's demonstrated ability to practice law.

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*, 267 Neb. 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 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*, 267 Neb. 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), (4), and (5); DR 3-101(B); DR 6-101(A)(3); and DR 9-102(A)(2) and (B)(4). 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*, 267 Neb. 540, 551, 675 N.W.2d 674, 682 (2004). Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, 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." *State ex rel. Counsel for Dis. v. Swanson*, 267 Neb. 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*, 267 Neb. 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 appropriate discipline to be imposed on an attorney requires consideration of any aggravating and mitigating factors. *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004).

The evidence in the present case establishes among other facts that respondent has neglected several legal matters for a client, failed to deposit client funds in his attorney trust account, failed to return funds to a client, failed to respond to relator's inquiries, and practiced law while under a suspended license.

As an aggravating factor, we note respondent's prior private reprimand for conduct similar to that which occurred in this case. 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, the court finds that respondent should be suspended from the practice of law for a period of 1 year. Should respondent apply for reinstatement, his reinstatement shall be conditioned as follows: Respondent shall be on probation for a period of 2 years following reinstatement, during which period respondent (1) 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, and (2) shall continue treatment as directed by his physicians, psychiatrist, and substance abuse counselor.

CONCLUSION

The motion for judgment on the pleadings is granted. We find by clear and convincing evidence that respondent violated DR 1-102(A)(1), (4), and (5); DR 3-101(B); DR 6-101(A)(3); DR 9-102(A)(2) and (B)(4); and his oath of office as an attorney. It is the judgment of this court that respondent should be and is hereby suspended from the practice of law for a period of 1 year, effective immediately, after which period, respondent may apply for reinstatement, subject to the terms outlined above. 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 rule 10(P) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

McCORMACK, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. PATRICK T. O'BRIEN, RESPONDENT.

684 N.W.2d 46

Filed July 30, 2004. No. S-03-1273.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, Patrick T. O'Brien, was admitted to the practice of law in the State of Nebraska on June 27, 1972, and at all times relevant hereto was engaged in the private practice of law in Lincoln, Nebraska. On November 10, 2003, formal charges were filed against respondent. The formal charges set forth one count that included charges that 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 that adversely reflects on fitness to practice law), and Canon 9, DR 9-102(B)(4) (returning client funds or properties as requested), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). A referee was appointed and heard evidence. On May 3, 2004, the referee filed his report. With respect to the single count in the charges, the referee found that respondent's conduct had breached DR 1-102(A)(1), (5), and (6), and DR 9-102(B)(4), as well as his oath of office as an attorney. The referee recommended that respondent be suspended from the practice of law for 90 days.

On June 7, 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 findings of fact and recommended sanction set forth in the referee's report. In addition, respondent agreed to a 1-year period of probation following the reinstatement of his license, during which probationary period, he would engage and work with a practicing attorney to monitor respondent's practice, and continue treatment for depression as directed by his psychiatrist and psychologist. In his conditional admission, respondent also waived all proceedings against him in connection with the formal charges in exchange for the sanction set forth above. Respondent asked that discipline be imposed 14 days after the ruling by this court on the conditional admission. Upon due consideration, the court approves the conditional admission and orders that respondent be suspended from the practice of law for 90 days commencing 14 days after the filing of this opinion and, should respondent apply for reinstatement, that respondent be subject to probation with monitoring as outlined *infra* for 1 year.

FACTS

In summary, in his report, the referee found that respondent had represented at trial Richard Allen, who had been charged with first degree sexual assault. Allen was convicted and sentenced, and respondent unsuccessfully appealed the sentence. Respondent's representation of Allen ended in approximately February 2002, at which time respondent held in his attorney trust account $10,894.76 belonging to Allen. Allen retained new counsel, and in August, Allen's new attorney directed respondent to transfer Allen's funds to Allen's sister. Respondent did not transfer the funds until April 25, 2003, which was after Allen had filed a formal complaint against respondent with the Counsel for Discipline's office. The referee found that respondent had failed to refund Allen's funds in a timely manner and that Allen had been harmed by respondent's delay. The referee found that respondent's conduct had breached DR 1-102(A)(1), (5), and (6), and DR 9-102(B)(4), as well as his oath of office as an attorney. The referee also found that respondent was suffering from depression and had been undergoing treatment with a

psychologist and a psychiatrist since March 2003. The referee found respondent's treatment for depression to be a mitigator which he took into account when he recommended that respondent be suspended for 90 days.

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 findings of fact and recommended sanction set forth in the referee's report and knowingly does not challenge or contest that he violated DR 1-102(A)(1), (5), and (6), and DR 9-102(B)(4), 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 9-102(B)(4), as well as his oath of office as an attorney, and that respondent should be and hereby is suspended for a period of 90 days, effective 14 days after filing this opinion, after which time respondent may apply for reinstatement. 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 (1) 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, and (2) shall continue treatment for his depression as directed by his psychiatrist and psychologist. 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 10(P) (rev. 2003) and 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

STEPHAN and MCCORMACK, JJ., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. GREGG E. WILLIAMS, RESPONDENT.

684 N.W.2d 45

Filed July 30, 2004. No. S-04-331.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

Respondent, Gregg E. Williams, was admitted to the practice of law in the State of Nebraska on February 15, 1985. Respondent was engaged in the private practice of law in Sioux City, Iowa. On

February 13, 2004, the office of the Counsel for Discipline received a grievance against respondent. Respondent's alleged misconduct involved the misappropriation of funds from his former law firm, resulting, in certain circumstances, in the erroneous billing of clients for expenses that had not been incurred. On March 12, an application for temporary suspension was filed by the Chair of the Committee on Inquiry of the First Disciplinary District. Upon consent, on March 17, respondent was temporarily suspended from the practice of law until further order of this court.

FACTS

On July 1, 2004, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent stated that he "knowingly [does] not challenge or contest the truth of the allegations" in the grievance that he misappropriated funds from his former law firm. In addition to surrendering his license, respondent voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the 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 his license to practice law, admitted in writing that he knowingly does not challenge or contest the truth of the allegations, and waived all proceedings against him in connection therewith. We further find that respondent has not challenged or contested the truth of the allegations that he misappropriated funds

from his former law firm and that respondent has consented to the entry of an order of disbarment. We further find that Williams has admitted to facts which are not consistent with adherence to the Code of Professional Responsibility or his oath of office as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997).

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 allegation that he misappropriated funds from his former law firm and that his waiver was knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with 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 10(P) (rev. 2003) and 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. LYNN E. MOORER, RESPONDENT.

684 N.W.2d 44

Filed July 30, 2004. No. S-04-533.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, Lynn E. Moorer, was admitted to the practice of law in the State of Nebraska on April 20, 1999, and at all times

relevant hereto was engaged in the private practice of law in Lincoln, Nebraska. On May 4, 2004, formal charges were filed against respondent. The formal charges set forth one count that included 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)(6) (engaging in conduct that adversely reflects on fitness to practice law), and Canon 7, DR 7-101(A)(3) (prejudicing or damaging client during course of professional relationship), as well as her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). On June 9, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which she knowingly did not challenge or contest the truth of the allegations that she violated DR 1-102(A)(1) and (6), and DR 7-101(A)(3), as well as her oath of office as an attorney, and waived all proceedings against her 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 on June 11, 2001, respondent was employed as general counsel and director of operations for the Organic Crop Improvement Association International, Inc. (OCIA). On that same day, her employment with OCIA was terminated, and she was instructed to leave OCIA's premises. The formal charges further allege that respondent refused to leave and instead met and spoke with other OCIA employees, resulting in OCIA calling the police, who forcibly removed respondent from OCIA's premises.

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 she violated DR 1-102(A)(1) and (6), and DR 7-101(A)(3), 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 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 (6), and DR 7-101(A)(3), as well as her 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 10(P) (rev. 2003) and 23(B) (rev. 2001).

JUDGMENT OF PUBLIC REPRIMAND.

SUSAN K. PARKS, APPELLEE, V. MERRILL, LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, APPELLANT.

684 N.W.2d 543

Filed August 6, 2004. No. S-02-1293.

1. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
2. **Judgments: Verdicts.** On a motion for judgment non obstante verdicto, or 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.
3. ____: ____. 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.
4. **Judgments: Verdicts: Appeal and Error.** Neb. Rev. Stat. §§ 25-1315.02 (Cum. Supp. 2003) and 25-1315.03 (Reissue 1995) authorize 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.
5. **Limitations of Actions: Malpractice: Torts: Contracts.** Where a party's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in Neb. Rev. Stat. § 25-222 (Reissue 1995) applies.
6. **Limitations of Actions: Negligence: Words and Phrases.** The definition of "profession" for purposes of the professional negligence statute of limitations under Neb. Rev. Stat. § 25-222 (Reissue 1995) is (1) a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods; (2) maintaining by force of organization or concerted opinion high standards of achievement and conduct, and (3) committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.
7. **Directed Verdict: Judgments: Time.** Pursuant to Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2002), if a verdict is not returned, within 10 days after the jury is discharged, a party who has moved for a directed verdict may move for judgment in accordance with the moving party's motion for a directed verdict.
8. **Directed Verdict: Judgments.** The plain language of Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2002) dictates that where a jury is unable to return a verdict and is discharged, a party must have previously asserted its stated grounds for judgment notwithstanding the verdict in its motion for directed verdict.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Mark E. Novotny and Robert A. Mooney, of Lamson, Dugan & Murray, for appellant.

David S. Houghton, Robert W. Mullin, and William G. Garbina, of Lieben, Whitted, Houghton, Slowiaczek & Cavanaugh, P.C., L.L.O., for appellee.

WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ., and IRWIN, Chief Judge.

MCCORMACK, J.

NATURE OF CASE

Appellee, Susan K. Parks, filed this action in the district court for Douglas County, Nebraska, against Merrill, Lynch, Pierce, Fenner & Smith, Incorporated (Merrill Lynch), alleging breach of oral contract. The case was tried to a jury. After the jury returned deadlocked, the trial court declared a mistrial and Merrill Lynch submitted motions for judgment notwithstanding the verdict and for new trial and renewed its previous motion for directed verdict. In each of its respective motions, Merrill Lynch contended that Parks' claim was one of professional negligence, not breach of contract, and that her claim was barred by the applicable statute of limitations. The trial court overruled the motions and reset the matter for trial. Merrill Lynch appeals.

BACKGROUND

On December 29, 1997, Parks brought a breach of contract action against Merrill Lynch. In her amended petition, Parks alleged that in 1991, she entered into an oral agreement with Merrill Lynch, whereby she and her independent investment consultant orally directed Richard Kenton of Merrill Lynch to invest proceeds Parks received from an employee stock ownership plan (ESOP) in noncallable bonds. Parks further alleged that instead of purchasing noncallable bonds, Merrill Lynch purchased callable bonds. Callable bonds are ones for which the issuer retains the right to pay an amount, the "call" price, which redeems the debt, fully or partially, before the scheduled maturity date. See Black's Law Dictionary 204 (6th ed. 1990). In her amended petition, Parks alleged that nine of the bonds purchased by Merrill Lynch were called on specified dates between January 1993 and June 2001. Parks alleged that as a proximate result of Merrill Lynch's breach, she sustained damages because of lost earnings on each bond and because she was

forced to prematurely recognize income subject to income tax in those years.

Merrill Lynch filed a motion for summary judgment, alleging that all of Parks' claims were time barred by the statute of limitations applicable to either professional negligence or oral contract claims. The trial court overruled Merrill Lynch's motion in part, concluding that Neb. Rev. Stat. § 25-222 (Reissue 1995), the 2-year statute of limitations for professional negligence claims, was inapplicable. The court found that Merrill Lynch's agent, Kenton, who purchased the bonds in question for Parks, was not acting as a professional when he did so.

At trial, Parks testified that she had $800,000 from an ESOP as a result of her divorce. As part of the settlement agreement pursuant to the divorce, Parks sold her shares in a company called Millard Manufacturing to its ESOP for $800,000. Parks understood that she would have to do an ESOP rollover—i.e., reinvest the funds in qualified securities within a 12-month period after the sale—in order to defer paying capital gains taxes on the proceeds from her sale of stock in Millard Manufacturing.

Parks was contacted by Kenton about investment possibilities. Their first meeting occurred on September 18, 1991. Parks testified that during this meeting, Kenton told Parks he had experience with ESOP rollovers and gave Parks the impression that he had been a broker for a long period of time. Parks explained to Kenton that her primary goal was to make sure the money was safe and secure. Parks testified that Kenton suggested investing in bonds, a subject which Parks knew nothing about at the time. No decisions were made during this meeting.

Before their next meeting, Parks reviewed a book authored by Dr. Ravi Batra, an economist at Southern Methodist University. Specifically, she reviewed the criteria Batra established in his book for safely investing in corporate bonds in an economic downturn. These included purchasing highly rated, AAA if possible, noncallable bonds. During her second meeting with Kenton, Parks told Kenton that she was concerned about the economy and that pursuant to the criteria set forth in Batra's book, she wanted to purchase AAA, noncallable, long-term bonds. Parks testified that she relied on Kenton's expertise only to ensure that the bonds he selected met her criteria that they be

highly rated, long-term, noncallable bonds. She testified that she relied on Batra's book to establish her selection criteria, not on any recommendation Kenton may otherwise have made.

Parks paid Batra a consulting fee. Parks and Kenton had a conference call with Batra, and after the conference call, Parks directed Kenton to purchase the bonds they had previously settled upon pursuant to Parks' established criteria, which Kenton did on October 8, 1991. Parks testified that at no time prior to purchasing the bonds did Kenton or anyone from Merrill Lynch inform her that some of the bonds Kenton purchased were callable.

Several of Parks' bonds were eventually called. Shortly after Parks received notice that the first bond was called, she contacted Kenton and he explained that the called bond just "slipped through the cracks." Parks testified that as a result of these bonds being called, she was required to pay the income tax on the capital gains from the sale of her Millard Manufacturing stock to the ESOP.

At the close of Parks' evidence, Merrill Lynch moved for a directed verdict on the ground that Parks failed to prove breach of contract and that Parks' claim was really one for professional negligence. Merrill Lynch claimed that the professional negligence 2-year statute of limitations of § 25-222 applied. The trial court overruled the motion, finding, inter alia, that Parks obtained information regarding her strategy for accomplishing the ESOP rollover from outside sources and that Kenton had acted under Parks' direction rather than advising Parks in a professional capacity during his relationship with her.

Kenton testified that he attended Creighton University but did not complete his degree. After obtaining his insurance license and working as an insurance agent for a while, Kenton accepted a position as an "investment executive" with PaineWebber in 1981, where he worked for less than a year. His duties entailed attracting and offering clients investment products. He later worked for Piper Jaffray for 3 years until 1984, where he did the same type of work and received training as a financial advisor. Kenton testified that during his employment with these employers, he held a general securities license and that 10 to 20 percent of his work related to bonds. In order to obtain his general securities license, he was required to pass two examinations: a "series 7" or general

securities representative examination, and the "blue sky" license examination, administered by the National Association of Security Dealers. See 48 Neb. Admin. Code, ch. 6, § 008 (2001) (specifying qualifying examinations for agents of broker-dealers). Kenton testified that the "series 7" examination was a full-day, 250-question test, and that the "blue sky" examination was shorter and less intense than the "series 7" examination.

Upon leaving Piper Jaffray, Kenton accepted employment with Equitable Life Insurance as an investment product coordinator and assistant manager. He testified that at Equitable Life Insurance, he worked primarily with mutual funds and variable annuities. Four years later, in 1988, Kenton went to work for Prudential doing the same kind of work he had performed at Equitable Life Insurance.

In 1991, Kenton accepted employment at Merrill Lynch as a trainee in a 2-year program. Kenton testified that at the time he handled Parks' bond transactions in 1991, he was still a trainee at Merrill Lynch, and that he had no previous experience with ESOP rollovers. As a trainee, Kenton assisted clients with their investments and received training regarding the same type of investment services he had provided with his previous employers.

Kenton testified that during his first meeting with Parks in September 1991, he did not tell Parks that he had experience with ESOP rollovers, but that he did tell Parks he had experience with retirement plan rollovers. After the meeting, Kenton contacted Merrill Lynch's tax advisory and fixed income departments for information. The fixed income department advised Kenton of Merrill Lynch's inventory of suitable bonds for ESOP rollovers. He testified that these bonds had a very long maturity and no call provisions.

Kenton's testimony generally controverted Parks' testimony that she directed him to purchase only noncallable bonds. At the conclusion of Merrill Lynch's evidence, Parks moved for a directed verdict and Merrill Lynch renewed its motion for directed verdict. The only ground for the directed verdict applicable to this appeal was that Kenton was acting as a professional and that, therefore, the 2-year statute of limitations of § 25-222 applied. Both of the motions for directed verdict were denied by the trial court. The matter was then submitted to the jury.

Following deliberations, the jury informed the trial court that it was deadlocked. The trial court declared a mistrial and reset the case for trial. Both parties timely filed motions for judgment notwithstanding the verdict and for new trial. In its respective motion, Merrill Lynch reasserted its statute of limitations contentions previously asserted in its motion for directed verdict, and Parks reasserted her previous motion for directed verdict. The trial court overruled both parties' motions for judgment notwithstanding the verdict and for new trial and reset the matter for trial.

ASSIGNMENTS OF ERROR

Merrill Lynch assigns, consolidated and restated, that the trial court erred in (1) presenting the case to the jury as one for breach of contract rather than professional negligence and (2) overruling its motion for judgment notwithstanding the verdict and motions for directed verdict, failing to find that Parks' action was time barred by the statute of limitations applicable to (a) claims for professional negligence under § 25-222, (b) claims for ordinary negligence under Neb. Rev. Stat. § 25-207 (Reissue 1995), and (c) claims for breach of oral contract under Neb. Rev. Stat. § 25-206 (Reissue 1995).

STANDARD OF REVIEW

[1] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998).

[2,3] On a motion for judgment non obstante verdicto, or 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); *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). 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. *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003).

ANALYSIS

[4] We first observe that Neb. Rev. Stat. §§ 25-1315.02 (Cum. Supp. 2002) and 25-1315.03 (Reissue 1995) authorize 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., supra*; *Critchfield v. McNamara*, 248 Neb. 39, 532 N.W.2d 287 (1995). If a verdict is not returned, within 10 days after the jury is discharged, a party who has moved for a directed verdict may move for judgment in accordance with the moving party's motion for a directed verdict. § 25-1315.02. This appeal arises from the trial court's denial of Merrill Lynch's motion for judgment notwithstanding the verdict after the jury returned deadlocked and was subsequently discharged. Accordingly, this appeal is properly before this court.

[5] Merrill Lynch contends that Parks' claim is really one for professional negligence rather than breach of contract and that, accordingly, the trial court should have applied the statute of limitations found in § 25-222. Where a party's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in § 25-222 applies. *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

Section 25-222 provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever

> is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

(Emphasis in original.)

In determining whether the special statute of limitations for professional negligence applies to a plaintiff's claims, we must determine whether the defendant is a professional and was acting in a professional capacity in rendering the services upon which the claim is based. *Reinke Mfg. Co. v. Hayes, supra.* In determining whether a particular act or service is professional in nature, we must look to the nature of the act or service itself and the circumstances under which it was performed. *Id.*

[6] As this court has previously noted, "[t]he Legislature has not specifically stated which occupations are governed by § 25-222." *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 512, 513 N.W.2d 521, 524 (1994). In *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998), we stated that the definition of "profession" for purposes of the professional negligence statute of limitations under § 25-222 is (1) a calling requiring specialized knowledge and often long and intensive preparation, including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods; (2) maintaining by force of organization or concerted opinion high standards of achievement and conduct, and (3) committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service. This definition was first adopted in *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987). In *Tylle*, we rejected a previous definition of profession based on a predominately mental or intellectual occupation, and further rejected criteria based on the "mere possession of a license." 226 Neb. at 480, 412 N.W.2d at 440. Instead, we emphasized that the new definition "stresses the long and intensive program of preparation to practice one's chosen occupation traditionally associated only with professions." *Id.* at 480, 412 N.W.2d at 441.

In *Jorgensen v. State Nat. Bank & Trust, supra*, we examined this court's line of cases addressing the issue of whether retirement planners are professionals for purposes of § 25-222. We recognized that we had held without analysis in earlier cases that the statute of limitations for professional negligence applied to retirement planners. See, *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994); *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974). However, *Educational Service Unit No. 3* was decided before the *Tylle* definition "radically altered the criteria by which this court would determine whether an occupation was a profession." *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. at 246, 583 N.W.2d at 335. Although we cited the *Tylle* definition in *Maloley*, we noted in *Jorgensen* that we had relied upon a pre-*Tylle* case in *Maloley* to determine once again that retirement planners were professionals. Because *Mammel* and *Maloley* did not analyze whether retirement planners were professionals under the *Tylle* definition, we determined that they were not dispositive of the issue in *Jorgensen*.

The two "retirement planners" in *Jorgensen* were employees of a bank that was the custodian of plaintiff's individual retirement account (IRA). The employees allegedly rendered advice to plaintiff concerning the IRA that resulted in the disqualification of plaintiff's IRA by the Internal Revenue Service. One employee had held a securities dealer license, but relinquished it when he went to work at the bank. He had attended 2 years of college as well as seminars dealing with IRA's. However, he had only limited experience in the investment area prior to working at the bank. The other employee had attended a school of commerce for 1 year and had also attended seminars, but testified that the bank did not require her to attend them on a yearly basis, nor had she attended such seminars annually.

In holding that the retirement planners in *Jorgensen* were not "professionals" within the meaning of § 25-222, we noted that neither had any specialized knowledge requiring long and intensive preparation to practice one's chosen occupation traditionally associated only with professionals. We stated that for purposes of the definition in *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987), "a college degree embodies such characteristics and that

licensing, although not dispositive, strongly indicates that an occupation is a profession." *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 246, 583 N.W.2d 331, 335 (1998). The bank employees were expected to do nothing more than fill out forms, did not hold licenses, did not regularly supplement their educations, and were not subject to an ethical code enforced by a disciplinary system. Finally, we observed that there was no evidence indicating that the kind of work performed by the bank employees had for its primary purpose the rendering of a public service. *Id.*

The facts of this case are distinguishable from the facts in *Jorgensen* because Kenton was licensed as a general securities agent and had received training from his employers in providing services for clients. However, this is true of many licensed occupations. Nebraska has over 100 certified or licensed occupations. See Nebraska Workforce Dev., Dept. of Labor, Certified and Licensed Occupations in Nebraska (2004). Most require the applicant to pass a licensing examination. See, e.g., Neb. Rev. Stat. § 71-101 et seq. (Reissue 2003) (governing licenses under control of Department of Health and Human Services); Neb. Rev. Stat. § 81-885.13 (Reissue 2003) (requisite for real estate license).

In the interest of protecting the public, the Legislature has authorized regulating boards for many occupations with powers to uphold licensing standards. See, e.g., Neb. Rev. Stat. § 71-373 (Reissue 2003) (creating Board of Cosmetology Examiners to protect health and safety of citizens); Neb. Rev. Stat. § 81-2104 (Supp. 2003) (authorizing State Electrical Board to regulate licensure); Neb. Rev. Stat. § 81-3402 (Reissue 1999) (in interest of public welfare, requiring architects and professional engineers to obtain board-issued license). These boards or the controlling government agency may generally suspend or revoke licenses for specified conduct or criminal convictions. The grounds, however, for disciplinary action against persons holding a business license generally do not act to maintain a high standard of conduct equivalent to the ethical duties of professionals. See, Neb. Rev. Stat. § 8-1103(9)(a) (Supp. 2003) (stating grounds for denying, suspending, or revoking securities license); Neb. Rev. Stat. § 76-551 (Reissue 2003) (authorizing disciplinary actions against licensed abstractors for specified conduct or felony convictions); Neb. Rev. Stat. § 81-885.24 (Reissue 2003) (specifying conduct constituting

unfair trade practices or fraud for persons holding real estate license). Compare Code of Professional Responsibility (setting out canons of ethical considerations for attorneys).

Further, the educational requisites for licensure vary widely and include the following: (1) no postsecondary education requirement or a requirement of previous work experience, see, e.g., Neb. Rev. Stat. § 76-542 (Reissue 2003) (requisites for abstractor); (2) a requirement of specified hours of postsecondary education and/or experience, see, e.g., Neb. Rev. Stat. § 81-8,117 (Reissue 2003) (requisites for land surveyor); (3) a requirement that the applicant complete coursework in an industry school or training program, see, e.g., Neb. Rev. Stat. § 71-387 (Reissue 2003) (requisites for cosmetology license); (4) a requirement of a 4-year degree from an accredited college or university, see, e.g., § 71-1,241 (requisites for athletic trainer); (5) a requirement of a postgraduate degree from a professional school or program, see, e.g., § 71-1,104 (requisites for license to practice medicine and surgery). The real estate broker in *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987), was required to complete approved postsecondary coursework and pass a licensing examination before obtaining his license. See § 81-885.13(3) (requiring combination of experience and education or more extensive postsecondary education in addition to passing licensing examination for real estate brokers). The State Real Estate Commission was authorized to investigate and discipline license holders for unfair trade practices. See § 81-885.24. We nonetheless determined in *Tylle* that a real estate license did not transform a licensed occupation into a licensed profession for purposes of § 25-222.

Our decision in *Tylle* is in accord with the emphasis we have placed on college degrees in *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998), and *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988). See, also, *Motor Club Ins. Assn. v. Fillman*, 5 Neb. App. 931, 568 N.W.2d 259 (1997) (doubting that insurance agents were professionals under *Tylle* definition, but declining to reach issue when claim was barred); *Garden v. Frier*, 602 So. 2d 1273, 1275 (Fla. 1992) (in absence of legislative guidance, defining profession as "any vocation requiring at a minimum a four-year college degree before licensing is possible"); *Chase Scientific Research v. NIA*

Group, 96 N.Y.2d 20, 749 N.E.2d 161, 725 N.Y.S.2d 592 (2001) (noting lack of legislative definition of professional under non-medical malpractice statute of limitations and concluding that insurance agents and brokers were not professionals whose qualities include extensive formal learning and training).

In contrast to those occupations that are commonly recognized as professions, agents of broker-dealers in securities are not required to obtain a degree as a prerequisite to taking a licensing examination. See 48 Neb. Admin. Code, ch. 6 (2001). Kenton did not testify to having obtained any securities license requiring advanced education or significant experience in his field. We do not doubt that the general securities representative examination requires preparation. However, neither the evidence at trial nor the securities regulations indicate that obtaining the license for Kenton's occupation required long and intensive training or preparation on a par with a college degree, or even preparation equivalent to that required for a real estate broker license—an occupation that we have determined is not a profession. See *Tylle v. Zoucha, supra*. For these reasons, we conclude that Kenton was not a professional.

We do not consider Merrill Lynch's alternative arguments that even if the professional negligence statute of limitations does not bar Parks' claim, the claim is barred by the statute of limitations claims under § 25-207 (ordinary negligence) and § 25-206 (breach of oral contract). We determine that Merrill Lynch's alternative arguments were not properly preserved for review because they were not set forth as grounds in Merrill Lynch's motion for directed verdict following the close of Parks' case and in Merrill Lynch's renewed motion for directed verdict at the close of evidence.

[7,8] Section § 25-1315.02 governs the procedure applicable to motions for judgment notwithstanding the verdict. It provides, in relevant part: "If a verdict is not returned, within ten days after the jury is discharged a party who has moved for a directed verdict may move for judgment *in accordance with the moving party's motion for a directed verdict*." (Emphasis supplied.) The plain language of § 25-1315.02 dictates that where a jury is unable to return a verdict and is discharged, a party must have previously asserted its stated grounds for judgment notwithstanding the

verdict in its motion for directed verdict. Otherwise, the trial court may not properly sustain the motion for judgment notwithstanding the verdict, and the asserted grounds are not properly preserved for appeal. See, *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997) (motion for judgment notwithstanding verdict may not properly be sustained in absence of motion for directed verdict made at close of all evidence); *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991) (specifying that when jury is discharged for its inability to reach verdict, § 25-1315.02 authorizes motion for judgment notwithstanding the verdict *in accordance with* denied motion for directed verdict made at close of all evidence); *In re Estate of Fehrenkamp*, 154 Neb. 488, 48 N.W.2d 421 (1951) (determining that trial court's order overruling motion for judgment notwithstanding verdict determines right of proponent to directed verdict; concluding, therefore, that merits of motion *for directed verdict* were properly considered on appeal).

In support of its motion for judgment notwithstanding the verdict, Merrill Lynch raised the statute of limitations issues under §§ 25-206 and 25-207. However, it failed to raise these issues in its motion for directed verdict following the close of Parks' case and in its renewed motion for directed verdict at the close of evidence. Accordingly, Merrill Lynch did not preserve its remaining assignments of error for appellate review.

CONCLUSION

Based on the facts as presented to the trial court, we conclude that Kenton is not a professional. Merrill Lynch did not properly preserve its remaining assignments of error, and, as such, we do not address them.

AFFIRMED.

HENDRY, C.J., and STEPHAN and MILLER-LERMAN, JJ., not participating.

TRACY JENSEN, APPELLEE, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A BODY POLITIC OF THE STATE OF NEBRASKA, ET AL., APPELLEES, AND NORTH AMERICAN SPECIALTY INSURANCE COMPANY, APPELLANT.

684 N.W.2d 537

Filed August 6, 2004. No. S-02-1459.

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. **Subrogation: Words and Phrases.** Subrogation involves a substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities.
3. **Contracts: Insurance: Subrogation: Tort-feasors.** In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.
4. **Equity: Insurance: Subrogation: Tort-feasors.** Under principles of equity, an insurer is entitled to subrogation only when the insured has received, or would receive, a double payment by virtue of an insured's recovering payment of all or part of those same damages from the tort-feasor.
5. **Insurance: Tort-feasors.** The insurer should not recover sums received by the insured from the tort source until the insured has been fully indemnified.
6. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
7. **Insurance: Contracts.** An ambiguous insurance policy will be construed in favor of the insured.
8. ____: ____. Whether the language in an insurance policy is ambiguous presents a question of law.
9. **Words and Phrases.** Under the ejusdem generis rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence.

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

Robert T. Grimit and Randall L. Goyette, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., and Gregory D. Seeley and Eric D. Baker, of Seeley, Savidge & Ebert Co., L.P.A., for appellant.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellee Tracy Jensen.

Andrew B. Koszewski and Melanie J. Whittamore-Mantzios, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee TIG Insurance Company.

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

MCCORMACK, J.

NATURE OF CASE

North American Specialty Insurance Company (NASIC) appeals from an order of the district court for Lancaster County denying its motion for summary judgment and granting Tracy Jensen's motion for summary judgment. NASIC argues that it is entitled to subrogation and also raises an issue requiring interpretation of a policy it issued providing benefits to Jensen. We affirm.

BACKGROUND

While attending the University of Nebraska-Lincoln, Jensen was a member of the university's spirit squad. On December 4, 1996, Jensen suffered a severe spinal cord injury while attempting a tumbling maneuver during a cheerleading practice. She was initially paralyzed from the neck down, but during her rehabilitation, she regained limited use of all four limbs. Despite the improvements Jensen made in the months following her accident, she continues to experience significant physical and psychological difficulties as a result of her accident. Her condition is not expected to improve in the future.

Jensen's accident implicated three insurance policies. The one at issue in this appeal is a policy issued by NASIC to the National Collegiate Athletic Association (NCAA) for the benefit of student-athletes attending NCAA member institutions, including the University of Nebraska-Lincoln. The NASIC policy was an excess policy, and section III of the policy, entitled "OTHER INSURANCE — EXCESS NATURE OF POLICY," specifically provided:

> Except as provided below, this insurance Policy is excess over any other valid and collectible insurance available to the Insured Person for a Covered Loss under this Policy. If an Insured Person receives or is entitled to receive benefits

or services from any source described below (herein called Other Insurance) for any benefit category of a Covered Loss for which he or she is entitled under this Policy, such benefit under this Policy will be in excess of the amount of such Other Insurance.

If an Insured Person is entitled to Other Insurance for a benefit category of a Covered Loss for which he or she has been paid benefits under this Policy, the Insured Person will reimburse the Company to the extent of such benefits paid under this Policy, not to exceed the amount of Other Insurance received.

. . . .

"Other Insurance" means any reimbursement for or recovery of any element of Covered Loss available from any other source whatsoever, except gifts and donations, but including without limitation:

a. any individual, group, blanket, or franchise policy of accident, disability, or health insurance;

b. any arrangement of benefits for members of a group, whether insured or uninsured;

c. any prepaid service arrangement such as Blue Cross or Blue Shield, individual or group practice plans, or health maintenance organizations;

d. any amount payable for hospital, medical, or other health services for accidental bodily injury arising out of a motor vehicle accident to the extent such benefits are payable under any medical expense payment provision (by whatever terminology used including such benefits mandated by law) of any motor vehicle insurance policy;

e. any amount payable for services for injuries or diseases related to the Insured Person's job to the extent that he [or she] actually receives benefits under a Worker's Compensation law. If the Insured Person enters into a settlement to give up his or her rights to recover future medical expenses under a Worker's Compensation Law, this Policy will not pay those medical expenses that would have been payable except for that settlement;

f. Social Security Disability Benefits, except that Other Insurance shall not include any increase in Social Security

Disability Benefits payable to an Insured Person after he or she becomes disabled while insured hereunder;

g. any benefits payable under any program provided or sponsored solely or primarily by any governmental agency or subdivision or through operation of law or regulation.

Jensen was also insured under a policy issued by TIG Insurance Company (TIG) to the University of Nebraska and a policy issued by Celtic Insurance Company (Celtic) to Jensen's parents.

Following her accident, Jensen filed a negligence action against the Board of Regents of the University of Nebraska (Board of Regents). In April 2001, Jensen settled her claim with the Board of Regents for $2.1 million. Under the terms of the settlement agreement, the Board of Regents agreed to pay Jensen a lump sum of $600,000 followed by annual payments of $150,000 for 10 years. Also included were a $40,000 payment for vocational rehabilitation services not covered by NASIC or TIG and a future tuition waiver for Jensen to complete her degree.

Jensen's operative petition in this action also named NASIC, TIG, and Celtic as defendants. Jensen alleged that she had received notice from NASIC of its intention to invoke section III of the NASIC policy and demand subrogation and reimbursement as well as to refuse future coverage of expenses. Thus, Jensen sought a declaration that she was not obligated to reimburse or subrogate NASIC for benefits paid under any of the policies and that the settlement funds Jensen received from the Board of Regents are not "Other Insurance" as defined in section III of the NASIC policy. Jensen sought similar relief with respect to both TIG and Celtic. NASIC filed a counterclaim in which it sought declaratory relief. Specifically, NASIC sought a declaration that "Other Insurance" includes the settlement funds Jensen received from the Board of Regents, that NASIC is entitled to reimbursement by Jensen to the extent of benefits it already paid to Jensen, and that it has no further obligation to pay benefits under the policy.

Jensen moved for summary judgment against NASIC, TIG, and Celtic. NASIC filed its own motion for summary judgment against Jensen. The district court found that NASIC, TIG, and Celtic are not entitled to subrogation because Jensen was not fully compensated for her injuries by her settlement with the Board of

Regents. The court also found that NASIC's definition of "Other Insurance" was ambiguous. Accordingly, the court construed that term in Jensen's favor and found that the settlement funds did not constitute "Other Insurance." NASIC appealed, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

NASIC assigns that the district court erred in (1) finding that NASIC was not entitled to subrogation of the settlement funds received by Jensen from the university; (2) finding that the settlement funds did not fully compensate Jensen for her injuries; (3) finding that the settlement funds did not constitute "Other Insurance" under the policy issued by NASIC; (4) finding that the policy issued by NASIC, including the definition of "Other Insurance," was ambiguous; (5) sustaining Jensen's motion for summary judgment; and (6) denying NASIC's motion for summary judgment.

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. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004).

ANALYSIS

SUBROGATION

[2,3] Subrogation involves a substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities. *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997). In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor. *Id.*

[4,5] Under principles of equity, an insurer is entitled to subrogation only when the insured has received, or would receive, a double payment by virtue of an insured's recovering payment of all or part of those same damages from the tort-feasor. *Id.*; *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993). Thus, we have stated that "'"[t]he insurer should not 'recover sums received by the insured from the tort source until the insured has been fully indemnified.'"'" *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. at 372, 570 N.W.2d at 712, quoting *Shelter Ins. Cos. v. Frohlich, supra.*

NASIC readily concedes that whether it is entitled to subrogation depends on whether Jensen has been fully compensated for her loss. However, NASIC argues that there is a factual dispute as to whether Jensen has been fully compensated which precludes summary judgment in Jensen's favor. At summary judgment, NASIC offered evidence that it has paid a total of over $51,000 for Jensen's home health care from 1996 to 2002. NASIC then points to the life care plan offered by Jensen into evidence which estimates her future home health care expenses to be more than $157,000 per year, beginning at age 24, which age Jensen attained in February 2000. Based on the discrepancy between what it has paid for Jensen's home health care and what those expenses will be in the future, NASIC argues that there is a factual dispute as to the amount it would take to compensate Jensen for her injuries and that therefore, it was inappropriate to conclude as a matter of law that Jensen was not fully compensated.

We are not persuaded. NASIC's argument misses the fact that there is no inherent contradiction in what Jensen's past expenses for the years 1996 to 2002 are and what her expenses will be for the rest of her life. In support of her motion for summary judgment, Jensen offered the life care plan that estimated the present value of her economic losses to be $8,594,978. NASIC offered no evidence disputing the life care plan's estimate of Jensen's expenses for the rest of her life. This amount was far more than what she has received from NASIC and an amount far more than the amount she settled for with the university. Nor did NASIC actually contradict the life care plan's estimate for her home health care expenses during the 1996 to 2002 time period. This is because (1) the life care plan estimate only began estimating

her expenses for 2000 and beyond and (2) while NASIC presented evidence of what it has paid from 1996 to 2002, the record does not indicate that NASIC is the only entity that has paid Jensen's home health care expenses during that time. Finally, NASIC argues that the mere fact that Jensen reached a settlement with the university indicates that she was fully compensated for her injuries; otherwise, she would not have accepted the settlement agreement. NASIC is no doubt aware of the risks involved in litigation and the benefits of sometimes settling disputes prior to trial. To say as a matter of law that any party who accepts a settlement is necessarily fully compensated is folly. For all of these reasons, it is apparent as a matter of law that Jensen has not come close to being fully compensated for her loss. Under the rule of *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997), NASIC is not entitled to subrogation.

"OTHER INSURANCE"

[6-8] NASIC also argues that the settlement funds Jensen received from the university are "Other Insurance" under section III of the NASIC policy. NASIC claims, therefore, that it is entitled to reimbursement of the funds Jensen has already received from the university and is excused from providing coverage to Jensen until the settlement funds are exhausted. The district court found that NASIC's policy, particularly its definition of "Other Insurance," was ambiguous and thus construed that term in favor of Jensen. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003). An ambiguous insurance policy will be construed in favor of the insured. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003). Whether the language in an insurance policy is ambiguous presents a question of law. *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

The policy defined "Other Insurance" as "any reimbursement for or recovery of any element of Covered Loss available from *any other source whatsoever*, except gifts and donations." (Emphasis supplied.) The definition then goes on to include seven

specific sources—all of which are traditional forms of insurance, as the term "insurance" is typically understood. See, e.g., Neb. Rev. Stat. § 44-102 (Reissue 1998) (defining "insurance" under chapter 44 of the Nebraska Revised Statutes). NASIC argues that the broad definition of "Other Insurance" as recovery from any source whatsoever captures the settlement funds Jensen received from the university.

[9] Jensen argues that the term is ambiguous. To reach that conclusion, she primarily relies on the doctrine of ejusdem generis. Under the ejusdem generis rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence. *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000). Applied in this context, our interpretation of the broad, general definition "any other source whatsoever" is modified by the specific words and terms surrounding it, notably, the specific term "Other Insurance" and the seven specific examples of "Other Insurance," all of which bear the traditional characteristics of insurance. Thus, NASIC's general description of "Other Insurance" as including recovery from any source whatsoever is restricted to include only recovery from any form of *insurance*. Jensen's settlement with the university bears none of the traditional characteristics of insurance. We conclude that the term "Other Insurance" is susceptible to two reasonable but conflicting interpretations. We construe the term in favor of Jensen and conclude that "Other Insurance" under section III of the NASIC policy does not include the settlement funds Jensen received from the university.

CONCLUSION

We conclude as a matter of law that NASIC is not entitled to subrogation because Jensen's settlement with the university did not fully compensate her for her loss. We further conclude that the settlement funds are not "Other Insurance" under section III of the NASIC policy. Accordingly, we affirm.

AFFIRMED.

WRIGHT and STEPHAN, JJ., not participating.

RICHARD CHAPIN, DOING BUSINESS AS CHAPIN ENTERPRISES, APPELLEE, V. NEUHOFF BROADCASTING-GRAND ISLAND, INC., AN ILLINOIS CORPORATION, APPELLANT.

684 N.W.2d 588

Filed August 6, 2004. No. S-03-241.

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. **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. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.
4. **Statutes.** The legal principle of expressio unius est exclusio alterius (the expression of one thing is the exclusion of the others) recognizes the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed.

Daniel M. Placzek and Caroline M. Cooper, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellant.

William F. Austin and Travis A. Ginest, of Erickson & Sederstrom, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ.

MCCORMACK, J.

NATURE OF CASE

This case involves the sale of the KSYZ-FM radio station in Grand Island, Nebraska, by Neuhoff Broadcasting-Grand Island, Inc. (Neuhoff), to Waitt Media (Waitt). Richard Chapin,

doing business as Chapin Enterprises (Chapin), brought this action against Neuhoff, seeking compensation on the theory of quantum meruit for brokerage services he provided in connection with the sale. A jury returned a verdict in favor of Chapin, prompting this appeal by Neuhoff. We reverse the judgment of the district court in favor of Chapin. We conclude that Chapin is barred from recovering any compensation for his services because he acted as a broker under the Nebraska Real Estate License Act without obtaining a real estate license.

BACKGROUND

Chapin has worked in the radio industry for more than 50 years, all but a few of them as a media broker. He described a media broker's job as "bring[ing] together a willing buyer and a willing seller of a radio property." Chapin estimated that he has served as a broker for 75 to 100 radio station sales. His commission is typically paid by the seller and is usually calculated based on the "Lehman Commission Formula." Under this formula, a broker's commission is equal to 5 percent of the first $1 million of the sale, 4 percent of the second $1 million, 3 percent of the third $1 million, 2 percent of the fourth $1 million, and 1 percent of everything over $4 million.

In addition to serving as a media broker, Chapin has also owned radio stations in the past. He owned KSYZ-FM for several years before selling it in 1999 to Neuhoff for $5.9 million. After the sale was complete, Neuhoff asked Chapin to help it obtain other radio stations in the Grand Island area as a part of Neuhoff's "clustering" business strategy. Clustering involves forming a group of stations in a narrow geographic area, which offers advertising and programming advantages to the owner of the stations. Neuhoff was unsuccessful in its attempt to cluster radio stations in the area. As a result, in February or March 2000, Neuhoff decided to sell KSYZ-FM.

Chapin approached several potential buyers of KSYZ-FM on behalf of Neuhoff to gauge their interest in its purchase, including Waitt. Neuhoff's asking price for KSYZ-FM was $6.9 million, which Waitt initially balked at. However, in July 2000, Neuhoff and Waitt eventually agreed upon a price of $6.6 million for the station. Chapin testified that during the course of negotiating the

sale price, it was he who made the contacts back and forth between Neuhoff and Waitt.

The sale of KSYZ-FM from Neuhoff to Waitt was governed by two documents: a local marketing agreement and a deferred asset purchase agreement. Chapin testified that these documents were drafted by Neuhoff's and Waitt's attorneys and that he played no part in negotiating the many specific terms included in them. The deferred asset purchase agreement provided that Waitt would initially pay Neuhoff a downpayment of $1.32 million for the station and would later pay $5.28 million upon closing, for a total payment of $6.6 million. The deferred asset purchase agreement further included a list of assets to be conveyed to Waitt as a part of the sale of the station. Those assets included "all interests and options in real property, including, without limitation, real property owned in fee, by easement, by right-of-way or otherwise occupied pursuant to a leasehold or other occupancy agreement, together with any and all improvements, fixtures and towers located thereon." The president and chief executive officer of Neuhoff testified that the sale of the station included a tower, a studio, and a parcel of land where the transmitting facilities and tower are located.

Chapin eventually became aware that Neuhoff and Waitt had executed the two agreements. He then contacted Neuhoff regarding his expected fee in a November 7, 2000, letter—the first in a series of letters over the next few months between Chapin and Neuhoff pertaining to Chapin's expected fee. When the parties could not reach an amicable resolution of the matter, Chapin filed this action against Neuhoff. The case was tried to a jury, which returned a verdict in favor of Chapin in the amount of $66,000. Judgment was entered accordingly, followed by Neuhoff's appeal and our movement of the appeal from the Nebraska Court of Appeals' docket to our own.

ASSIGNMENTS OF ERROR

Neuhoff assigns that the district court erred in (1) denying its motion for directed verdict made at the close of Chapin's case in chief and at the close of all the evidence, (2) admitting the expert testimonies of Chapin and a vice chairman at Waitt, and (3) excluding the expert testimony of a media broker.

STANDARD OF REVIEW

[1,2] 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. *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004). 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. *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004).

ANALYSIS

Neuhoff argues that the district court erred in denying its motion for a directed verdict because Chapin was barred, as a matter of law, from recovering a brokerage fee for the services he provided in connection with the sale of KSYZ-FM. Neuhoff bases its argument in part upon the Nebraska Real Estate License Act (the Act), Neb. Rev. Stat. § 81-885.01 et seq. (Reissue 1996 & Cum. Supp. 2000).

Section 81-885.06 provides in part:

> No action or suit shall be instituted, nor recovery be had, in any court of this state by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited under the Nebraska Real Estate License Act to other than licensed brokers, licensed associate brokers, or licensed salespersons.

Section 81-885.02 provides, in relevant part, that

> it shall be unlawful for any person, directly or indirectly, to engage in or conduct, or to advertise or hold himself or herself out as engaging in or conducting the business, or acting in the capacity, of a real estate broker . . . within this state without first obtaining a license as such broker . . . as provided in sections 81-885.01 to 81-885.48, unless

> he or she is exempted from obtaining a license under section 81-885.04.

Neuhoff argues that Chapin is barred from recovery under § 81-885.06 because he engaged in actions prohibited by the Act, that is, he acted as a real estate broker without a license. It is undisputed that Chapin did not hold a real estate broker's license at any relevant time in this case.

Chapin does not argue that any of the exceptions to the licensure requirement in § 81-885.04 apply to him, nor does the record support such a conclusion. Instead, he argues that he did not act as a broker, as that term is defined in § 81-885.01(2), thus rendering the Act inapplicable to this case.

The applicable version of § 81-885.01(2) defines a broker in part as:

> any person who, for a fee, a commission, or any other valuable consideration or with the intent or expectation of receiving the same from another, negotiates or attempts to negotiate the listing, sale, purchase, exchange, rent, lease, or option for any real estate or improvements thereon, or assists in procuring prospects or holds himself or herself out as a referral agent for the purpose of securing prospects for the listing, sale, purchase, exchange, renting, leasing, or optioning of any real estate or collects rents or attempts to collect rents, gives a broker's price opinion or comparative market analysis, or holds himself or herself out as engaged in any of the foregoing.

Whether a person acted as a broker under § 81-855.01(2) was the issue presented in *Ford v. American Medical International*, 228 Neb. 226, 422 N.W.2d 67 (1988). In that case, Michael J. Ford alleged the existence of an agreement between himself and the defendant under which Ford would be paid a fee for his services in assisting the defendant in acquiring a hospital. The acquisition was eventually consummated, but the defendant refused to pay Ford a commission. As in the present case, the defendant argued that Ford was barred from recovering a fee because he did not hold a real estate broker's license, while Ford argued that the Act was not applicable because he did not act as a broker.

This court concluded that the defendant was entitled to summary judgment because Ford acted as a broker under

§ 81-855.01(2). The evidence established that Ford approached the hospital about a possible acquisition, arranged for a meeting between the defendant and the hospital, and negotiated the terms of the acquisition. Viewing that evidence in the light most favorable to Ford, we stated that "it seems clear that Ford is a 'person who . . . with the . . . expectation of receiving [a fee] from another, negotiate[d] or attempt[ed] to negotiate the . . . sale, purchase, . . . or lease' of St. Joseph Hospital, and 'assist[ed] in procuring prospects . . . for the . . . sale, purchase, [or] leasing' of said hospital." *Ford v. American Medical International*, 228 Neb. at 229, 422 N.W.2d at 70. We also rejected Ford's characterization of the acquisition of the hospital as one of an ongoing business in which any transfer of real estate was merely incidental to the transaction. We noted that the broad language of § 81-885.01(2) provided, as it does today, that a broker is one who negotiates, attempts to negotiate, or assists in procuring prospects for the sale or lease of "'*any* real estate or improvements thereon.'" (Emphasis in original.) 228 Neb. at 230, 422 N.W.2d at 70.

Our holding in *Ford* was also applied in *First Corporate Fin. v. Rogers*, 237 Neb. 727, 467 N.W.2d 853 (1991). In that case, the plaintiffs aided the defendants in acquiring an ongoing wholesale distribution business. This court relied solely upon *Ford* and affirmed a summary judgment award in favor of the defendants because the plaintiffs did not hold a real estate license and because one of the assets acquired by the defendants was a leasehold interest in certain warehouse property.

The rule of *Ford v. American Medical International, supra*, and *First Corporate Fin. v. Rogers, supra*, controls our decision here. Chapin testified that after Neuhoff decided to sell KSYZ-FM, he approached two potential buyers of the radio station, including Waitt. Chapin conveyed Neuhoff's asking price for the radio station to Waitt and subsequently conveyed Waitt's rejection of that offer back to Neuhoff. Chapin further testified that during the course of the negotiations over the sale price, it was he who made the contacts between Neuhoff and Waitt. These actions indicate that Chapin, with the expectation of receiving compensation, "negotiate[d] or attempt[ed] to negotiate the . . . sale . . . for any real estate or improvements thereon" and also

"assist[ed] in procuring prospects . . . for the . . . sale . . . of any real estate." See § 81-885.01(2).

Chapin argues that he did not negotiate the sale of KSYZ-FM because he played no part in the negotiation and drafting of the two documents governing the sale. Ignoring for a moment our conclusion that Chapin acted as a broker by assisting in procuring prospects for the sale of any real estate, his own testimony belies his contention that he did not negotiate or assist in negotiating the sale of any real estate. By his own admission, Chapin was involved in the negotiation of one essential term of the agreements: the sale price.

[3] Chapin further argues that the sale price was merely a function of KSYZ-FM's "book of business" and its Federal Communication Commission license and was not meant to reflect any real estate that may have been a part of the transaction. We interpret this argument as advocating an abandonment of the bright-line rule of *Ford v. American Medical International*, 228 Neb. 226, 422 N.W.2d 67 (1988). We recognize that other states allow business brokers who do not hold a real estate broker's license to receive a commission when a transaction includes some real estate. See, e.g., *Business Brokerage Centre v. Dixon*, 874 S.W.2d 1 (Tenn. 1994) (holding that business broker, although not licensed real estate broker, may recover commission if real estate component is merely incidental to sale of entire business); *Kazmer-Standish Consultants v. Schoeffel Instrum. Corp.*, 89 N.J. 286, 445 A.2d 1149 (1982) (holding that business broker, although not licensed real estate broker, may recover commission on portion of sale of ongoing business attributable to personal property, even if sale includes interest in real estate). However, beginning with our decision in *Ford v. American Medical International, supra*, 16 years ago, it has been the law in Nebraska that the Act's licensure requirement for real estate brokers applies to transactions that involve *any* real estate or improvements thereon. We are reminded that where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). Should the Legislature disagree with our broad interpretation of

the definition of real estate broker, it is free to make the necessary amendments, just as it has been for the past 16 years.

[4] In addition, the rule of *Ford v. American Medical International, supra*, is consistent with the legal principle of expressio unius est exclusio alterius: the expression of one thing is the exclusion of the others. This legal principle recognizes the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute. *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). The Legislature has excluded persons acting in a number of different capacities from the Act in § 81-885.04, but has not chosen to exclude business brokers negotiating the sale of an ongoing business that only incidentally includes real estate. The Legislature's failure to provide an exception for that situation, where it has expressly provided exceptions for others, indicates the Legislature's intent that all nonexcluded situations be subject to the Act. Put another way, "[w]hen a statute specifically provides for exceptions, items not excluded are covered by the statute." *Knight v. Johnson*, 741 S.W.2d 842, 845-46 (Mo. App. 1987).

Section 81-885.01(2) applies to a transaction that involves the sale of *any* real estate or improvements thereon. See *Ford v. American Medical International, supra*. The sale of KSYZ-FM included a tower, transmitters, a studio, and a parcel of land where they are located. Thus, Chapin's activities fall squarely within the purview of § 81-885.01(2).

CONCLUSION

As an unlicensed real estate broker, § 81-885.06 prohibits Chapin from recovering compensation for the services he provided to Neuhoff. Thus, we conclude that Neuhoff was entitled to a directed verdict as a matter of law. Given this result, it is unnecessary to address Neuhoff's remaining assignments of error. The judgment of the district court is reversed.

REVERSED.

STEPHAN and MILLER-LERMAN, JJ., not participating.

AUTO-OWNERS INSURANCE COMPANY, APPELLEE, V. HOME PRIDE COMPANIES, INC., APPELLANT, AND APPLETREE APARTMENTS, INC., ET AL., APPELLEES.

684 N.W.2d 571

Filed August 6, 2004. No. S-03-352.

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. **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.
4. **Insurance: Contracts.** 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.
5. **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.
6. **Insurance: Contracts: Words and Phrases.** An accident within the meaning of liability insurance contracts includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby.
7. **Insurance: Contracts: Liability.** Faulty workmanship, standing alone, is not covered under a standard commercial general liability policy.
8. **Insurance: Contracts: Liability: Damages.** Although a standard commercial general liability policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists.
9. **Insurance: Contracts: Proof.** The burden to prove that an exclusionary clause applies rests upon the insurer.
10. **Insurance: Contracts: Liability.** Generally speaking, the "your work" exclusions in a commercial general liability policy operate to prevent liability policies from insuring against an insured's own faulty workmanship, which is a normal risk associated with operating a business.
11. **Insurance: Contracts: Contractors and Subcontractors: Liability.** The rationale behind the "your work" exclusions in a commercial general liability policy is that they discourage careless work by making contractors pay for losses caused by their own defective work, while preventing liability insurance from becoming a performance bond.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions.

Andrew J. Wilson, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Curtis D. Ruwe and C.J. Gatz, of Gatz, Fitzgerald, Vetter & Temple, for appellee Auto-Owners Insurance Company.

Thomas M. Locher and Douglas W. Krenzer, of Locher, Cellilli, Pavelka & Dostal, L.L.C., and Roger W. Warren and Jeffrey C. Baker, of Sanders, Conkright & Warren, L.L.P., for appellees Certain Teed Corporation and G.S. Roofing Products Co.

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

GERRARD, J.

NATURE OF CASE

Auto-Owners Insurance Company (Auto-Owners) instituted this declaratory judgment action to determine its obligations to its insured, Home Pride Companies, Inc. (Home Pride). The district court determined that the policy issued by Auto-Owners to Home Pride did not cover Home Pride's claim and granted summary judgment in favor of Auto-Owners. The main issue on appeal is whether a standard commercial general liability (CGL) insurance policy covers an insured contractor for the faulty workmanship of a subcontractor that it hired.

FACTUAL AND PROCEDURAL BACKGROUND

Because this action is based upon an underlying action filed in April 2002, we digress to trace the history of the original action. Appletree Apartments, Inc. (Appletree), is a wholly owned subsidiary of J.A. Peterson Enterprises, Inc. (Peterson). Appletree and Peterson entered into a contract with JT Builders, Inc., to install new shingles on a number of Appletree's apartment buildings. Thereafter, JT Builders subcontracted with Craig Industries, Inc., to do the work. After becoming dissatisfied with Craig Industries' work, JT Builders terminated its contract with Craig Industries and subcontracted the work to Home Pride. Home Pride then entered into a subcontract with Ron

Hansen, doing business as Ron Hansen Construction, to install the shingles.

Sometime in 1996, Ron Hansen Construction completed the project. Soon thereafter, Appletree began to notice problems with the roof. Appletree notified Home Pride of the problems, and after receiving what it believed to be an unsatisfactory response, Appletree and Peterson filed suit against Home Pride, JT Builders, and Craig Industries. In their petition, Appletree and Peterson claimed that the aforementioned parties failed to install the shingles in a workmanlike manner and that such faulty workmanship caused substantial and material damage to the roof structures and buildings. Appletree and Peterson also alleged that the shingles were defective and included in the action the manufacturer of the shingles, Certain Teed Corporation, and G.S. Roofing Products Co., a company that merged with Certain Teed Corporation after Appletree purchased the shingles.

After the suit was filed, Home Pride made a claim to its insurer, Auto-Owners, for coverage under its CGL policy. Pursuant to a reservation of rights, Auto-Owners assumed the defense of Home Pride. Thereafter, Auto-Owners instituted this declaratory judgment action against Home Pride, Appletree, Peterson, JT Builders, Craig Industries, Certain Teed Corporation, G.S. Roofing Products Co., and Ron Hansen, doing business as Ron Hansen Construction. Essentially, Auto-Owners claimed that the insurance policy did not provide coverage because the faulty workmanship of a subcontractor is not an "occurrence" under a CGL policy.

Both Auto-Owners and Home Pride moved for summary judgment. The district court determined that any alleged property damage was not caused by an "occurrence" and granted summary judgment in favor of Auto-Owners. Home Pride filed a timely notice of appeal.

ASSIGNMENT OF ERROR

Home Pride assigns that the district court erred in determining that its CGL policy did not provide coverage.

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. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004). 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.*

ANALYSIS

Broadly speaking, this appeal requires us to determine whether damage caused by faulty workmanship is covered under a standard CGL insurance policy. Although this issue has been frequently examined by a number of courts, it is a matter of first impression in Nebraska.

[3-5] 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. *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004). 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. *Id.* 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. *Id.*

As relevant here, Home Pride's policy states:

> **SECTION I—COVERAGES**
>
> **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement.**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. . . .
>
> . . . .
>
> **b.** This insurance applies to "bodily injury" and "property damage" only if:

> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" . . . .
>
> . . . .
>
> **2. Exclusions.**
>
> This insurance does not apply to:
>
> . . . .
>
> **1.** "Property damage" to "your work" arising out of it or any part of it and including in the "products-completed operations hazard".
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

As an initial matter, we note that Home Pride appears to argue that coverage exists because the policy contains a subcontractor exception to the "your work," or "1," exclusion found in section 2. We disagree. The provision Home Pride relies on is merely an exception to an exclusion and, therefore, incapable of providing coverage. See, *Auto Owners Ins. Co. v. Travelers Cas. & Surety*, 227 F. Supp. 2d 1248 (M.D. Fla. 2002); *Hawkeye-Security Ins. Co. v. Davis*, 6 S.W.3d 419 (Mo. App. 1999); *Lassiter Const. v. American States Ins.*, 699 So. 2d 768 (Fla. App. 1997). Stated otherwise, the exception contained within exclusion "l" is irrelevant until two conditions precedent are met: (1) There is an initial grant of coverage and (2) exclusion "l" operates to preclude coverage. See, *L-J, Inc. v. Bituminous Fire and Marine*, 350 S.C. 549, 567 S.E.2d 489 (S.C. App. 2002); *Kalchthaler v. Keller Const. Co.*, 224 Wis. 2d 387, 591 N.W.2d 169 (Wis. App. 1999). If, and only if, these two conditions are met may the subcontractor exception to the exclusion be applicable.

In order to determine if coverage exists, we must first determine if there was "property damage" caused by an "occurrence." On both accounts, Auto-Owners contends that there is not. As to the former, the policy states that "property damage" is "[p]hysical injury to tangible property, including all resulting loss of use of that property" as well as "[l]oss of use of tangible property that is not physically injured." In their amended petition, Appletree and Peterson alleged that shingles were breaking apart and falling off the roofs at Appletree's apartments, resulting in

substantial and material damage to the roof structures and buildings. Such allegations state a cause for physical injury to tangible property and, therefore, "property damage" under the policy. See, *American Family Mut. v. American Girl, Inc.*, 268 Wis. 2d 16, 673 N.W.2d 65 (2004); *Kalchthaler v. Keller Const. Co., supra*; *Maryland Cas. Co. v. Reeder*, 221 Cal. App. 3d 961, 270 Cal. Rptr. 719 (1990).

[6] At the core of Auto-Owners' appellate argument is its contention that faulty workmanship does not constitute an "occurrence" under the policy. The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While the term "accident" is not defined in the policy, we have previously stated that "an accident within the meaning of liability insurance contracts includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby." *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 206, 570 N.W.2d 320, 325 (1997). See, also, *Sullivan v. Great Plains Ins. Co.*, 210 Neb. 846, 851, 317 N.W.2d 375, 379 (1982) (accident is "'an unexpected happening without intention or design,'" quoting 45 C.J.S. *Insurance* § 829 (1946)); *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 154, 206 N.W.2d 632, 634 (1973) ("[t]he word 'accident' as used in liability insurance is a more comprehensive term than 'negligence' and in its common signification the word means an unexpected happening without intention").

Whether faulty workmanship fits within the aforementioned definition of accident is a difficult question, and courts have answered it in a variety of ways. For example, a relatively small number of courts have determined that the damage that occurs as a result of faulty or negligent workmanship constitutes an accident, so long as the insured did not intend for the damage to occur. See, *Fidelity & Deposit of Maryland v. Hartford Cas.*, 189 F. Supp. 2d 1212 (D. Kan. 2002); *Joe Banks Drywall v. Transcont. Ins. Co.*, 753 So. 2d 980 (La. App. 2000); *Erie Ins. Exchange v. Colony Dev. Corp.*, 136 Ohio App. 3d 406, 736 N.E.2d 941 (1999).

However, the majority of courts have determined that faulty workmanship is not an accident and, therefore, not an occurrence. See, e.g., *Lenning v. Commercial Union Ins. Co.*, 260 F.3d

574, 583 (6th Cir. 2001) ("there is no 'occurrence' to the extent [a] complaint alleges property damage arising out of defective or faulty craftsmanship"); *J.Z.G. Resources, Inc. v. King*, 987 F.2d 98 (2d Cir. 1993) (defective workmanship, standing alone, is not occurrence); *Pursell Const. v. Hawkeye-Security Ins.*, 596 N.W.2d 67, 71 (Iowa 1999) ("defective workmanship standing alone, that is, resulting in damages only to the work product itself, is not an occurrence under a CGL policy"); *L-J, Inc. v. Bituminous Fire and Marine*, 350 S.C. 549, 556, 567 S.E.2d 489, 493 (S.C. App. 2002) ("faulty workmanship, standing alone, does not constitute an 'accident' and cannot therefore be an 'occurrence'"); *State Farm Fire and Cas. Co. v. Tillerson*, 334 Ill. App. 3d 404, 409, 777 N.E.2d 986, 991, 268 Ill. Dec. 63, 68 (2002) ("[w]here the defect is no more than the natural and ordinary consequences of faulty workmanship, it is not caused by an accident"); *Radenbaugh v. Farm Bureau*, 240 Mich. App. 134, 610 N.W.2d 272 (2000); *Heile v. Herrmann*, 136 Ohio App. 3d 351, 736 N.E.2d 566 (1999); *U.S. Fidelity & Guar. v. Advance Roofing*, 163 Ariz. 476, 788 P.2d 1227 (Ariz. App. 1989).

[7] Although it is clear that faulty workmanship, standing alone, is not covered under a standard CGL policy, it is important to realize that there are two different justifications for this rule. On the one hand, the rule has been justified on public policy grounds, primarily on the long-founded notion that the cost to repair and replace the damages caused by faulty workmanship is a business risk not covered under a CGL policy. See, *Nas Sur. Group v. Precision Wood Products, Inc.*, 271 F. Supp. 2d 776 (M.D.N.C. 2003); *LaMarche v. Shelby Mut. Ins. Co.*, 390 So. 2d 325 (Fla. 1980). Today, the business risk rule is part of standard CGL policies in the form of "your work" exceptions to coverage. Therefore, the business risk rule does not serve as an initial bar to coverage, but, rather, as a potential exclusion, via the "your work" exclusions, if an initial grant of coverage is found. See, *American Family Mut. v. American Girl, Inc.*, 268 Wis. 2d 16, 673 N.W.2d 65 (2004); *Erie Ins. Exchange v. Colony Dev. Corp., supra.*

On the other hand, rather than relying on the business risk rule, a majority of courts have determined that faulty workmanship, standing alone, is not covered under a CGL policy because,

as a matter of policy interpretation, "[t]he fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." *McAllister v. Peerless Ins. Co.*, 124 N.H. 676, 680, 474 A.2d 1033, 1036 (1984). See, also, *J.Z.G. Resources, Inc. v. King, supra*; *Pursell Const. v. Hawkeye-Security Ins., supra*; *Heile v. Herrmann, supra*; *R.N. Thompson & Associates v. Monroe Guar.*, 686 N.E.2d 160 (Ind. App. 1997); *Indiana Ins. Co. v. Hydra Corp.*, 245 Ill. App. 3d 926, 615 N.E.2d 70 (1993); *U.S. Fidelity & Guar. v. Advance Roofing, supra.* Because the majority rule is based on an actual interpretation of policy language, as opposed to a mere exposition of policy, and comports with our prior definitions of the term "accident," we believe that it represents the better rule. See *id.* Consequently, we conclude that faulty workmanship, standing alone, is not covered under a standard CGL policy because it is not a fortuitous event.

[8] Important here, although faulty workmanship, *standing alone*, is not an occurrence under a CGL policy, an accident caused by faulty workmanship is a covered occurrence. See, e.g., *J.Z.G. Resources, Inc. v. King*, 987 F.2d 98 (2d Cir. 1993); *Wm. C. Vick Const. Co. v. Pennsylvania Nat. Mut.*, 52 F. Supp. 2d 569 (E.D.N.C. 1999); *Pursell Const. v. Hawkeye-Security Ins.*, 596 N.W.2d 67 (Iowa 1999); *High Country Assocs. v. N.H. Ins. Co.*, 139 N.H. 39, 648 A.2d 474 (1994); *L-J, Inc. v. Bituminous Fire and Marine*, 350 S.C. 549, 567 S.E.2d 489 (S.C. App. 2002); *Radenbaugh v. Farm Bureau*, 240 Mich. App. 134, 610 N.W.2d 272 (2000); *Heile v. Herrmann*, 136 Ohio. App. 3d 351, 736 N.E.2d 566 (1999); *Kalchthaler v. Keller Const. Co.*, 224 Wis. 2d 387, 591 N.W.2d 169 (Wis. App. 1999); *Auto Owners Ins. v. Tripp Const., Inc.*, 737 So. 2d 600 (Fla. App. 1999); *Pekin Ins. v. Richard Marker Associates*, 289 Ill. App. 3d 819, 682 N.E.2d 362, 224 Ill. Dec. 801 (1997); *U.S. Fidelity & Guar. v. Advance Roofing*, 163 Ariz. 476, 788 P.2d 1227 (Ariz. App. 1989). Stated otherwise, although a standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists. See, *High Country Assocs. v. N.H. Ins. Co., supra*; *L-J, Inc.*

v. Bituminous Fire and Marine, supra; *Radenbaugh v. Farm Bureau, supra*; *Kalchthaler v. Keller Const. Co., supra.*

For example, in *L-J, Inc. v. Bituminous Fire and Marine, supra*, a subcontractor was hired to clear, grub, grade, and construct the subbase for a road construction project. The subcontractor failed to remove a number of tree stumps in the roadbed and moisture seeped into the road base, deteriorating the road. After stating the general rule that "faulty workmanship, standing alone, does not constitute an 'accident' and cannot therefore be an 'occurrence,' " the court noted faulty workmanship that causes an accident is covered under a standard CGL policy. *Id.* at 556, 567 S.E.2d at 493.

> [H]ad the pavement not failed and [the developer] brought an action to recover the cost of removing the tree stumps from the roadbed, the defective work, standing alone, would not have been "property damage" or an "occurrence" under the policy. The damages, however, extend beyond the cost of removing the tree stumps because the failure to properly compact the roadbed led to property damage, namely, the failure of the road surfaces. These remote damages were an "accident" not expected or intended by the insured.

Id. at 556-57, 567 S.E.2d at 493.

Similarly, in *High Country Assocs. v. N.H. Ins. Co., supra*, a homeowners' association sued the builders of a number of condominiums for negligently constructing the condominiums' exterior walls. Initially, the court noted the rule that claims for faulty workmanship, standing alone, do not constitute an "occurrence" within the meaning of a CGL policy. *Id.* The court then went on to point out that the homeowners' association's petition not only requested compensation to repair and replace the poorly constructed exterior walls, but also requested compensation for the water damage that allegedly occurred as a result of the builders' faulty workmanship, including decay of the sheathing, harm to the structural studding, loss of structural integrity, and damage to the vertical siding. *Id.* Determining that these consequential damages constituted accidental damage to property other than the insured's own work product, the court held that the homeowners' association had made out a claim for property damage caused by an occurrence and that therefore, the

insurer was obligated to provide coverage for the insured builder. *Id.*

In the instant case, Appletree and Peterson alleged that JT Builders, through its subcontractors Craig Industries and Home Pride (hereinafter contractors), negligently installed shingles on a number of apartments, which caused the shingles to fall off. Additionally, the amended petition alleged that as a consequence of the faulty work, the roof structures and buildings have experienced substantial damage. This latter allegation represents an unintended and unexpected consequence of the contractors' faulty workmanship and goes beyond damages to the contractors' own work product. Therefore, the amended petition properly alleged an occurrence within the meaning of the insurance policy.

[9] Because Appletree and Peterson's amended petition alleges property damage caused by an occurrence, the policy provides an initial grant of coverage. Therefore, we now turn to the policy exclusions. Under established law, the burden to prove that an exclusionary clause applies rests upon the insurer. See *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003). On appeal, Auto-Owners contends that coverage is excluded by exclusions "n(2)" and "n(3)." These exclusions state:

> **SECTION I—COVERAGES**
> **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> . . . .
>
> **2. Exclusions.**
>
> This insurance does not apply to:
>
> . . . .
>
> **n.** Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
>
> . . . .
>
> (2) "Your work"; or
>
> (3) "Impaired property";
>
> if such . . . work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

[10,11] Generally speaking, the "your work" exclusions, of which "n(2)" is one, operate to prevent liability policies from insuring against an insured's own faulty workmanship, which is a normal risk associated with operating a business. See, *American Family Mut. v. American Girl, Inc.*, 268 Wis. 2d 16, 673 N.W.2d 65 (2004); *Employers Mut. Cas. Co. v. Pires*, 723 A.2d 295 (R.I. 1999); *Knutson Const. Co. v. St. Paul Fire & Marine Ins.*, 396 N.W.2d 229 (Minn. 1986); *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979); *Sapp v. State Farm Fire & Cas. Co.*, 226 Ga. App. 200, 486 S.E.2d 71 (1997). Essentially, the rationale behind the "your work" exclusions is that they discourage careless work by making contractors pay for losses caused by their own defective work, while preventing liability insurance from becoming a performance bond. See, *Fireguard Sprinkler Systems v. Scottsdale Ins.*, 864 F.2d 648 (9th Cir. 1988); *Knutson Const. v. St. Paul Fire & Marine Ins., supra*; *Weedo v. Stone-E-Brick, Inc., supra*; *U.S. Fidelity & Guar. v. Advance Roofing*, 163 Ariz. 476, 788 P.2d 1227 (Ariz. App. 1989); *C. D. Walters Const. Co. v. Fireman's Ins. Co.*, 281 S.C. 593, 316 S.E.2d 709 (S.C. App. 1984).

In the instant case, exclusion "n(2)" does not serve to exclude Appletree and Peterson's damage claim because their claim extends beyond the cost to simply repair and replace the contractors' work, i.e., to reshingle the roofs. As previously noted, Appletree and Peterson alleged that the contractors' faulty workmanship resulted in substantial damage to the roof structures and buildings. Therefore, their claimed damages to the roof structure and buildings fall outside of the exclusion. See, *Standard Fire Ins. Co. v. Chester O'Donley*, 972 S.W.2d 1 (Tenn. App. 1998) (noting that "your work" exclusion does not apply to claims involving losses resulting from failure of insured's work); *Glens Falls Ins. v. Donmac Golf Shaping*, 203 Ga. App. 508, 417 S.E.2d 197 (1992).

Similarly, in regard to exclusion "n(3)," the policy states that property is not "impaired" unless it is capable of being restored by the "repair, replacement, adjustment or removal of . . . 'your work'; or . . . [y]our fulfilling the terms of the contract or agreement." Therefore, because damage to the roof structures and buildings cannot be repaired or restored by simply reshingling

the apartment roofs, they are not "impaired property" within the meaning of exclusion "n(3)." See, *Federated Mut. Ins. Co. v. Grapevine Excavation*, 197 F.3d 720 (5th Cir. 1999). Consequently, exclusion "n(3)" is inapplicable.

CONCLUSION

For the foregoing reasons, we conclude that Auto-Owners has a duty to defend Home Pride, and to the extent that Home Pride may be found liable for the resulting damage to the roof structures and the buildings, Auto-Owners is obligated to provide coverage. The district court erred in granting summary judgment in favor of Auto-Owners and in not granting summary judgment in favor of Home Pride. The judgment entered in favor of Auto-Owners and against Home Pride is reversed, and the district court is directed to enter judgment in favor of Home Pride consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ROBERT CAVE, DOING BUSINESS AS CAR MART, A SOLE PROPRIETORSHIP, APPELLANT AND CROSS-APPELLEE, V. ALFRED L. REISER, APPELLEE, AND JERALD J. REISER, APPELLEE AND CROSS-APPELLANT.

684 N.W.2d 580

Filed August 6, 2004. No. S-03-391.

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. **Motions for New Trial: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912.01(1) (Reissue 1995), a motion for a new trial is not a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record.
3. **Judgments: Liens: Abatement, Survival, and Revival: Time.** Under Neb. Rev. Stat. § 25-1515 (Cum. Supp. 2002), a judgment becomes dormant and ceases to be a lien upon real estate when an execution is not sued out within 5 years after the date of entry of the judgment or if 5 years have intervened between the date of the last execution issued on the judgment and the time of suing out another writ of execution.
4. **Judgments: Abatement, Survival, and Revival: Time.** Under Neb. Rev. Stat. § 25-1420 (Reissue 1995), if a judgment becomes dormant, it may be revived, so long as the action to revive the judgment is commenced within 10 years after it became dormant.

5. **Judgments: Abatement, Survival, and Revival.** A proceeding for revival of a judgment is not the commencement of an action but is a continuation of the suit in which the judgment was rendered.
6. ____: ____. An order of revivor is a mere continuation of the original action and continues the vitality of the original judgment with all of its incidents from the time of its rendition.
7. ____: ____. The court cannot retry the merits of the original suit in the revivor proceedings.
8. ____: ____. The only defenses available against an application to revive are (1) there is no judgment to revive, (2) the purported judgment is void, and (3) the judgment was paid or otherwise discharged.
9. **Judgments: Jurisdiction.** A judgment entered without personal jurisdiction is void.
10. **Judgments: Abatement, Survival, and Revival: Jurisdiction: Evidence.** While a defendant in revival proceedings may not use extrinsic evidence to relitigate the merits of the case, the defendant can introduce extrinsic evidence to show that the original judgment was void because the court entered it without jurisdiction.
11. **Attorney and Client.** A litigant is not responsible for the acts of an unauthorized attorney.
12. **Attorney and Client: Judgments.** When a person has never hired an attorney, but the attorney appears in court purporting to represent the person, then all of the acts of the attorney are void and the judgment based on those acts is void.
13. **Attorney and Client: Presumptions: Proof.** When an attorney appears in an action as the representative of a party to the action, the presumption of the law is that he appears by the authority of the party whom he assumes to represent; but this presumption is prima facie only and may be rebutted by proof that the appearance was without such authority.
14. ____: ____: ____. The presumption that the appearance of an attorney was authorized must be overcome by clear and convincing evidence.
15. **Jurisdiction.** Jurisdiction is a question for the court, not the jury, even when the court must resolve factual disputes to determine the jurisdictional question.
16. **Judgments: Abatement, Survival, and Revival: Juries.** A defendant in revival proceedings does not have the right to have a jury decide whether the original judgment was entered without personal jurisdiction.

Appeal from the District Court for Lancaster County, KAREN FLOWERS, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court affirmed.

Mary C. Wickenkamp for appellant.

Brian S. Kruse, of Rembolt, Ludtke & Berger, L.L.P., for appellee Jerald J. Reiser.

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

CONNOLLY, J.

The appellant, Robert Cave, doing business as Car Mart, seeks to revive a judgment against the appellee Jerald J. Reiser. Jerald contends that the judgment is void because he was not properly served and an attorney who entered a general appearance on his behalf lacked the authority to do so. The main issue is whether Jerald can introduce extrinsic evidence to show that the judgment was void. The county court revived the judgment. Jerald appealed to the district court, which reversed, and remanded for a new trial. We affirm.

BACKGROUND

ORIGINAL JUDGMENT

In 1987, Cave filed a petition in Lancaster County Court, naming Alfred L. Reiser and "Jerold J. Reiser" as individual defendants; Alfred is Jerald's brother. Cave alleged that Alfred and Jerald had breached a contract.

The praecipe for summons attached to the petition requested that the sheriff make personal service on Alfred and Jerald and gave their address as "4210 Adams St., Lincoln, NE 68504." It is undisputed that Alfred lived at this address and was served. Jerald, however, claims that at the time, he lived at a different address, and that he was never served.

On February 5, 1988, an attorney filed an answer and counterclaim, purportedly on behalf of both Alfred and Jerald. Jerald claims that he never spoke with the attorney, employed her, or authorized her to make appearances or filings on his behalf. He also points out that on the answer and counterclaim, his first name is misspelled.

Following a bench trial, the court entered judgment for Cave. The judgment became dormant in 1993. Jerald claims that he did not learn about the lawsuit or the outstanding judgment until the revival proceedings.

REVIVAL PROCEEDINGS

In 2001, Cave filed an application for an order of revivor in Lancaster County Court, and the court conditionally revived the judgment. Both Alfred and Jerald received notice of the conditional revival order. Alfred responded by filing a suggestion in

bankruptcy; Jerald filed an answer, in which he alleged that the judgment had been obtained without proper service of summons or an appearance on his part. He also requested a jury trial.

The county court initially granted Jerald's request for a jury trial. Later, however, the court reversed its decision and denied a jury trial.

At the hearing before the county court, the judge took judicial notice of the record. In addition, Jerald testified that he was never served, he had no knowledge of the lawsuit, and the attorney who appeared on his behalf was not authorized to do so.

The county court found that service had been defective, but concluded that Jerald's testimony by itself was not enough to rebut the presumption that he had authorized the attorney to appear on his behalf. Accordingly, the county court entered an order reviving the judgment.

Jerald appealed to the district court. The district court reversed, and remanded for a new trial, reasoning as follows:

> The [county] court found that service on Jerald Reiser was defective but that the testimony of the Defendant by itself is not enough to overcome the presumption that [the attorney] appeared for him when the judgment was entered. The essence of the County Court's order is that, as a matter of law, to overcome the presumption, the Defendant must present witnesses (or perhaps other evidence) that corroborates his testimony. I find that the County Court was in error in so ruling. The Defendant's testimony alone, if believed, is legally sufficient to overcome the presumption raised by the record.

ASSIGNMENTS OF ERROR

Cave assigns that the district court erred in reversing the county court's order. In addition, Cave contends that the district court lacked jurisdiction because Jerald did not file a motion for a new trial in the county court before he appealed to the district court.

On cross-appeal, Jerald assigns that the district court erred in (1) remanding the case to the county court instead of determining that the judgment was void and (2) failing to rule that Jerald was entitled to a jury trial.

STANDARD 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. *Demerath v. Knights of Columbus, ante* p. 132, 680 N.W.2d 200 (2004).

ANALYSIS

MOTION FOR NEW TRIAL

As an initial manner, Cave argues that an appellate court cannot consider an issue decided by a trial court unless the appealing party raised the issue in a motion for a new trial before the trial court. He argues that because Jerald did not move for a new trial in the county court, the district court could not consider Jerald's appeal. Cave further contends that we should dismiss Jerald's cross-appeal for the same reason.

[2] Cave's argument has no merit. Under Neb. Rev. Stat. § 25-1912.01(1) (Reissue 1995), "[a] motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record." Here, the county court's ruling on the issues raised by Jerald in his appeal to the district court appear in the record, and therefore Jerald was not required to move for a new trial as a prerequisite to obtaining appellate relief. See *State v. Wright*, 220 Neb. 847, 374 N.W.2d 26 (1985).

EXTRINSIC EVIDENCE TO IMPEACH JUDGMENT IN REVIVAL PROCEEDINGS

[3,4] Under Neb. Rev. Stat. § 25-1515 (Cum. Supp. 2002), a judgment becomes dormant and ceases to be a lien upon real estate when an execution is not sued out within 5 years after the date of entry of the judgment or if 5 years have intervened between the date of the last execution issued on the judgment and the time of suing out another writ of execution. Under Neb. Rev. Stat. § 25-1420 (Reissue 1995), if a judgment becomes dormant, it may be revived, so long as the action to revive the judgment is commenced within 10 years after it became dormant.

[5-8] However, a proceeding for revival of a judgment is not the commencement of an action but is a continuation of the suit in which the judgment was rendered. *Mousel Law Firm v. The*

Townhouse, Inc., 259 Neb. 113, 608 N.W.2d 571 (2000). An order of revivor is a mere continuation of the original action and continues the vitality of the original judgment with all of its incidents from the time of its rendition. *Id.* The court, however, cannot retry the merits of the original suit in the revivor proceedings. See, *Krause v. Long*, 109 Neb. 846, 192 N.W. 729 (1923); *St. Paul Harvester Co. v. Mahs*, 82 Neb. 336, 117 N.W. 702 (1908). Rather, the only defenses available against an application to revive are (1) there is no judgment to revive, (2) the purported judgment is void, and (3) the judgment was paid or otherwise discharged. See, *Gergen v. The Western Union Life Ins. Co.*, 149 Neb. 203, 30 N.W.2d 558 (1948); *Baker Steel & Machinery Co. v. Ferguson*, 137 Neb. 578, 290 N.W. 449 (1940).

[9] Jerald claims that the judgment was void because the court never attained personal jurisdiction over him. A judgment entered without personal jurisdiction is void. See, *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999); *Enewold v. Olsen*, 39 Neb. 59, 64, 57 N.W. 765, 766 (1894) ("personal judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction, and is utterly and entirely void"); *Eaton v. Hasty*, 6 Neb. 419 (1877) (holding that when personal jurisdiction is based on general appearance made by attorney who was not authorized to make appearance, judgment is void). To support his contention that the judgment was void, Jerald offered extrinsic evidence—his own testimony that he was never served and that the attorney who purported to enter a general appearance on his behalf lacked the authority to do so. Cave, however, contends that a defendant in revival proceedings must stay within the judgment record and therefore cannot offer extrinsic evidence to prove that the original judgment was void for lack of jurisdiction. According to Cave, Jerald's remedy was to bring a suit in equity to vacate the judgment. To resolve the issue, we review the history of revival proceedings in Nebraska.

At common law, a writ of scire facias was the appropriate method for reviving a dormant judgment. See *Eaton v. Hasty, supra.* The writ required the defendant to show cause why the dormant judgment should not be revived. See Black's Law Dictionary 1347 (7th ed. 1999). When a plaintiff invoked scire facias to revive a judgment, the defendant was limited to two

defenses: (1) payment and satisfaction of the judgment and (2) nul tiel record. See, *McCormick v. Carey*, 62 Neb. 494, 87 N.W. 172 (1901); *Bank of Eau Claire v. Reed*, 232 Ill. 238, 83 N.E. 820 (1908). Nul tiel record was a common-law plea which alleged "(1) that there is no such Record at all in existence, or (2) a Variance, the Record being Different from that Declared on by the Plaintiff, or (3) that the Judgment is Void *on the Face of the Record*." (Emphasis supplied.) Joseph H. Koffler & Alison Reppy, Handbook of Common Law Pleading § 264 at 505 (1969). Thus, the defendant could not use extrinsic evidence to show that the judgment was entered without jurisdiction. See, *Bank of Eau Claire, supra*; *Simpson v. Watson*, 15 Mo. App. 425 (1884).

Nebraska's statutory revival scheme supplanted the writ of scire facias as the means for reviving a judgment. See, *Lashmett v. Prall*, 83 Neb. 732, 120 N.W. 206 (1909); *Wright v. Sweet*, 10 Neb. 190, 4 N.W. 1043 (1880). But the statute is silent on defenses. Some of our early cases suggested—but did not expressly hold—that a defendant's defenses were identical to those in scire facias proceedings and that thus the defendant could not use extrinsic evidence to show that the judgment was void for lack of jurisdiction. *McCormick, supra*; *Wright, supra*. But our practice departed from the language in our decisions. For example, in *Johnson v. Carpenter*, 77 Neb. 49, 108 N.W. 161 (1906), the return of summons in the original action recited that a certified copy of the summons had been left at the defendant's usual place of abode. In the revival proceedings, we allowed the defendant to introduce affidavits showing that when he was served, he did not live at the address where the copy of the summons was left. Similarly, in *St. Paul Harvester Co. v. Mahs*, 82 Neb. 336, 117 N.W. 702 (1908), we affirmed a denial of revival based on extrinsic evidence showing that the defendant had not been served, even though the judgment record contained a sheriff's return of service reciting that service had been made.

[10] *Johnson, supra*, and *St. Paul Harvester Co., supra*, demonstrated that Nebraska adopted a more lenient attitude toward allowing extrinsic evidence in revival proceedings than what was allowed in scire facias proceedings. Thus, while a defendant in revival proceedings may not use extrinsic evidence to relitigate the merits of the case, the defendant can introduce

extrinsic evidence to show that the original judgment was void because the court entered it without jurisdiction. Thus, the district court did not err in ruling that the county court could consider Jerald's extrinsic evidence.

JUDGMENT VOID AS MATTER OF LAW

The county court allowed Jerald to testify that he was never served, did not know about the lawsuit, and had not authorized the actions of the attorney who purported to make a general appearance on his behalf. In its ruling, the county court determined that Jerald had not been served, but also determined that as a matter of law, Jerald needed more than his own testimony to establish that the attorney's appearance had been unauthorized. The district court decided that the county court had erred in ruling that as a matter of law, Jerald's testimony alone could not overcome the presumption that he had authorized the attorney's appearance. The court remanded for a new trial. On cross-appeal, Jerald contends that based on the evidentiary record, we should decide that as a matter of law, the attorney's appearance was unauthorized. We disagree.

[11-14] A litigant is not responsible for the acts of an unauthorized attorney. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). Thus, when a person has never hired an attorney, but the attorney appears in court purporting to represent the person, then all of the attorney's acts are void and the judgment based on those acts is void. See *id.* When an attorney appears in an action as the representative of a party to the action, the presumption of the law is that he appears by the authority of the party whom he assumes to represent; but this presumption is prima facie only and may be rebutted by proof that the appearance was without such authority. *Vorce v. Page*, 28 Neb. 294, 44 N.W. 452 (1889). The presumption that the appearance of an attorney was authorized must be overcome by clear and convincing evidence. See *Winters v. Means*, 25 Neb. 241, 246, 41 N.W. 157, 159 (1888) (holding that want of authority to appear "should be clearly made to appear").

Jerald was the only person who testified at trial. His testimony, if believed, would have been sufficient to overcome the presumption that the attorney's appearance was authorized. But this case ultimately turns on whether Jerald's testimony was credible. The

county court did not determine whether it believed Jerald, and, because we have only a cold record, we are not able to evaluate Jerald's credibility. Thus, we refuse to decide this case as a matter of law and agree with the district court's decision to remand for a new trial.

JURY TRIAL

On cross-appeal, Jerald also claims that the county court erred in refusing to grant him a jury trial. Although Jerald made this argument to the district court, the court did not address it. We conclude, however, that the county court did not err in denying Jerald a jury trial.

[15,16] In support of his claim that he is entitled to a jury trial, Jerald relies on *Farak v. First Nat. Bank of Schuyler*, 67 Neb. 463, 93 N.W. 682 (1903). In *Farak*, we held that in revival proceedings, when the defendant alleges as a defense that the judgment has been paid or otherwise satisfied, the parties have the right to have the issue determined by a jury. See, also, *McCormick v. Carey*, 62 Neb. 494, 87 N.W. 172 (1901); *Broadwater v. Foxworthy*, 57 Neb. 406, 77 N.W. 1103 (1899). But this case does not involve the issue of payment; rather, the question is whether the judgment was void because the court lacked personal jurisdiction. Jurisdiction is a question for the court, not the jury. *Miller v. Walter*, 247 Neb. 813, 530 N.W.2d 603 (1995). And this is true even when the court must resolve factual disputes to determine the jurisdictional question. Thus, Jerald does not have the right to have a jury decide whether the original judgment was entered without personal jurisdiction. Cf. *Montgomery v. USS Agri-Chemical Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980) (holding that in motion to set aside default judgment, defendant was not entitled to jury trial on issue whether judgment was void because it was entered without personal jurisdiction).

CONCLUSION

Jerald was not precluded from offering extrinsic evidence to show that the original judgment was void for lack of personal jurisdiction. Nor did the district court err in remanding for a new trial. We have also considered Jerald's motion for sanctions and have decided that it should be denied.

AFFIRMED.

DONALD SCOTT SCURLOCKE, PERSONAL REPRESENTATIVE OF THE ESTATE OF DONALD ROY SCURLOCKE, DECEASED, APPELLANT, V. GREGORY HANSEN, APPELLEE.

684 N.W.2d 565

Filed August 6, 2004. No. S-03-442.

1. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
2. ____. 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.
3. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
4. **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.
5. **Expert Witnesses.** Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion, as distinguished from a mere guess or conjecture.
6. **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 Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Michael B. Kratville for appellant.

Patrick E. Brookhouser, Jr., of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

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

PER CURIAM.

NATURE OF CASE

Donald Roy Scurlocke sued Gregory Hansen seeking to recover for damage to trees on his property which allegedly occurred while Hansen was making preparations for the construction of a fence between their properties. Prior to trial,

Scurlocke died; however, the action was revived in the name of Scurlocke's personal representative, Donald Scott Scurlocke. Thus, when we refer to "Scurlocke" hereinafter, all such references shall be to Donald Scott Scurlocke. The Douglas County District Court sustained Hansen's motion for directed verdict and dismissed Scurlocke's petition. Scurlocke appeals.

FACTS

The petition which initiated this action alleged that Hansen had destroyed and/or removed hundreds of trees from the Scurlocke property and destroyed a fence that separated their adjacent properties. The petition further alleged that Hansen's actions caused special damages of approximately $29,390 to the trees and an unknown value to the fence. The petition also asserted that under Neb. Rev. Stat. § 25-2130 (Reissue 1995), which version was in effect at the time the alleged destruction occurred, any damages awarded should be trebled.

Hansen filed a motion for summary judgment, which the district court sustained in part on the claim for treble damages, finding that § 25-2130 was unconstitutional under *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960). The court denied the motion as to the sufficiency of the causation and damages. Scurlocke subsequently filed a third amended petition which did not include a request for treble damages.

Prior to trial, Hansen filed a motion in limine asking the district court to exclude all testimony by James Slater, a retired arborist who was to be called as an expert by Scurlocke. At a hearing on the motion, Slater testified that an arborist prunes, maintains, fertilizes, installs, and removes trees and shrubs. Slater received a bachelor of science degree in forest management from Colorado State University. Slater said he had no formal training in the type of estimating work he did in this case because none is available. He testified that he had experience estimating costs for between 125 and 150 residences after storm damage to trees for tax and insurance purposes and that the first step in making such an estimate is to make a visual inspection.

Slater testified that he went to the Scurlocke property and attempted to "visualize" from the remaining trees and shrubs what plants had been in the area prior to the alleged damage. He

stated that the area where the alleged damage occurred contained a variety of trees and shrubs that had grown over time. Slater testified that he based his opinion as to the property line on information given to him by Scurlocke. When Slater returned to the property at a later time, he observed a fence and determined that some of the trees he previously believed to be on the Scurlocke property were actually on Hansen's property.

Slater also testified at the hearing on the motion in limine that he looked at nearby areas where there was no damage and attempted to determine what actions were necessary to return the area to its original condition. He took no measurements, but based his estimate of damage on his visual inspection. Slater took notes at the time, but the notes do not indicate whether he saw any stumps where trees had been knocked down. Slater estimated that the cost for replacement of trees which had been destroyed would be $13,190 and that the cost for a 2-year maintenance program for the trees would be $15,600. Slater acknowledged that he had never undertaken a similar maintenance program in Nebraska and had never completed a damage estimate in a similar case where there was bulldozer damage to trees.

The district court sustained Hansen's motion in limine, finding that Slater's pretrial testimony contained opinions that had not been verified or tested and that the visualized estimate of damage and maintenance plan did not rest on a reliable foundation.

At trial, Slater was asked his opinion to a reasonable degree of "horticultural probability" as to the damage sustained by Scurlocke as a result of Hansen's actions, and Hansen's objection was sustained. As an offer of proof, Scurlocke offered testimony from the hearing on the motion in limine.

Contrary to the allegations made in Scurlocke's petition, Hansen testified that he had hired a person with a bulldozer to clear some of the land near the property line separating the Hansen and Scurlocke properties. Hansen claimed that after the fence was erected, he walked along the property line and saw no evidence that trees had been knocked down on the Scurlocke property.

The district court sustained Hansen's motion for directed verdict and dismissed the petition. Hansen's counterclaims were subsequently dismissed.

ASSIGNMENTS OF ERROR

Scurlocke's assignments of error, summarized, assert that the district court erred in sustaining the motion in limine and failing to admit Slater's testimony into evidence, granting Hansen's motion for directed verdict, and granting Hansen's motion for summary judgment with respect to the availability of treble damages.

STANDARD OF REVIEW

[1] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

[2] 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. *In re Estate of Matteson*, 267 Neb. 497, 675 N.W.2d 366 (2004).

[3] 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. *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004).

[4] 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*, 267 Neb. 397, 675 N.W.2d 89 (2004).

ANALYSIS

ADMISSION OF EXPERT TESTIMONY

We first consider Scurlocke's assertion that the district court erred in sustaining the motion in limine and failing to admit Slater's testimony into evidence. We have held that 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 as to 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. *Carlson v. Okerstrom, supra.*

The district court sustained Hansen's motion in limine to exclude Slater's testimony, noting that Slater testified that he had no formal training in this type of estimating, that this was the only time he had utilized the method, and that the estimates for replacement and maintenance of trees and shrubs were based on Slater's "visual estimation." The court found that Slater's testimony contained opinions that had not been verified or tested and that his estimates did not rest on a reliable foundation.

Slater testified that although he had experience estimating costs for a number of residences after storm damage to trees for tax and insurance purposes, he had no experience estimating damages where trees were damaged by a bulldozer. Slater's methodology involved walking around the Scurlocke property and trying to "visualize" where trees had been prior to the construction of Hansen's fence. Slater's estimate was based on the cost to restore the property to its original condition, even though there was no evidence presented that he had ever seen the property prior to the alleged damage. Slater testified that he took no measurements and did not attempt to establish any sort of grid to determine the number of trees in a certain area for comparison. Slater testified that for his initial inspection, he relied on information from Scurlocke to determine the property line. Slater later determined that some of the trees he initially believed to be on Scurlocke's property were actually on Hansen's property.

[5] Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion, as distinguished from a mere guess or conjecture. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). The district court properly excluded Slater's testimony. Although Slater may have specialized knowledge, the record does not support a finding that he had a sufficient foundation for his opinion regarding the damage to the trees.

Scurlocke also raises an estoppel argument, suggesting that Hansen should not be allowed to argue that Slater's testimony

did not qualify as expert opinion because Hansen destroyed the evidence, i.e., the trees, that Slater needed to support his opinion. The issue of equitable estoppel was not raised in the district court during the hearing on the motion in limine or at trial, and it cannot be raised for the first time on appeal. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

In addition, Scurlocke asserts that even if Slater's testimony was properly excluded, the district court should have awarded him nominal damages. Scurlocke raises this issue in his argument concerning the admission of expert testimony, but it is not specifically assigned as 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. *In re Estate of Matteson*, 267 Neb. 497, 675 N.W.2d 366 (2004). Therefore, we will not address this alleged error.

None of the assignments of error related to Slater's testimony have merit. The district court properly granted the motion in limine and did not abuse its discretion in excluding Slater's opinion testimony. 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*, 267 Neb. 397, 675 N.W.2d 89 (2004). The district court correctly determined that Slater's opinion lacked proper foundation.

DIRECTED VERDICT

[6] Scurlocke also claims the district court erred in granting Hansen's motion for directed verdict. 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. *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004). 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. *Id.*

The district court sustained Hansen's motion for directed verdict, finding that it had not received or heard evidence that specific damage was done to the Scurlocke property. The court noted that Scurlocke did not offer specific testimony concerning damage to trees on his father's property. The court stated that it was offered no credible evidence as to the amount of damage.

Scurlocke argues there was ample evidence to conclude that the trees which were damaged were on his father's property. However, we agree with the district court's finding that the only evidence presented concerning the location of the damaged trees was the testimony of Scurlocke that trees were removed from the Scurlocke side of the property line. Scurlocke's testimony was imprecise. He stated merely that trees were removed from his father's property and placed in a pile 50 yards away. Scurlocke did not testify as to the number of trees that were damaged or the size of the area where the alleged damage occurred.

The district court concluded that there was no evidence as to the amount of damage to the Scurlocke property. We find that no inferences can be drawn from the evidence which would allow reasonable minds to differ as to this conclusion. The district court did not err in granting Hansen's motion for directed verdict and dismissing Scurlocke's petition.

Other Assignments of Error

Because we conclude that the district court did not err in excluding Slater's testimony or in directing a verdict in favor of Hansen, it is not necessary to address Scurlocke's other assignments of error.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

TOM BARNETT, APPELLANT, V. CITY OF SCOTTSBLUFF, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

684 N.W.2d 553

Filed August 6, 2004. No. S-03-702.

1. **Administrative Law: Appeal and Error.** In reviewing the decision of an administrative tribunal on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.
2. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
3. **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.
4. **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.
5. **Constitutional Law: Due Process.** The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.
6. **Due Process: Words and Phrases.** Although 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 in a meaningful manner.
7. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial decisionmaker.
8. **Administrative Law: Due Process.** In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker.
9. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
10. **Administrative Law.** Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship.
11. **Administrative Law: Recusal: Presumptions.** The party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Sterling T. Huff, of Island, Huff & Nichols, Attorneys at Law, P.C., L.L.O., for appellant.

Howard P. Olsen, Jr., and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Tom Barnett's employment with the City of Scottsbluff, Nebraska, was terminated pursuant to the decision of the Scottsbluff city manager, Rick Kuckkahn. The termination resulted from Barnett's erroneous claim that he had attended an educational conference in Kearney, Nebraska. In accordance with the city's personnel manual, Barnett requested and was granted a hearing to challenge his termination of employment (formal hearing). The formal hearing was conducted before Kuckkahn on December 18 and 24, 2002. The formal hearing was transcribed. Witnesses testified under oath and were generally subject to cross-examination. Documents were received into evidence. Following the formal hearing, Kuckkahn issued a letter affirming the decision to terminate Barnett's employment with the city and setting forth the reasons therefor.

Barnett filed the instant petition in error proceeding with the district court for Scotts Bluff County, challenging the decision to terminate his employment. Barnett claimed, in summary, that his due process right to an impartial decisionmaker was violated and that Kuckkahn's decision was arbitrary and capricious. Following an evidentiary hearing, the district court affirmed the decision terminating Barnett's employment. Barnett appeals. We affirm the district court's decision.

II. STATEMENT OF FACTS

At the time of Barnett's termination of employment, he had been employed by the city for approximately 25 years, working primarily in the city's sewage treatment facility, and held the title of "Utilities Capital Improvements Coordinator." He was licensed by the State of Nebraska in the wastewater management area, and he was required by the state to fulfill continuing education requirements to renew and retain that license.

From November 6 through 8, 2002, Barnett was scheduled to attend an educational conference in Kearney. Barnett's attendance at the conference was paid for by the city. Attendance at the conference would satisfy certain wastewater management licensure continuing education requirements. Prior to his attendance at the conference, Barnett completed and submitted to the state an "Operator Certification Renewal Application," claiming, inter alia, to have attended 6.5 "contact hours" at the Kearney conference. The record reflects that Barnett was required by the Nebraska Department of Environmental Quality to sign the application and that his signature "certif[ied] that all information contained in [the] application is true and current to the best of [Barnett's] knowledge and belief; [and that he] understand[s] that any fraud or deception may result in revocation of any certificate granted."

On November 5, 2002, Barnett drove to Kearney for the conference. On November 12, following his return from Kearney, Barnett submitted to the city a personnel action report (P.A.) form, which form was used by the city to track employee absences from work. On the P.A. form, Barnett stated as the reason for his absence "32 Hr Training Recertification Hs . . . Joint Water/WW [Wastewater] Conference in Kearney." Barnett also submitted to the city a voucher seeking reimbursement for mileage and lodging expenses incurred during the conference.

On November 18, 2002, Eva Johnston, the city's human resources director, received a complaint that Barnett had not actually attended any of the sessions held during the Kearney conference. Johnston reported the complaint to Kuckkahn, the city manager, who directed that Johnston conduct an investigation. Johnston investigated the report. On or about November 20, Johnston and Mark Bohl, Barnett's supervisor, met with Barnett to discuss with him the results of Johnston's investigation, which had confirmed Barnett's absence from any of the conference sessions. Barnett told them that he had been sick during the entire conference and had stayed in his hotel room, where he stated he had done some work. Barnett explained that he had tried to go to some of the sessions but had been too sick and had returned to his hotel room. When shown an agenda from the conference, Barnett could not identify which sessions he had attempted to

attend. Barnett acknowledged that he had not advised any of the other city employees attending the conference that he was sick, nor had he reported his illness to his supervisor or anyone else with the city. During the meeting with Johnston and Bohl, Barnett also stated that he had not advised the state that the certification form he had submitted verifying his attendance at the conference was incorrect. The record reflects that Barnett did not notify the state of the error in his certification renewal application until either December 3 or 4, approximately 1 month after the conference.

Following their meeting with Barnett, Johnston and Bohl prepared and presented to Kuckkahn a memorandum in which they recommended that as a result of Barnett's actions during and after the conference, his employment with the city should be terminated.

The Legislature has provided for, and the city has adopted, a city manager plan for its plan of government. See Neb. Rev. Stat. § 19-601 et seq. (Reissue 1997 & Cum. Supp. 2002). Under the statutes governing the city manager plan, a city council chooses its city manager, § 19-618, who in turn is responsible "for the proper administration of all affairs of the city," § 19-645. The city manager's duties include the following:

> (1) to see that the laws and ordinances are enforced, (2) to appoint and remove all heads of departments and all subordinate officers and employees in the departments in both the classified and unclassified service, which appointments shall be upon merit and fitness alone, and in the classified service all appointments and removals shall be subject to the civil service provisions of the Civil Service Act, [and] (3) to exercise control over all departments and divisions thereof that may be created by the council[.]

§ 19-646. Pursuant to § 19-647, the city manager is authorized to investigate employee conduct and "shall have the same power to compel the attendance of witnesses and the production of books and papers and other evidence . . . which has herein been conferred upon the [city] council." Under a city manager plan form of government, the city council is required to "deal with the administrative service solely through the city manager, and neither the council nor any member thereof shall give orders to

any of the subordinates of the city manager, either publicly or privately." § 19-618.

On November 22, 2002, Kuckkahn met with Barnett. Kuckkahn informed Barnett of Johnston and Bohl's recommendation that Barnett be terminated. Kuckkahn sought Barnett's response to that recommendation. Later on that same day, Kuckkahn met with Barnett a second time, at which time he presented Barnett with a letter informing him that his employment with the city had been terminated. The letter outlined the reasons for Barnett's termination, which included his failure to notify his supervisor of his illness, the P.A. form he had completed which "represented attendance at the conference . . . with no mention of sick leave," and his failure to correct the state certification renewal application he had completed, in which he had erroneously certified his attendance at the Kearney conference. The letter stated that these actions constituted violations of § 3.2a(2), (7), and (23) of the city's personnel manual, in that Barnett had (1) failed to meet the prescribed standards of work, morality, and ethics to an extent that makes an employee unsuitable for employment; (2) demonstrated insubordination or a failure to hold a supervisor's position in respect; and (3) acted or failed to act in a manner which was sufficient to show Barnett to be an unsuitable and unfit person for city employment.

Following Barnett's termination of employment, he requested a formal hearing to contest his termination pursuant to § 3.2c of the city's personnel manual, which provides as follows:

> An employee . . . not subject to the Civil Service laws of the State of Nebraska, who has been demoted, suspended, or dismissed by the City Manager may request a formal hearing . . . .
>
> . . . .
>
> The City Manager will, in writing, set a date, time, and place for a hearing to further evaluate the case . . . .
>
> The employee may represent himself or be represented by counsel of his choice at the hearing.
>
> Proceedings at the hearing may be recorded as the City Manger [sic] may direct or approve. . . .
>
> Within ten days after the completion of the hearing, the City Manager shall enter his findings, determination, and

orders, if any, and a copy of such will be delivered or mailed by certified mail within five work days of such entry.

Kuckkahn set the formal hearing for December 18, 2002, and notified Barnett in writing of the hearing date. On December 11, Barnett filed a "Motion to Disqualify," seeking to have Kuckkahn disqualified as the hearing officer for the December 18 formal hearing. Barnett claimed that Kuckkahn was not an impartial decisionmaker, citing Kuckkahn's involvement in Barnett's employment termination and the likelihood that Barnett would call Kuckkahn as a witness. In a letter dated December 17, Kuckkahn overruled the motion, stating, in part, that he was "the only official in the City Manager form of government with the authority to conduct such a hearing. There is no statutory or city power providing for an alternative."

The formal hearing, which was transcribed, was held on December 18 and 24, 2002. Kuckkahn presided. Barnett was represented by an attorney during the formal hearing, and he was permitted to present evidence in opposition to his termination. Barnett, Bohl, Johnston, and Terri Rose, Bohl's administrative records technician, appeared as witnesses and testified under oath. Barnett also called Kuckkahn as a witness. Kuckkahn provided sworn testimony. Approximately 20 exhibits were admitted into evidence.

Barnett's attorney was allowed to and did cross-examine the witnesses extensively regarding the circumstances surrounding Barnett's employment with the city and the termination of that employment. During the formal hearing, Barnett's attorney attempted to solicit evidence from Bohl, Johnston, and Kuckkahn regarding other individuals whose employment had been terminated by the city. Although Barnett's attorney was permitted to elicit general testimony regarding the circumstances surrounding other employment terminations, he was not permitted by Kuckkahn to go into such detail as might lead to the identification of the former employees.

Following the formal hearing, in a letter dated January 8, 2003, Kuckkahn upheld the decision to terminate Barnett's employment. In the letter, Kuckkahn outlined the reasons behind the decision, including the inaccurate P.A. form Barnett submitted which suggested that he had attended the conference when in

fact he had not attended any of the sessions, his failure to report his illness to his supervisor, and the inaccurate certification form Barnett had submitted to the state. Kuckkahn concluded that these actions, among others, constituted violations of § 3.2a(2), (7), and (23) of the personnel manual, and as a result, Kuckkahn affirmed the decision to terminate Barnett's employment with the city.

Thereafter, on February 5, 2003, Barnett filed a petition in error proceeding with the district court. It is the outcome of the petition in error proceeding which Barnett now appeals. On May 21, a hearing was held on the petition in error, during which hearing the exhibits and the transcribed testimony from the formal hearing were received into evidence. In its oral pronouncement made following the hearing on the petition in error, the district court concluded that there was sufficient evidence to support the city's decision to terminate Barnett's employment. The district court further concluded that Barnett had not been denied procedural due process. The district court concluded that Barnett had failed to make a "showing of actual bias or actual partiality, or animosity, or financial interest, or anything like that that would indicate . . . Kuckkahn made [the] decision on those grounds, as opposed to giving it an honest and objective taking a second look at it, which was done." In an order entered May 29, the district court affirmed the decision to terminate Barnett's employment.

Barnett appeals from the district court's order affirming Barnett's termination from employment with the city.

III. ASSIGNMENTS OF ERROR

On appeal, Barnett assigns seven errors, which can be restated as five. Barnett asserts, restated and renumbered, that the district court erred in (1) failing to determine that §§ 19-646 and 19-647 violate Barnett's procedural due process rights, (2) failing to determine that §§ 19-646 and 19-647 and the personnel manual violate Barnett's rights to equal protection under Neb. Const. art. I, § 6, and the 14th Amendment to the U.S. Constitution, (3) failing to conclude that Kuckkahn made erroneous evidentiary rulings during the formal hearing, (4) failing to determine that the procedures adopted by the city in its personnel manual and used by the city during the formal

hearing violated Barnett's procedural due process rights, and (5) failing to conclude that the decision to terminate Barnett's employment was arbitrary and capricious and unsupported by the evidence.

We do not consider Barnett's first through third assignments of error. The record fails to reflect that Barnett raised his equal protection claim during the district court proceedings. Accordingly, we decline to consider this assignment of error on appeal. See *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003) (stating that constitutional issue not presented to or passed on by lower tribunal is not appropriate for consideration on appeal). Furthermore, in his briefs on appeal, Barnett does not present argument that supports his assertion that §§ 19-646 and 19-647 violate his due process rights, or that Kuckkahn made erroneous evidentiary rulings. As a result, we likewise decline to consider these assignments of error on appeal. See *Misle v. HJA, Inc.*, 267 Neb. 375, 382, 674 N.W.2d 257, 263 (2004) (stating that to be considered on appeal "an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error").

IV. STANDARDS OF REVIEW

[1,2] In reviewing the decision of an administrative tribunal on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence. See *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23 (2003). The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. See *id.*

[3,4] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *In re Estate of Reed*, 267 Neb. 121, 672 N.W.2d 416 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Tri-Par Investments v. Sousa, ante* p. 119, 680 N.W.2d 190 (2004).

V. ANALYSIS

1. Due Process

(a) General Due Process Requirements

We first turn to Barnett's contention that the formal hearing, conducted according to § 3.2c of the city's personnel manual, violated his procedural due process rights. We note that the city does not challenge Barnett's claim that he was entitled to procedural due process during this proceeding. Instead, what is generally at issue in this case is whether the procedures afforded Barnett satisfied due process.

[5-7] We have stated that the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). We have recognized that although "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 in a meaningful manner." *Hass v. Neth*, 265 Neb. at 328, 657 N.W.2d at 20. Accord *Marshall v. Wimes, supra*. With regard to proceedings before an administrative agency or tribunal, we have stated that procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial decisionmaker. *Id.*

(b) Impartial Decisionmaker

Barnett claims that the hearing procedures set forth in the city's personnel manual and provided at the formal hearing violated his procedural due process rights. Specifically, Barnett claims that the procedures are unconstitutional because they did not provide for an independent and unbiased review before an impartial decisionmaker. In support of his argument, Barnett relies on *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997). We conclude that the procedures provided to Barnett comported with the procedural due process requirement of an impartial decisionmaker and that Barnett's reliance on *Crown Products Co.* is misplaced.

[8,9] As noted above, in formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker. See, *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002); *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994). We have recognized that administrative adjudicators serve with a presumption of honesty and integrity. *Id.* In *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993), we noted that judges and arbitrators are subject to the same ethical standards. By extension, we have said that ethical standards apply to administrative hearing officers. See *Urwiller v. Neth, supra.*

[10,11] We have also identified factors that may indicate partiality or bias on the part of an adjudicator. The factors are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship. *Urwiller v. Neth, supra*; *Dowd v. First Omaha Sec. Corp., supra.* Nonetheless, the party seeking to disqualify an adjudicator on the basis of bias or prejudice "bears the heavy burden" of overcoming the presumption of impartiality. *Urwiller v. Neth*, 263 Neb. at 435, 640 N.W.2d at 423.

Initially we note that Barnett does not claim, nor does the record reflect, that Kuckkahn participated in the investigation into the facts that formed the basis of the termination of Barnett's employment. Thus, we are not confronted with a situation in which the adjudicator was also the investigator. See *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed 2d 712 (1975). Instead, Barnett argues that Kuckkahn was not an impartial decisionmaker because of his familiarity with the circumstances of the case and because he was the city official who rendered the initial decision to terminate Barnett's employment. Barnett claims that given § 3.2c of the city's personnel manual, which provides for the city manager to conduct the formal hearing, and Kuckkahn's refusal to disqualify himself from the hearing, Barnett was denied procedural due process during his formal hearing. We disagree.

In *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976) (*Hortonville*), the U.S. Supreme Court considered a due process challenge in a

teacher disciplinary context. After negotiations for renewal of a collective bargaining contract failed to produce an agreement, certain teachers went on strike, in violation of state law. The teachers were ordered to return to work, and when some refused, the school board conducted disciplinary hearings. The hearings resulted in the termination of the striking teachers' employment with the school district. Certain of the terminated teachers challenged the hearings on due process grounds, claiming the school board lacked the requisite impartiality due to its involvement in the contract negotiations.

The issue the Court considered in *Hortonville* was "whether School Board members, vested by state law with the power to employ and dismiss teachers, could, consistent with the Due Process Clause of the Fourteenth Amendment, dismiss teachers engaged in a strike prohibited by state law." 426 U.S. at 483-84. The Court concluded there was no due process violation present in the case.

The Court was unpersuaded by the teachers' claim that the school board was biased because it had participated in the negotiations that preceded the striking teachers' discharge. The Court observed:

> Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decisionmaker. . . . Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances."

(Citations omitted.) 426 U.S. at 493 (quoting *United States v. Morgan*, 313 U.S. 409, 61 S. Ct. 999, 85 L. Ed. 1429 (1941)).

In analyzing the teachers' due process claim in *Hortonville*, the U.S. Supreme Court noted that participation in the negotiations was a statutory duty of the school board, as was the school board's authority to discipline the teachers. The Court noted that under state law, the school board had broad authority over the management of the school district and its teachers, and that the school board was the only body authorized to employ and dismiss the teachers. Given the foregoing duties, the Court determined that the school board could, consistent with due process

concerns, conduct the disciplinary hearing and render a decision. In reaching this decision, the Court stated:

> State law vests the governmental, or policymaking, function exclusively in the School Board and the State has two interests in keeping it there. First, the Board is the body with overall responsibility for the governance of the school district; it must cope with the myriad day-to-day problems of a modern public school system including the severe consequences of a teachers' strike . . . . Second, the state legislature has given to the Board the power to employ and dismiss teachers, as a part of the balance it has struck in the area of municipal labor relations; altering those statutory powers as a matter of federal due process clearly changes that balance. Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law.

Hortonville, 426 U.S. at 495-96. See, also, *Beischel v. Stone Bank School Dist.*, 362 F.3d 430 (7th Cir. 2004) (applying *Hortonville* reasoning to conclude school administrator who had been notified by school board that her contract might not be renewed was not denied due process where school board was body authorized under state law both to renew administrators' contracts and to conduct nonrenewal hearing).

In *Hortonville*, the Court concluded that given the state's interest as articulated in its statutes in preserving the board's governing authority, and given the presumption of honesty and integrity that is afforded administrative decisionmakers, absent some evidentiary presentation of actual bias or partiality on the part of the board, a mere showing that the school board had been involved in the proceedings that led up to the teachers' strike was insufficient to disqualify the board as a matter of federal due process. We apply the *Hortonville* reasoning to the state and federal due process claim in the instant case.

As noted above, the city has elected to follow the city manager plan of government. See § 19-601 et seq. Under the statutes governing the city manager plan, the city manager is responsible "for

the proper administration of all affairs of the city," § 19-645, and his or her duties include appointing and removing all heads of departments and all subordinate officers and employees in the departments in both the classified and unclassified service, § 19-646. In accordance with the Nebraska statutes, under a city manager plan form of government, the city council is required to "deal with the administrative service solely through the city manager, and neither the council nor any member thereof shall give orders to any of the subordinates of the city manager, either publicly or privately." § 19-618.

As in *Hortonville*, in the instant case, state law vests in Kuckkahn the authority to make employment decisions. The formal hearing procedure set forth in the personnel manual and Kuckkahn's decision not to disqualify himself are reflections of that authority established by state law. Because under state law Kuckkahn had broad authority over the management of city employees and was the only person authorized to employ and dismiss city employees, absent a showing of a lack of impartiality, he could, consistent with due process concerns, conduct the formal hearing and render a decision.

A party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality. *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002). In the instant case, the district court found that Barnett had failed to demonstrate "actual bias or actual partiality, or animosity, or financial interest" on the part of Kuckkahn. The record supports these determinations. Some evidence of Kuckkahn's involvement in the employment termination process, without more, is not enough to overcome the presumption of honesty and integrity applicable to administrative adjudicators. *Id.* Accordingly, the district court did not err when it indicated that Barnett had failed to carry his burden of demonstrating that the decisionmaker was biased or was adverse to Barnett, such that would disqualify a decisionmaker based on due process grounds.

Despite the lack of evidence demonstrating Kuckkahn's purported partiality as a decisionmaker, Barnett claims that under this court's decision in *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997), Kuckkahn was required to recuse himself. Barnett's reliance on *Crown Products Co.* is

misplaced. In *Crown Products Co.*, the City of Ralston entered into a purchase contract with Crown Products Company (Crown) to purchase a production facility located in Ralston. Before the purchase could be finalized, however, Ralston required Crown to conduct additional environmental tests on the property. Those tests were performed, and as a result of the test results, Ralston refused to continue with the purchase contract. Thereafter, Ralston and Crown worked together to address Ralston's environmental issues.

After approximately 2 years, the Ralston City Council notified Crown that it was no longer interested in purchasing Crown's property. The property was sold at auction for an amount significantly lower than Ralston's offer, and Crown filed a claim for breach of contract damages with Ralston.

A hearing was held on Crown's claim before the Ralston City Council. Several city council members, who were members of the council when Ralston had entered into the purchase contract with Crown and when Crown and Ralston had attempted to resolve the environmental concerns, submitted affidavits into the hearing record over Crown's objection. Crown was not permitted to cross-examine the council members. Following the hearing, the city council voted unanimously to deny Crown's claim. Crown filed a petition in error, and the district court reversed based on its conclusion that Crown had been denied due process because it had not received a fair and impartial hearing before the city council. We affirmed.

On appeal to this court, we agreed with the district court that the actions taken by the city council violated Crown's due process rights. We stated that the actions taken by the city council "essentially thwarted Crown's only opportunity to create a record supporting its position. Crown was effectively prohibited from executing a proper cross-examination of council members regarding submitted affidavits." *Id.* at 7, 567 N.W.2d at 298. We expressed concern surrounding the city council members' personal knowledge of the underlying facts, gained from their involvement in the 2-year process of attempting to finalize the purchase of the Crown property. As a result, we agreed with the district court that under the facts of the case, the city council members should have recused themselves from the decisionmaking process.

Unlike *Crown Products Co.*, in the instant case, Kuckkahn had no firsthand knowledge of the underlying facts. Specifically, Kuckkahn had no independent knowledge of Barnett's erroneous claims surrounding the Kearney conference, which are the events that led up to Barnett's termination of employment. Significantly, Kuckkahn was not involved directly in the investigation of any facts that resulted in Barnett's termination. Moreover, unlike *Crown Products Co.*, Barnett was permitted to examine Kuckkahn under oath regarding Barnett's termination. Kuckkahn's refusal to testify about the specifics of disciplinary actions involving other city employees did not deny Barnett an opportunity for a fair hearing regarding his own dismissal. The denial of due process exhibited in *Crown Products Co.* is not present in the instant case.

We agree with the district court that Barnett has failed to demonstrate that the hearing procedures set forth in the city's personnel manual and provided at the formal hearing violated his procedural due process rights. Accordingly, we determine that there is no merit to this assignment of error.

2. Sufficiency of Evidence

For his remaining assignment of error, Barnett claims that the district court erred when it determined that Kuckkahn's decision affirming the termination of Barnett's employment with the city was supported by sufficient evidence. We reject this assignment of error.

The record contains evidence, although disputed in part by Barnett, that demonstrates Barnett's failure to comply with the appropriate procedures regarding the completion of his P.A. form, as well as his submission of an inaccurate form to the state, which form he certified was true and correct. Kuckkahn reviewed the city's personnel manual and, following the formal hearing, concluded in his January 8, 2003, letter, that these actions, and others, established that Barnett had (1) failed to meet the prescribed standards of work, morality, and ethics to an extent that makes an employee unsuitable for employment; (2) demonstrated insubordination or a failure to hold a supervisor's position in respect; and (3) acted or failed to act in a manner which was sufficient to show Barnett to be an unsuitable and

unfit person for city employment. In particular, Kuckkahn concluded that these actions, among others, constituted violations of § 3.2a(2), (7), and (23) of the personnel manual. As a result, Kuckkahn affirmed the decision to terminate Barnett's employment with the city.

In reviewing the decision of an administrative tribunal on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence. See *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23 (2003). We agree with the district court that Kuckkahn's conducting the formal hearing was within his jurisdiction and that the testimony and exhibits contained in the record support the decision affirming Barnett's termination of employment. Accordingly, we conclude there is no merit to this assignment of error.

VI. CONCLUSION

The district court determined that Barnett was afforded due process, that the decision to terminate Barnett's employment with the city was neither arbitrary nor capricious, and that the termination was supported by the evidence. The district court's decision affirming the city's decision to terminate Barnett's employment with the city was not error, and we affirm.

AFFIRMED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
L.T. THOMAS, APPELLANT.

685 N.W.2d 69

Filed August 13, 2004. No. S-03-257.

1. **Judges: Recusal.** A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.
2. **Judges: Recusal: Appeal and Error.** A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.

3. **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.
4. **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.
5. ____: ____. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
6. **Constitutional Law: Due Process: Trial: Sentences: Judges.** The right to an impartial judge is guaranteed under the Due Process Clause of the 14th Amendment to the U.S. Constitution and the due process clause of the Nebraska Constitution, the parameters of which are coextensive. This right extends to both the trial and the sentencing hearing.
7. **Constitutional Law: Trial: Judges: Proof.** In order to show a constitutional violation of the right to an impartial judge, a defendant must prove actual bias or structural error.
8. **Trial: Judges: Words and Phrases.** Structural error occurs when the defendant shows that a judge had such a strong personal or financial interest in the outcome of the trial that he or she was unable to hold the proper balance between the State and the accused.
9. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
10. **Trial: Judges: Recusal.** A judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings when a litigant requests such recusal.
11. **Trial: Judges: Words and Phrases.** An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.
12. **Judges: Recusal: Sentences.** A judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. This rule extends to the sentencing phase of a criminal trial.
13. **Judges: Recusal.** Absent extraordinary circumstances, in order to disqualify a judge based upon the appearance of impropriety, the bias and prejudice must stem from a nonjudicial source and not from what the judge learned from his or her prior involvement in the defendant's case or cases that concerned parties or witnesses in the defendant's case.
14. **Courts: Appeal and Error.** When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.
15. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.

16. **Criminal Law: Statutes: Jurisdiction: Presumptions: Waiver.** A facial challenge to a presumptively valid criminal statute does not raise an issue of subject matter jurisdiction in a criminal prosecution and thus may be waived if not timely asserted.
17. **Prior Convictions: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior convictions.
18. **Sentences: Prior Convictions: Right to Counsel: Waiver: Proof.** When using a prior conviction to enhance a sentence, the State need show only that at the time of the prior conviction, the defendant had, or waived, counsel.
19. **Prior Convictions: Records: Proof.** The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.
20. ____: ____: ____. In reviewing criminal enhancement proceedings, a judicial record of this state, or of any federal court of the United States, may be proved by the production of the original or by a copy thereof, certified by the clerk or the person having the legal custody thereof, and authenticated by his or her seal of office, if he or she has one.
21. **Prior Convictions: Sentences: Proof.** To prove an earlier conviction for the purpose of sentence enhancement, the evidence must, with some trustworthiness, reflect a court's act of rendering judgment.
22. **Prior Convictions: Records: Names.** An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.
23. **Presentence Reports.** Neb. Rev. Stat. § 29-2261(1) (Reissue 1995) mandates that the sentencing court obtain and consider a presentence investigation with every felony conviction. However, the mandate is imposed for the benefit of the defendant, and the statutory right to a presentence investigation may be waived.
24. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

James Walter Crampton for appellant.

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

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

PER CURIAM.

In *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002) (*Thomas I*), this court affirmed L.T. Thomas' convictions for

second degree murder, first degree assault, and two counts of use of a firearm to commit a felony. Concluding, however, that the evidence was insufficient to sustain a finding that Thomas was a habitual criminal, we vacated the sentences and remanded the cause to the district court for Douglas County with directions to conduct a new enhancement hearing and resentence Thomas. *Id.* Following our remand, Thomas filed a motion to recuse the judge to whom the case had been assigned and a motion in arrest of judgment. The district court denied both motions. After conducting an enhancement hearing pursuant to our mandate, the district court determined that Thomas was a habitual criminal and sentenced him accordingly. Thomas now appeals from these rulings.

BACKGROUND

The facts pertinent to this criminal prosecution are set forth in detail in *Thomas I*, and we summarize them here only to the extent necessary to provide context for the issues presented in this appeal. In June 1994, Thomas shot two men in a car who were near the Stage II lounge in Omaha. Thomas claimed that he shot at the men in self-defense after they had threatened him with a gun. The driver, Phillip White, was shot in the left leg and subsequently crashed into a building as he attempted to drive to a hospital at a high rate of speed. White later died as the result of the head injuries he received in the crash. The other man, Rafael Petitphait, was shot three times but survived.

Thomas was charged with first degree murder, first degree assault, and two counts of the use of a firearm to commit a felony. An amended information added a charge that Thomas was a habitual criminal. District Judge Stephen A. Davis presided over Thomas' trial, which was held from January 24 to February 7, 1995. Aybar Crawford testified for the State that he saw Thomas shoot the men in the car and that he did not see or hear either of the men threaten Thomas. On cross-examination, Crawford testified that no promises had been made to him in exchange for his testimony. During a recess, the State informed Thomas' counsel that Crawford had a pending felony conviction for which he was yet to be sentenced. On recross-examination, Crawford testified that he could not benefit from any leniency

regarding the pending felony conviction because he would be returned to California for a probation violation. On redirect examination by the State, Crawford again denied that anyone had made any promises to him. The jury found Thomas guilty of the lesser-included offense of second degree murder, first degree assault, and two counts of use of a firearm to commit a felony.

At an enhancement hearing held on July 26, 1995, the State introduced certified copies of unsigned journal entries purporting to show that Thomas had two felony convictions: a 1989 conviction for attempted possession of a controlled substance with intent to deliver, for which he was sentenced to a prison term of 6 to 12 years, and a 1984 conviction for second degree assault, for which he was sentenced to a prison term of 18 to 24 months. The State also introduced "pen packs," or certified copies from the Department of Correctional Services, showing Thomas' commitment and discharge dates for both periods of incarceration, including his photographs and fingerprints. Judge Davis thereafter found Thomas to be a habitual criminal and sentenced him to prison terms of 20 years to life for second degree murder, 12 to 14 years for the use of a firearm to commit second degree murder, 12 to 14 years for first degree assault, and 10 to 12 years for the use of a firearm to commit first degree assault. All sentences were ordered to be served consecutively. Following his sentencing, Thomas filed a motion for new trial and two supplemental motions for new trial. He subsequently clarified his intent that the supplemental motions be considered as part of the original motion. All three motions were overruled.

Thomas' direct appeal was dismissed because his poverty affidavit was signed by trial counsel rather than by Thomas. See *State v. Thomas*, 4 Neb. App. xlix (No. A-95-1313, Jan. 9, 1996). In response to a motion for postconviction relief, he was granted a new direct appeal. The court did not consider Thomas' other grounds for postconviction relief. Thomas then concurrently filed an appeal from the postconviction order and a new direct appeal. His appeal of the postconviction order was dismissed without prejudice upon the State's motion for summary affirmance.

In the direct appeal, we affirmed all of Thomas' convictions but vacated his sentences because we determined that the evidence received at the enhancement hearing was insufficient to

support a finding that Thomas was a habitual criminal. We therefore remanded the cause "with directions for a new enhancement hearing and for resentencing." *Thomas I*, 262 Neb. at 1016, 637 N.W.2d at 661.

Upon remand, the case was assigned to Judge Richard J. Spethman because Judge Davis had retired. Thomas filed a motion to recuse Judge Spethman on the ground that he had obtained information from sources outside the record by virtue of presiding over sentencing and parole revocation proceedings involving Crawford in 1995. Thomas also filed a motion to quash the information charging him with second degree murder on the ground that it was based upon an unconstitutional statute, a motion in arrest of judgment on the same ground, and a motion seeking a new trial or an evidentiary hearing on his postconviction claims.

At a hearing on the motion to recuse, the court received evidence consisting of the transcript from the 1995 proceedings involving Crawford over which Judge Spethman had presided. The transcript reflects that on May 3, 1994, Crawford pled guilty to a charge of possession of a controlled substance in exchange for the State's dismissing an identical charge filed as a result of a separate incident. Crawford remained free on bond pending his sentencing. That sentencing did not take place until May 31, 1995, over a year after Crawford's plea and subsequent to the conclusion of Thomas' trial. During Crawford's sentencing hearing, his attorney asked that he be placed on probation, in part because he had assisted the State by testifying at Thomas' trial. Crawford's attorney further related that as a result of that cooperation, Crawford was subjected to physical attacks and threats. In response, Judge Spethman stated:

> I had you [Crawford] down for penitentiary time until such time as I found out, and I talked to the authorities about what you did in fact do and the risk that you put yourself in in doing it. I'm going to . . . give you one year [of probation]. I'm making it a short time to make it easier on you . . . .

Judge Spethman further stated that he "was really debating what to do with this gentleman. He did us a great service, I know that, in cooperating with the authorities."

The evidence reflects that in November 1995, Crawford again appeared before Judge Spethman on a charge of parole violation. In reviewing the case history, the court was initially confused as to whether Crawford had been sentenced in May 1994 or May 1995. When his counsel clarified that the sentencing was in 1995, Judge Spethman stated:

> That's what I thought, that we waited until about a year until we saw what your cooperation was like and it was fine. And that's the main reason I put you on probation. But you're not going to be able to ride that help that you gave the Omaha police any further, you know. You've got to do what all the other probationers do.

In support of the motion to recuse, Thomas' counsel argued that while Judge Spethman had done nothing improper in presiding over the Crawford proceedings, the information gained in those proceedings would make it improper for him to preside over Thomas' case following our remand. Judge Spethman stated on the record that he had no independent recollection of Crawford's case even after considering the transcript and that there was no reasonable basis for any claim of prejudice against Thomas with respect to the issues to be considered on remand from this court. He therefore overruled the motion to recuse.

The enhancement hearing was conducted on October 3, 2002. On the same day, Thomas filed a motion to reconsider the court's ruling on the motion for recusal or to grant Thomas a new trial on the recusal motion based on newly discovered evidence consisting of the deposition of Donald Schense, the prosecutor in Thomas' case. The motion alleged that the deposition showed that Schense had spoken to Judge Spethman about Crawford's cooperation and that Crawford had received a benefit for his cooperation. In considering this motion at the commencement of the enhancement hearing, the court requested a summary of Schense's deposition. Counsel for Thomas stated that he had taken Schense's deposition in the postconviction action and that Schense had indicated that he probably did talk to Judge Spethman regarding Crawford's cooperation. In response, Judge Spethman stated that he did not deny that the communication had occurred but concluded that it did not constitute grounds for his recusal in this case. The court therefore declined to receive

Schense's deposition and overruled the motion for reconsideration. It also overruled Thomas' remaining pending motions, including the motion in arrest of judgment, reasoning that Thomas had failed to raise the issues presented in the motions at the trial level.

At the commencement of the enhancement hearing, the court announced the title of the case and asked, "You're Mr. L. T. Thomas?" to which Thomas gave an affirmative response. The State offered evidence consisting of unsigned but certified copies of journal entries and certified pen packs received in the original enhancement hearing to show Thomas' two prior convictions. Additionally, however, the exhibits included certified docket entries from the two prior criminal prosecutions which reflect that Thomas was present with counsel at the time of his plea, conviction, and sentencing in each of the cases. The entries reflecting these facts are followed by the handwritten initials of the trial judge. Thomas interposed foundational and relevance objections to this evidence, arguing that the journal entries were not signed by the trial judge and that the State had failed to prove that he was the same person named in the docket entries from the prior criminal cases. The district court overruled these objections and determined, based upon the evidence presented, that Thomas was a habitual criminal.

At the conclusion of the enhancement hearing, Thomas agreed to proceed immediately to resentencing, specifically waiving a supplemental presentence investigation. Thomas asked the court to consider imposing concurrent sentences, given his good prison record. In response to this request, the court continued the hearing until a supplemental presentence investigation could be prepared which would reflect Thomas' conduct while incarcerated.

When the resentencing hearing reconvened on February 5, 2003, the court stated that after learning from the probation office that Thomas had been incarcerated since his original sentence, it had decided not to request a supplemental presentence investigation, and instead had requested a report of Thomas' record during his incarceration. The report, which was received into evidence, indicated that Thomas' conduct was "very appropriate . . . within the prison walls." The court also received letters written on behalf of Thomas, as well as Thomas' own written

statement. Thomas was allowed to make an oral statement in which he reasserted his claim of self-defense. The court stated that Thomas was entitled to some consideration "for the way [Thomas had] conducted himself while . . . in prison." It then sentenced Thomas to prison terms of 20 years to life for second degree murder, 6 to 8 years for the first count of use of a weapon to commit a felony, 10 to 12 years for assault in the first degree, and 5 to 10 years on the second count of use of a weapon to commit a felony, all terms to be served consecutively.

On the following day, February 6, 2003, the parties again appeared before the court. The court stated that in an attempt to show Thomas leniency, it had unintentionally imposed void sentences because any sentence for less than 10 years was not permitted under the habitual criminal statute. See Neb. Rev. Stat. § 29-2221(1) (Cum. Supp. 1994). Accordingly, the court imposed consecutive prison sentences of 20 years to life for second degree murder, 10 to 12 years on the first related weapons conviction, 10 to 12 years for assault in the first degree, and 10 to 12 years on the second related weapons conviction.

ASSIGNMENTS OF ERROR

Thomas assigns, reordered and restated, that the district court erred in (1) overruling his motion for recusal, (2) overruling his motion in arrest of judgment, (3) failing to find that the second degree murder statute is unconstitutional, (4) finding that Thomas was a habitual criminal, and (5) imposing improper and excessive sentences.

STANDARD OF REVIEW

[1,2] A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

[3] 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. *Hubbard, supra.*

[4,5] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *Hubbard, supra*; *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (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. *Hurbenca, supra.*

ANALYSIS

MOTION FOR RECUSAL

[6-8] The right to an impartial judge is guaranteed under the Due Process Clause of the 14th Amendment to the U.S. Constitution and the due process clause of the Nebraska Constitution, the parameters of which are coextensive. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999); *State v. Lotter*, 255 Neb. 889, 587 N.W.2d 673 (1999) (supplemental opinion). This right extends to both the trial and the sentencing hearing. *Ryan, supra.* In order to show a constitutional violation of the right to an impartial judge, a defendant must prove actual bias or structural error. See *Ryan, supra.* Structural error occurs when the defendant shows that a judge had such a strong personal or financial interest in the outcome of the trial that he or she was unable to hold the proper balance between the state and the accused.

[9] Thomas does not contend that structural error occurred in this case. However, he does contend that the record reflects actual bias on the part of Judge Spethman, citing as examples the judge's "refusal to allow even the offer of the prosecutor's deposition," his failure to require fingerprint evidence to prove Thomas' identity, and his sarcasm in initially requesting a supplemental presentence investigation. Thomas, however, also acknowledges that other portions of the record "tend to show differently." Brief for appellant at 13. A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *Bjorklund, supra.* Based upon our review of this record, we find no indication of actual bias on the part of Judge Spethman.

[10] Thomas correctly argues that there are circumstances in which recusal of a judge is required even where actual bias cannot be shown. In *State v. Barker*, 227 Neb. 842, 847, 420 N.W.2d 695, 699 (1988), this court held that "a judge, who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal." We noted in *State v. Ryan*, 257 Neb. at 652, 601 N.W.2d at 487, that this recusal rule "is premised on evidentiary principles and judicial ethics" and that while the "underlying concerns promote due process and efficiency in the legal process, they are separate and distinct from constitutional rights." We thus concluded that "[t]he *Barker* rule is not a constitutional right in and of itself." *Id.* See, also, *Barker, supra*. In *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), we noted that the *Barker* recusal rule is limited to ex parte communications which pose a threat to the judge's impartiality.

[11] Here, Thomas argues that Judge Spethman was required to grant his motion for recusal based upon an alleged ex parte communication from a prosecutor during his participation in the Crawford case and that the judge became a "peripheral participant" in Thomas' prosecution by giving Crawford "preferential treatment" in recognition of his testimony against Thomas. Brief for appellant at 12. This argument fails because the record does not reflect that Judge Spethman received an ex parte communication. An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party. *In re Interest of Chad S.*, 263 Neb. 184, 639 N.W.2d 84 (2002); *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). Any communication between the prosecutor and Judge Spethman in Crawford's case would not constitute an ex parte communication in Thomas' case, which was not pending or impending before Judge Spethman when he delayed Crawford's sentencing or when he sentenced Crawford in 1995. Nor did Judge Spethman preside over Thomas' trial. Thus, any information that the judge received regarding Thomas while presiding over Crawford's case was not ex parte with respect to Thomas, and the *Barker* rule is therefore inapplicable.

[12] We have also held that a judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998). See, also, Neb. Rev. Stat. § 24-739 (Reissue 1995). This rule extends to the sentencing phase of a criminal trial. *Pattno, supra.* Thomas argues that "[a] reasonable person, knowing that Judge Spethman had received extraneous information in the Crawford case from ex-parte [sic] communication with a prosecutor would believe that the validity of the February 5, 2003 pronounced sentence was not discovered by the judge himself." Brief for appellant at 13. As noted, the record does not establish the claim that Judge Spethman received an ex parte communication about Thomas from a prosecutor in the Crawford case. However, it does establish that at the time he sentenced Crawford, Judge Spethman was aware of Crawford's cooperation in the prosecution of Thomas. Thus, the issue is whether a reasonable person with knowledge of this circumstance would question Judge Spethman's impartiality in his subsequent involvement in this case under an objective standard of reasonableness.

[13] Absent extraordinary circumstances, in order to disqualify a judge based upon the appearance of impropriety, the bias and prejudice must stem from a nonjudicial source and not from what the judge learned from his or her prior involvement in the defendant's case or cases that concerned parties or witnesses in the defendant's case. *U.S. v. Morris*, 988 F.2d 1335 (4th Cir. 1993) (trial judge's involvement in coparticipant's trial and sentence reduction for coparticipant's cooperation in defendant's prosecution insufficient ground for disqualification); *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977) (trial judge not disqualified because he presided over separate trial of codefendant or because he accepted guilty plea of codefendant); *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990) (judge who presided at trial not precluded from subsequently considering defendant's postconviction motion); *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988) (allegation that judge previously prosecuted defendant in another case while serving as county attorney insufficient to show bias

and prejudice). We conclude that under an objective standard of reasonableness, Judge Spethman's judicial involvement in the Crawford case would not cause a reasonable person to question his impartiality in this case.

For the reasons outlined above, we conclude that the district court did not abuse its discretion in overruling Thomas' motion for recusal.

MOTION IN ARREST OF JUDGMENT

In his second and third assignments of error, Thomas contends that the district court erred in overruling his motion in arrest of judgment as untimely and in failing to find that the statute defining second degree murder is unconstitutional. Neb. Rev. Stat. § 29-2104 (Reissue 1995) provides:

> A motion in arrest of judgment may be granted by the court for either of the following causes: (1) That the grand jury which found the indictment had no legal authority to inquire into the offense charged, by reason of it not being within the jurisdiction of the court; or (2) that the facts stated in the indictment do not constitute an offense.

Thomas' motion in arrest of judgment, filed after remand pursuant to our opinion in *Thomas I*, alleges:

> 1. The facts alleged in the information for Second Degree Murder do not constitute an offense and to the extent the other charges are based upon the Second Degree Murder Charge, these other charges do not constitute offenses.
>
> 2. The Second Degree Murder statute under which defendant was charged is unconstitutional and the constitutional defect was attempted to be cured by adding a malice element to the information and jury instructions which element is not embodied in the statute in violation of Defendant's due process rights.

Thomas argues that Neb. Rev. Stat. § 28-304 (Reissue 1995), which defines the offense of second degree murder, is unconstitutional because nothing in the definition prevents the State from arbitrarily and discriminatorily choosing to charge second degree murder rather than the offense of manslaughter upon sudden quarrel, which is defined in Neb. Rev. Stat. § 28-305(1) (Reissue 1995).

Thomas' arbitrary enforcement claim falls within the void-for-vagueness doctrine. See, *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000) (void-for-vagueness doctrine requires that penal statute define criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in manner that does not encourage arbitrary and discriminatory enforcement); *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996). Although in *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001), this court determined that neither § 28-304 nor § 28-305 is unconstitutionally vague, Thomas argues that vagueness and arbitrary enforcement provide independent grounds for challenging the constitutionality of a criminal statute under *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996).

Regardless of how Thomas labels his challenge, we do not reach the constitutional issue because we conclude that it has been waived. First, even if arbitrary enforcement provides an independent ground for challenging the constitutionality of a statute, both it and a void-for-vagueness claim are facial challenges. See, *Caddy, supra*; *Kelley, supra*. Although Thomas argues that his trial counsel could not have filed a motion to quash or a demurrer because the information charged only first degree murder, Thomas' trial counsel did not object to the lesser-included jury instruction of second degree murder. Absent plain error, an issue not raised to the trial court will not be considered by this court on appeal. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). Second, assuming without deciding that a motion in arrest of judgment would be an appropriate method of challenging the constitutionality of a statute defining a lesser-included offense under these circumstances, Thomas' trial counsel did not file such a motion after Thomas' convictions and prior to his direct appeal.

[14] In addition, the issue of unconstitutionality was not raised in Thomas' previous appeal in which we affirmed his convictions but vacated his sentences and remanded with directions for a new enhancement hearing and resentencing. *Thomas I*. Under similar circumstances in *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001), this court held that the district court on remand had no authority to consider assignments of error challenging the validity of convictions that had previously been

affirmed. Rather, its authority was limited by the order remanding the causes for resentencing, under the rule that

> [w]hen a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.

262 Neb. at 326, 632 N.W.2d at 284-85.

[15] Thomas argues, however, that the claimed unconstitutionality of a criminal statute raises an issue of subject matter jurisdiction which can be asserted at any stage of a criminal proceeding and can never be waived. Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *State v. Gorman*, 232 Neb. 738, 441 N.W.2d 896 (1989). Pursuant to Neb. Rev. Stat. § 24-302 (Reissue 1995), district courts are vested with general, original, and appellate jurisdiction over civil and criminal matters. In this action, Thomas does not challenge the power of the district court to hear and determine a case of this general class. Rather, Thomas relies on *Nelson v. State*, 167 Neb. 575, 94 N.W.2d 1 (1959), to support his argument that his motion in arrest of judgment raises a jurisdictional issue which can be raised at any time in a criminal proceeding.

Nelson did not involve a claim that a statute defining a criminal offense was unconstitutional. Rather, the defendant alleged that the information purporting to charge him with the uttering of a forged instrument was fatally defective because it failed to allege an essential element under prior case law. This issue was raised for the first time on direct appeal. This court stated that under Nebraska's Constitution, a defendant had the right to demand the nature and cause of accusation, and determined that the information was fatally defective because it failed to charge an offense even if true. We stated the rule that an objection to a fatally insufficient information may be raised for the first time on appeal in the absence of a statute to the contrary. We then determined that the waiver of defects statute was not to the contrary because it applied only to defects which could be raised by a

motion to quash, and not to defects that could be raised by a demurrer. Although the defective information in *Nelson* raised constitutional concerns, this court did not analyze it as an issue of subject matter jurisdiction, but, rather, focused on whether the objection was foreclosed by the waiver of defects statute.

Thomas' argument that his facial challenge to the constitutionality of the statute under which he was convicted raises a jurisdictional issue which can never be waived is contrary to our holding in *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996). In *Severin*, we held that the proper way to challenge the facial constitutional validity of a charging statute is by a motion to quash or by a demurrer and that a defendant who did neither but allowed a plea of not guilty to be entered on his behalf waived any claim that the statute under which he was charged was unconstitutional on its face. Although Thomas argues that *Severin* is inconsistent with *Nelson*, we conclude that on the issue before us, they are consistent in that neither treats an allegation of a fatally defective information as a jurisdictional issue. Moreover, in *State v. Blackson*, 256 Neb. 104, 107, 588 N.W.2d 827, 830 (1999), we held in a somewhat different context that "[t]he fact that an information is fatally defective does not deny the trial court jurisdiction to issue any order relating to those purported charges."

Thomas refers us to language in two of our cases that he claims supports his jurisdictional argument. In *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980), this court determined that a facial challenge to a criminal statute could be raised by a motion to quash or by a demurrer, and further determined that the waiver of defects statute did not operate to preclude using a motion to quash to make a facial challenge when a demurrer was filed on the same day making the same challenge. In the process of making that determination, we cited a case in which the Wisconsin Supreme Court held that "an information which charges an offense in language of a statute which is unconstitutional states no offense and the defect is jurisdictional." *Id.* at 727, 290 N.W.2d at 185, citing *State v. Evjue*, 253 Wis. 146, 33 N.W.2d 305 (1948). Thomas further points out that in *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998), we cited *People v. Starnes*, 273 Ill. App. 3d 911, 653 N.E.2d 4, 210 Ill. Dec. 417 (1995), in which the Illinois

Court of Appeals held that while a constitutional challenge to a statute under which a defendant is convicted cannot be waived, a defendant can waive such a challenge to the constitutionality of a collateral statute.

In both *Valencia* and *Torres*, the cited language was dicta. In *Valencia*, we did not hold that the alleged defect raised an issue of subject matter jurisdiction, and in *Torres*, we did not hold that a constitutional challenge to the charging statute could not be waived. We further note that in *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001), we disposed of an argument similar to that made in this case by assuming without deciding that a constitutional challenge to a charging statute was jurisdictional and could be raised at any time, but concluding that § 28-304 was not unconstitutionally vague as alleged in that case. We view the issue of whether a facial challenge to the constitutionality of a charging statute is an issue of subject matter jurisdiction as one on which this court has not definitively held.

This issue was addressed by the District of Columbia Court of Appeals in *U.S. v. Baucum*, 80 F.3d 539 (D.C. Cir. 1996). In that case, the court of appeals had declined to address the defendant's constitutional challenge to the underlying criminal statute on direct appeal because he had failed to preserve it at trial. In his petition for rehearing, the defendant argued for the first time that his constitutional challenge to the charging statute raised an issue of the district court's subject matter jurisdiction and that, therefore, he could not be deemed to have waived it. The court of appeals noted that there was authority to the contrary, but ultimately concluded that "the weight of the precedent, as well as prudential considerations, counsel toward treating facial constitutional challenges to presumptively valid statutes as nonjurisdictional." *Id.* at 540. The court reasoned:

> At the time of [the defendant's] indictment (and still today), the federal law he was charged with violating, having never been declared unconstitutional, enjoyed a presumption of validity. When a federal court exercises its power under a presumptively valid federal statute, it acts within its subject-matter jurisdiction . . . . It is true that once a statute has been declared unconstitutional, the federal courts thereafter have no jurisdiction over alleged violations (since there

> is no valid "law of the United States" to enforce), but [the defendant's] belated assertion of a constitutional defect does not work to divest that court of its original jurisdiction to try him for a violation of the law at issue.

Id. at 540-41. The court further reasoned that because federal courts are obligated to address jurisdictional issues sua sponte, a rule that a constitutional challenge to a statute implicated subject matter jurisdiction would require federal courts to address a statute's validity as a threshold matter in any case. The court determined that such a requirement was contrary to established U.S. Supreme Court precedent declining to address constitutional questions not put in issue by the parties. See, also, *U.S. v. Feliciano*, 223 F.3d 102 (2d Cir. 2000).

[16] We find this reasoning persuasive and therefore hold that a facial challenge to a presumptively valid criminal statute does not raise an issue of subject matter jurisdiction in a criminal prosecution and thus may be waived if not timely asserted. Nebraska law is consistent with federal law in that criminal statutes are presumed constitutional. *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). Thomas was charged with first degree murder and convicted of the lesser-included offense of second degree murder defined by a statute, § 28-304, which has never been held unconstitutional. The jury was instructed, without objection, on all of the statutory elements of second degree murder plus the element of malice which was then required under our case law. See *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), *overruled, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). At the time we affirmed his conviction in *Thomas I*, Thomas made no claim that § 28-304 was unconstitutional. Accordingly, we conclude that the claim was waived and that the district court did not err in declining to consider it upon our remand for a new enhancement hearing and resentencing.

HABITUAL CRIMINAL DETERMINATION

Nebraska's habitual criminal statutes provide for enhanced mandatory minimum and maximum sentences for a convicted defendant who "has been twice convicted of [a] crime, sentenced, and committed to prison, in this or any other state . . . for

terms of not less than one year." § 29-2221(1). The statutes further provide:

> At the hearing of any person charged with being a habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

Neb. Rev. Stat. § 29-2222 (Reissue 1995).

[17-20] In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior convictions. *Thomas I.* When using a prior conviction to enhance a sentence, the State need show only that at the time of the prior conviction, the defendant had, or waived, counsel. *Id.* The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities. *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982). In reviewing criminal enhancement proceedings, "'[a] judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he has one.'" *State v. Addison*, 197 Neb. 482, 487, 249 N.W.2d 746, 749 (1977), quoting *State v. Micek*, 193 Neb. 379, 227 N.W.2d 409 (1975).

Thomas mounts a two-pronged attack on the sufficiency of the evidence offered by the State at the enhancement hearing conducted pursuant to our remand and directions in *Thomas I.* First, relying upon *State v. Linn*, 248 Neb. 809, 539 N.W.2d 435 (1995), he argues that the evidence of prior convictions was insufficient because it did not include the signature of the judge(s) who entered the judgments of conviction. Second, he argues that the State failed to prove that he was the defendant in the two prior criminal proceedings which were reflected in the State's evidence.

[21] In *Linn*, which involved a sentence enhancement for driving under the influence of alcohol, the State sought to prove two prior convictions by evidence consisting of copies of the

complaints and certified copies of the county court's checklist showing that the defendant appeared with counsel, was advised of her rights, and entered a plea of guilty. However, the checklist relating to one of the convictions was not signed by the judge. This court held that in order "to prove an earlier conviction for the purpose of sentence enhancement, the evidence must, with some trustworthiness, reflect a court's act of rendering judgment." 248 Neb. at 812, 539 N.W.2d at 438. We concluded that an unsigned checklist failed to prove that a judgment had been rendered on the complaint despite the clerk's certification.

In *State v. Fletcher*, 8 Neb. App. 498, 596 N.W.2d 717 (1999), the Nebraska Court of Appeals considered a *Linn* challenge to the State's proof of prior convictions in a habitual criminal enhancement proceeding. The court did not interpret *Linn* to require as a matter of law that a judge's signature must appear on a judgment of conviction offered for purposes of enhancement. Rather, the court framed the dispositive issue as "whether the State's evidence . . . was sufficient to establish with some trustworthiness a district court's act of rendering at least two prior judgments." *Fletcher*, 8 Neb. App. at 511, 596 N.W.2d at 726. See, also, *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987) (concluding that State substantially complied with required proof of commitment in criminal enhancement proceeding). We agree with this formulation of the standard and apply it to this case.

We note that while a district judge's signature is now required to render a judgment, see Neb. Rev. Stat. § 25-1301(2) (Cum. Supp. 2002), a signature was not required at the time of Thomas' prior convictions. While it is likewise true that a county court judge's signature was not required at the time that *Linn* was decided, an unsigned checklist and a copy of a complaint were the only evidence supporting the prior conviction in *Linn*. That is not the case here.

The State submitted certified copies of journal entries of two prior judgments convicting and committing Thomas to terms of incarceration over 1 year in length. Although unsigned, each journal entry has the judge's name typed on the judgment, and the certification contains the clerk's seal and attestation that the copy is the same as the judgment that appears in the court's

records. The State also submitted certified trial docket entries, initialed by the judge, showing that Thomas was represented by counsel who was present with Thomas when he was convicted and sentenced in both of the prior criminal cases. Compare *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999) (recognizing that initialed checklist is sufficient to show compliance with all requirements to establish prior, valid plea-based conviction). In addition, the State submitted certified copies of records maintained by the Department of Correctional Services showing Thomas' dates of commitment for each prior conviction and sentence. This evidence was sufficient to establish with the requisite trustworthiness the rendering of two prior judgments of conviction, each carrying prison sentences of 1 year or more.

[22] As to the issue of identity, we have held that an authenticated record establishing a prior conviction of a defendant with the same name is prima facie evidence sufficient to establish identity for the purpose of enhancing punishment and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989). The documents offered by the State in this case meet this requirement. In addition, the documents offered included photographs of the incarcerated person named "L. T. Thomas" and reflected his date of birth as "7-24-65," the same date of birth reflected in the presentence investigation report prepared prior to Thomas' original sentencing in this case. At the commencement of the enhancement hearing, Thomas acknowledged that he was "L. T. Thomas." His counsel did not deny that Thomas was the person referred to in the prior conviction records but argued that the State had not met its burden to prove that he was. We conclude that the State's evidence was sufficient to meet its prima facie burden of proof that Thomas had been convicted of two prior offenses carrying prison sentences of 1 year or more and that because that evidence was not controverted, it was sufficient to support the finding of the court that Thomas was a habitual criminal.

Sentencing Issues

In arguing that his sentences were excessive, Thomas first contends that the district court erred in resentencing him without

waiting for preparation of an updated presentence investigation report, or obtaining a "further waiver" with regard thereto. Brief for appellant at 17. As noted, Thomas initially waived a supplemental presentence investigation, but the district court nevertheless ordered one when Thomas requested leniency based upon his good prison record. When the hearing resumed, the court stated that it had decided that a report of Thomas' prison record subsequent to his original sentencing would suffice in lieu of a supplemental presentence investigation. The court received the report in evidence, as well as letters in support of Thomas from his family members. The report reflected several incidents of misconduct during Thomas' incarceration, but also included a letter in support of Thomas from a prison official. Thomas was allowed to submit an additional written statement and to make an oral statement to the court before sentencing. He did not object to the court's proceeding without a supplemental presentence investigation.

[23] Neb. Rev. Stat. § 29-2261(1) (Reissue 1995) provides that "[u]nless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation." This court has interpreted this section as mandating that the sentencing court obtain and consider a presentence investigation with every felony conviction. *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986). However, the mandate is imposed for the benefit of the defendant, and the statutory right to a presentence investigation may be waived. *Id.*

In *Tolbert*, the defendant left an alcohol treatment program without permission while serving a 90-day sentence for misdemeanor convictions. She was charged with one count of escape. At the plea hearing, her counsel asked the court to use the presentence investigation report that had been prepared 2 months earlier for her misdemeanor convictions. The court agreed. At sentencing, the defendant waived her right to have the presentence investigation completed for the escape conviction and the court pronounced her sentence. The court's failure to obtain the report was assigned as error.

This court stated that the defendant waived her right to a presentence investigation. We further determined that the savings

clause of § 29-2261, providing "[u]nless it is impractical to do so," included those circumstances where a presentence investigation would be needlessly repetitive of one completed a short time earlier.

[24] The presentence investigation report that was prepared for Thomas' original sentencing in 1995 is included in our record and contains all of the information required under § 29-2261(3). In addition, a sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed. *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). We conclude that the district court did not abuse its discretion in obtaining and relying on the evidence received in lieu of a supplemental presentence investigation, in view of the fact that Thomas consented and did not object to proceeding in that manner. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003) (defendant in criminal case may not take advantage of alleged error which defendant invited trial court to commit).

Thomas also contends that the sentences imposed by the district court pursuant to our remand and directions in *Thomas I* were excessive. The record reflects that in consideration of Thomas' conduct while incarcerated, the court initially imposed shorter sentences than Thomas had originally received on all of his convictions except that for second degree murder. After realizing that two of these sentences fell below the mandatory minimum required under the habitual criminal statute, the court correctly resentenced Thomas on those counts to the mandatory minimum term. As a result, Thomas received prison sentences of 10 to 12 years on each of the two counts of use of a weapon to commit a felony, compared to his original prison sentences of 12 to 14 years on the use of a weapon count related to the second degree murder conviction and 10 to 12 years on the use of a weapon count related to the first degree assault conviction. He also received a prison sentence of 10 to 12 years on his conviction of first degree assault, compared to his original prison sentence of 12 to 14 years, and a prison sentence of 20 years to life on his conviction for second degree murder, the same as his original sentence. Thomas requested that the court impose concurrent sentences for his

convictions of second degree murder and first degree assault, but the court declined to do so.

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). Although it is generally within the trial court's discretion to direct that sentences imposed for separate crimes be served concurrently or consecutively, Neb. Rev. Stat. § 28-1205 (Reissue 1989) does not permit such discretion in sentencing because it mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Thus, the district court had no discretion to order anything other than consecutive prison sentences of at least 10 years for Thomas' two convictions for use of a weapon to commit a felony. The sentence imposed for assault in the first degree was the minimum allowed under the habitual criminal statute, and the sentence for second degree murder was the same that had been ordered in his first sentencing. The trial court stated that while it believed Thomas was entitled to some consideration of his conduct while in prison, it did not intend to minimize the seriousness of the homicide conviction. Thomas' overall sentences were reduced by 4 years from the sentences imposed by the original sentencing court. We conclude that the court did not abuse its discretion in imposing these sentences.

CONCLUSION

Finding no error, we affirm the judgment of the district court determining that Thomas was a habitual criminal and resentencing him accordingly.

AFFIRMED.

L.T. THOMAS, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

685 N.W.2d 66

Filed August 13, 2004. No. S-03-423.

1. **Pleadings: Appeal and Error.** An order denying a petition to perpetuate testimony is reviewed to determine whether the trial court abused its discretion.
2. **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.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

James Walter Crampton for appellant.

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

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

PER CURIAM.

NATURE OF CASE

L.T. Thomas appeals from an order of the Douglas County District Court which denied his request to take depositions in anticipation of a postconviction action.

FACTS

The background of this case is delineated in *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002) (*Thomas I*), *cert. denied* 537 U.S. 918, 123 S. Ct. 303, 154 L. Ed. 2d 203. Thomas was convicted of second degree murder, first degree assault, and two counts of use of a firearm to commit a felony. His motions for new trial were overruled, and he was sentenced as a habitual criminal. Thomas' direct appeal was dismissed by the Nebraska Court of Appeals because the poverty affidavit accompanying his notice of appeal was signed by trial counsel rather than by Thomas. See *State v. Thomas*, 4 Neb. App. xlix (No. A-95-1313, Jan. 9, 1996). He was granted a new direct appeal in which we affirmed his convictions but vacated the

sentences because we found the evidence insufficient to prove Thomas' earlier convictions for purposes of sentence enhancement. We remanded the cause to the trial court with directions to hold a new enhancement hearing.

Thomas subsequently filed an amended petition citing as authority Neb. Ct. R. of Discovery 27 (rev. 2000) and "the inherent power of the court to entertain an action to perpetuate testimony." Via this action, Thomas requested permission to perpetuate the testimony of three jurors who participated in his trial. Thomas alleged that he expected the testimony might be used in a postconviction action anticipated following this court's opinion in *Thomas I*. The petition stated that Thomas sought the testimony to address the issue of a juror who failed to inform counsel in voir dire as to a relative's murder. Thomas also asserted that he desired to perpetuate the testimony of the trial judge and the bailiff as to the existence of a note or notes from the jury to the court and the current location of any such note.

The district court sustained the State's motion to dismiss Thomas' action, and he appealed. Thomas' appeal was dismissed by the Court of Appeals for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001). See *Thomas v. State*, 11 Neb. App. lxxv (No. A-02-1502, March 5, 2003). The Court of Appeals concluded that the district court's journal entry dismissing Thomas' action was not a final, appealable order and that, thus, there was no proper entry of judgment by the district court.

Thereafter, the district court entered a written order dismissing Thomas' petition, finding that it is not proper or appropriate for Thomas to file a separate civil action to perpetuate testimony regarding the jurors and that rule 27 is not a proper method by which to obtain this testimony. Thomas timely appealed from this order.

ASSIGNMENT OF ERROR

Thomas asserts that the district court abused its discretion in dismissing his amended petition.

STANDARD OF REVIEW

[1] An order denying a petition to perpetuate testimony is reviewed to determine whether the trial court abused its discretion. See *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000).

[2] 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. *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004).

ANALYSIS

Thomas seeks to perpetuate the testimony of jurors to obtain information about whether one of the jurors failed to disclose on voir dire that he had a relative who had been the victim of a murder, an issue we have previously addressed.

In *Thomas I*, Thomas alleged that he was denied a fair trial due to the misconduct of a juror who failed to disclose during voir dire that his uncle had been the victim of a violent crime. We noted that the burden to establish prejudice related to alleged jury misconduct rests on the party claiming the misconduct. Whether jury misconduct occurred is largely a question of fact, and the trial court must resolve whether the misconduct was so prejudicial that the defendant was denied a fair trial. *Id.*

The trial court in Thomas' case reviewed the issue of juror misconduct at a hearing on a second supplemental motion for new trial. Sworn statements were offered from jurors; however, the trial court excluded the statements based upon Neb. Rev. Stat. § 27-606(2) (Reissue 1995), which states that a juror may not testify concerning the jury's deliberations or concerning the juror's mental process in reaching a verdict. A juror may testify as to "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." *Id.*

In *Thomas I*, we held that no evidence was presented to establish that any extraneous information was brought to the jury's attention, because during deliberations, a juror stated that his uncle had been murdered. However, this information came from a juror and not from an external source. We held that the trial court properly excluded the jurors' sworn statements offered after trial based upon the court's interpretation of § 27-606(2), which "does not allow a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought

processes, or discussions during deliberations." *Thomas I*, 262 Neb. at 1000, 637 N.W.2d at 650. We concluded that Thomas had not sustained his burden to prove that juror misconduct occurred or that the jury considered facts not in evidence. We also addressed Thomas' allegation that private communication occurred between the trial court and the jury. We held that the record showed that the communication between the trial court and the jury merely directed the jury to continue its deliberations and that this did not have a tendency to influence the verdict.

We have held that matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. See *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996). 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. *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004). Our ruling in *Thomas I* precludes further consideration of the issues addressed therein.

Thomas asserts that the district court abused its discretion in dismissing his petition to perpetuate testimony of jurors involved in his trial. The issues for which Thomas seeks to perpetuate the testimony have been considered, and Thomas has not presented any materially or substantially different facts to support his petition. An order denying a petition to perpetuate testimony is reviewed to determine whether the trial court abused its discretion. See *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000). Thomas has not shown that the district court abused its discretion in denying his motion to perpetuate testimony. Thus, there is no merit to his assignment of error.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

IN RE CLAIMS AGAINST ATLANTA ELEVATOR, INC. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE AND CROSS-APPELLEE, V. ROBERTS CATTLE COMPANY, CLAIMANT, APPELLANT, AGP GRAIN COOPERATIVE, INC., ET AL., CLAIMANTS, APPELLEES AND CROSS-APPELLANTS, AND G & W FARMS PARTNERSHIP ET AL., CLAIMANTS, APPELLEES.

685 N.W.2d 477

Filed August 20, 2004. No. S-02-1406.

1. **Public Service Commission: Appeal and Error.** The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusion independent of the determination made by the administrative agency.
4. **Administrative Law: Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the tribunal below.
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 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.
7. **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.
8. **Public Service Commission: Appeal and Error.** In reviewing a decision of the Nebraska Public Service Commission, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the commission if there is evidence in the record to support its findings.
9. ____: ____. If there is evidence to sustain the findings of the Nebraska Public Service Commission, an appellate court cannot substitute its judgment for that of the commission.
10. ____: ____. Determinations by the Nebraska Public Service Commission are a matter peculiarly within its expertise and involve a breadth of judgment and policy

determination that will not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable.

11. **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.
12. **Contracts.** Courts will not permit a party to avoid a contract into which that party has entered on the grounds that he or she did not attend to its terms, that he or she did not read the document which was signed and supposed it was different from its terms, or that it was a mere form.
13. **Due Process: Words and Phrases.** Although 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 in a meaningful manner.
14. **Administrative Law: Due Process: Notice: Evidence.** Procedural due process in proceedings before an administrative agency or tribunal requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial decisionmaker.

Appeal from the Nebraska Public Service Commission. Affirmed.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

Rocky C. Weber, of Crosby Guenzel, L.L.P., for appellee AGP Grain Cooperative, Inc.

Kimberli D. Dawson and Bruce L. Hart, of Hart, Dawson & Sudbeck, P.C., L.L.O., for appellees Brian Bertrand et al.

Daniel L. Lindstrom and Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellees G & W Farms Partnership et al.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Upon the insolvency of Atlanta Elevator, Inc. (AEI), on March 11, 2002, the Nebraska Public Service Commission (PSC)

assumed title to all grain in storage at AEI for the benefit of the owners, depositors, and storers of that grain. See Neb. Rev. Stat. § 88-547 (Reissue 1999). After combining the value of the grain inventory and a grain warehouse bond, a total amount available for distribution was determined to be $1,083,259.42, and proceedings for distribution were instituted. The PSC received claims totaling $4,529,654.47.

Appellant Roberts Cattle Company (RCC) and appellees and cross-appellants AGP Grain Cooperative, Inc. (AGP); Brian Bertrand; Mark Bertrand; Max Schultz; Dave Wells; the Harley Wells estate; Dean Pape; Wells Ag Enterprises, Inc.; Neil Young; and Dennis Fulk (collectively appellants) were among the claimants who filed claims seeking to share in the distribution. A hearing was conducted on May 30 and 31, 2002. After reviewing the evidence, the PSC denied all or a portion of appellants' claims, based on its determination that with respect to the denied portions of appellants' claims, appellants were not valid owners, depositors, or storers of grain in storage at AEI at the point in time at which the PSC took title to that grain. The PSC ordered pro rata distributions in accordance with its findings. A motion for rehearing was denied. This appeal followed. We affirm the PSC's decision with regard to appellants' claims.

II. STATEMENT OF FACTS

1. PSC Inspection and Warehouse Shortage

AEI was a Nebraska public grain warehouse, licensed under the Grain Warehouse Act, Neb. Rev. Stat. § 88-525 et seq. (Reissue 1999). The PSC is the state agency authorized to enforce the provisions of the act. One of the PSC's duties is to conduct inspections of licensed warehouses. See § 88-527(1). Additionally, the PSC is required under the act to "adopt and promulgate rules and regulations to aid in the administration of" the act. § 88-545.

On March 11, 2002, the PSC warehouse examiners inspected AEI. As a result of the inspection, the PSC determined that the quantities of grain actually in storage with AEI were significantly below the amount necessary to cover AEI's apparent storage obligations. During the inspection, AEI voluntarily surrendered its grain warehouse license to the PSC. Due to the surrender, the

PSC took immediate control of AEI's facilities and all grain stored in AEI's warehouse, closed the warehouse, and, as of March 11, took title to all grain in storage in the warehouse for the benefit of the owners, depositors, and storers of grain in the warehouse at that time.

2. Claims Process

In accordance with §§ 88-547 and 88-530, on March 19, 2002, the PSC entered an order directing the liquidation of AEI's grain, with the proceeds from that liquidation and a warehouse security bond to be distributed to claimants deemed qualified as of March 11. Section 88-547 provides, inter alia, as follows:

> If the [PSC] determines that a shortage of grain exists [or] if a license is surrendered . . . the [PSC] may close the warehouse and do one or more of the following:
>
> (1) Take title to all grain stored in the warehouse at that time in trust for distribution on a pro rata basis to all valid owners, depositors, or storers of grain who are holders of evidence of ownership of grain. . . . Such distribution may be made in grain or in proceeds from the sale of grain; [and]
>
> (2) After notice and hearing (a) determine the value of the shortage and the pro rata loss to each owner, depositor, or storer of grain, (b) require all or part of the warehouse security to be forfeited to the [PSC], and (c) distribute the security proceeds on such pro rata basis[.]

Although not defined in the statute, a "Depositor, Storer, and/or Owner" is defined in the PSC's grain warehouse rules and regulations as "[a]ny person who has grain stored with a warehouseman. . . . Owner does not include mortgagee or pledgee." 291 Neb. Admin. Code, ch. 8, § 001.01D (2002).

Section 88-530 reads, in relevant part, that the security required of a licensed warehouse "shall run to the State of Nebraska for the benefit of each person who stores grain in such warehouse."

Pursuant to the March 19, 2002, order, the PSC required parties who claimed to be either an owner, depositor, or storer of grain with AEI on March 11 to file their claims by May 23. A hearing on such claims was set for May 30. Notice of the claims deadline and hearing date was published in several newspapers and sent to potential claimants identified through the PSC's March inspection.

On May 6, 2002, AEI filed chapter 7 bankruptcy proceedings. On May 22, the PSC entered into a stipulation in the bankruptcy case providing for the bankruptcy estate's abandonment of the grain inventories and the grain warehouse bond in the amount of $433,700. The bankruptcy court approved the stipulation.

Thereafter, pursuant to its statutory authority, the PSC liquidated AEI's grain inventories. The net proceeds from the liquidation of the grain inventories totaled $649,559.42. In addition, AEI's grain warehouse bond of $433,700 was available for distribution. Thus, a total of $1,083,259.42 (the proceeds) was available for pro rata distribution by the PSC to approved claimants.

3. Claims Hearing

The claims hearing was held on May 30, 2002, and continued on May 31. Fifty-seven claims, totaling $4,529,654.47, had been filed with the PSC. The PSC hearing was governed by the PSC's rules of procedure, 291 Neb. Admin. Code, ch. 1 (2001), and its grain warehouse rules and regulations. The rules of procedure provide, inter alia, that although the PSC is not "bound to follow the technical rules of evidence, the record will be supported by evidence which possesses probative value commonly accepted by reasonable men in the conduct of their affairs." 291 Neb. Admin. Code, ch. 1, § 016.01. Furthermore, in accordance with the PSC's rules of procedure, the claimants had the option of appearing before the PSC on their own behalf or being represented by counsel. 291 Neb. Admin. Code, ch. 1, §§ 002.01 and 002.02. At the outset of the hearing, the PSC indicated that cross-examination of witnesses would not be permitted. The record does not reflect that any party objected to the PSC's announcement regarding cross-examination.

Thirty-three individuals testified during the claims hearing. In addition, 57 affidavits were submitted in support of claims by individuals or business entities. Sixty-eight exhibits, consisting of approximately 2,000 pages, were admitted into evidence.

On September 18, 2002, the PSC entered its "Order Determining Claims." In summary, the order reviewed the various claims which had been filed and the evidence in the record relating to such claims, and made findings. In the order, the PSC approved or denied the claims, in total or in part, based on the

PSC's determination as to whether the record demonstrated that on March 11, the date the PSC took title to the grain in storage at AEI, the claimant was an owner, depositor, or storer of that grain. Appellants are among those persons or entities whose claims the PSC denied, in total or in part, in its September 18 order.

With respect to the subject matter involved in this case, pursuant to statutes then in effect, timely motions, styled as "motions for rehearing," were filed with the PSC. See Neb. Rev. Stat. § 75-137 (Cum. Supp. 2000) (repealed by 2003 Neb. Laws 187). Those motions came on for hearing on October 24 and 30, 2002. In an order entered November 19, the PSC overruled the motions. The instant appeal was filed in December, pursuant to Neb. Rev. Stat. § 75-136 (Cum. Supp. 2002), which statute we observe has been subsequently amended. See § 75-136 (Reissue 2003).

Additional facts will be set forth below where pertinent to our analysis of appellants' arguments on appeal.

III. ASSIGNMENTS OF ERROR

All appellants assert essentially the same assignment of error, restated, that the PSC erred in denying all or a part of their individual claims based upon the PSC's determination that with regard to the denied claim, the record failed to demonstrate that on March 11, 2002, the claimant was an owner, depositor, or storer of grain in storage at AEI. In addition to this assignment of error, both RCC and AGP claim that the PSC denied them due process during the claims hearing.

We note that G & W Farms Partnership, Gray Farms Partnership, and Jimmie "Jim" Lindstrom have also filed a single brief in this court, in which they identify themselves both as appellants and appellees. In their brief, these parties do not assign any error and instead generally argue in support of the PSC's September 18, 2002, order entered following the claims hearing. Because G & W Farms Partnership, Gray Farms Partnership, and Lindstrom have not challenged on appeal the PSC's determination with respect to their claims, these parties are not included in our definition of "appellants," and their claims and the PSC's decision with respect to those claims will not be further discussed in this opinion. See *Misle v. HJA, Inc.*, 267 Neb. 375, 382, 674 N.W.2d 257, 263 (2004) (stating that to be considered on appeal,

"an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error").

Furthermore, we note that claimants Mark Nelson and Kallen Kuck initially appeared as cross-appellants in this appeal and were represented by the same counsel. Their attorney filed separate motions to withdraw as their counsel and sent copies of the respective motions to Nelson and Kuck by certified mail. This court granted the motions to withdraw. No substitute counsel entered an appearance for either Nelson or Kuck, and neither Nelson nor Kuck submitted a brief in this appeal. Accordingly, these parties are not included in our definition of "appellants," and their claims and the PSC's decision with respect to those claims will not be further discussed in this opinion. See, generally, Neb. Ct. R. of Prac. 10B (rev. 2000).

IV. STANDARDS OF REVIEW

[1,2] The appropriate standard of review for these appeals from the PSC is a review for errors appearing on the record. See *In re Proposed Amend. to Title 291*, 264 Neb. 298, 646 N.W.2d 650 (2002). When reviewing an order 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.*

[3] The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusion independent of the determination made by the administrative agency. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000).

[4] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the tribunal below. See *Professional Bus. Servs. v. Rosno, ante* p. 99, 680 N.W.2d 176 (2004).

V. ANALYSIS

1. Appellants' Substantive Challenges to Denied Claims

(a) Statutory Meaning of §§ 88-547 and 88-530

The primary issue in this appeal is appellants' assertion that with regard to their individual denied claims, the PSC erred in its

determination that at the time the PSC took title to all grain stored in the AEI warehouse on March 11, 2002, appellants were not owners, depositors, or storers of grain, and thus, they were not entitled to a pro rata share of the proceeds. The PSC reached this determination pursuant to the authority granted it under § 88-547, which provides, inter alia, as follows:

> If the [PSC] determines that a shortage of grain exists [or] if a license is surrendered . . . the [PSC] may close the warehouse and do one or more of the following:
>
> (1) Take title to all grain stored in the warehouse at that time in trust for distribution on a pro rata basis to all valid owners, depositors, or storers of grain who are holders of evidence of ownership of grain. . . . Such distribution may be made in grain or in proceeds from the sale of grain; [and]
>
> (2) After notice and hearing (a) determine the value of the shortage and the pro rata loss to each owner, depositor, or storer of grain, (b) require all or part of the warehouse security to be forfeited to the [PSC], and (c) distribute the security proceeds on such pro rata basis[.]

[5,6] Resolution of appellants' claims involves statutory interpretation. The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusion independent of the determination made by the administrative agency. *In re Application of Neb. Pub. Serv. Comm., supra.* 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. *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004). 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.*

Under § 88-547, inter alia, if the PSC determines that a grain shortage exists or if the license of the warehouse has been surrendered to the PSC, pursuant to § 88-547(1), the PSC is to "[t]ake title to all grain stored in the warehouse at that time . . ." for subsequent distribution. Applying the statute's plain language, it is

apparent that § 88-547 establishes a temporal requirement, that is, a point in time at which the rights of entities claiming to be either "owners, depositors, or storers" of grain are fixed. According to § 88-547(1), an entity's status is determined "at that time" at which the PSC takes title to the grain stored in the warehouse, and it is an entity's status as an owner, depositor, or storer of grain in storage at such time that determines such entity's right to subsequently receive a pro rata distribution of the proceeds.

Section 88-547(1) also contains a physical requirement. Section 88-547(1) provides that at the time the PSC takes possession of the grain, the grain is to be "stored in the warehouse." Given the temporal and physical requirements of § 88-547(1), the statute effectively gives a preference to claimants who meet these requirements as compared to other individuals or entities who do not meet the requirements but nonetheless may have rights against the insolvent warehouse. Thus, significant to our analysis of the PSC's decision with regard to the individual appellants' claims in this appeal, is an assessment of the right as of March 11, 2002, of each appellant to grain actually in storage at AEI on March 11, the time at which the PSC took title to the grain stored in the warehouse.

We note that in addition to the liquidation of grain stored at the warehouse, the proceeds available for distribution included AEI's warehouse bond. In this connection, we note, as quoted *supra*, that § 88-530, relating to the bond, provides, in relevant part: "The security shall run to the State of Nebraska for the benefit of each person who stores grain in such warehouse . . . ." Given the nature of the claims in this case, potential beneficiaries of the security under § 88-530 other than "person[s] who store[] grain" are not relevant to this case.

[7] 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. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004). We consider §§ 88-547(1) and (2) and 88-530 together. We read the word "security" in § 88-547(2)(b) and (c) to mean the warehouse bond. See § 88-530. Section 88-547(2)(c) states that distribution of the security proceeds is to

be done on "such pro rata basis." We read "such" in the expression "such pro rata basis" in § 88-547(2)(c) as referring back to "pro rata" used in § 88-547(2)(a) in which pro rata refers to the loss to be compensated to each owner, depositor, or storer of grain. Thus, the distribution of the security proceeds under § 88-547(2)(c) is to be made pro rata to the owners, depositors, and storers of grain, which group we have determined must meet the temporal and physical requirements of § 88-547(1) to be eligible to share in the proceeds. Accordingly, given the facts of this case, we conclude that distribution of the portion of the proceeds attributable to the warehouse bond pursuant to § 88-547(2), must be made to claimants who meet the temporal and physical requirements which are contained in § 88-547(1).

(b) Appellants' Denied Claims

(i) RCC

RCC asserts under a variety of theories that the PSC erred in denying its claim in which it alleged it was the owner of 102,592 bushels of corn, with an approximate value of $192,000. The PSC determined that on March 11, 2002, RCC was neither an owner, depositor, nor storer of grain at AEI. Finding no error on the record relative to this determination, we reject RCC's arguments on appeal.

RCC's claim of ownership is based primarily on two warehouse receipts issued by AEI, receipts Nos. B665911 and B665949. RCC asserts that these two receipts demonstrate it had purchased grain which was being stored at AEI on March 11, 2002. The PSC rejected this argument.

The record reflects that receipt No. B665911 was issued on July 26, 2001, purportedly showing RCC's purchase of 25,000 bushels of corn from AEI. There is evidence that RCC later took delivery of 22,408 bushels of corn under receipt No. B665911, leaving a balance of 2,592 bushels of corn.

The record reflects that receipt No. B665949 was issued on February 21, 2002, and purportedly showed RCC's previous purchase of 100,000 bushels of corn from AEI on January 14, 2000. In this connection, the record also contains an internal RCC document signed by J. Daniel Roberts, RCC's managing partner, that memorializes the purchase of 100,000 bushels of corn from AEI

on January 14, 2000. According to this document, the corn was to be delivered to RCC "whenever [it] want[ed] it," and the point of delivery was "RCC." Elsewhere on the document is the notation, "RCC . . . prepaid this."

The record also includes an affidavit from Roberts. With regard to receipt No. 665911, Roberts stated that this receipt represented RCC's purchase of 25,000 bushels of corn from AEI on July 26, 2001, and that RCC paid a total of $49,250 to AEI for the corn. In his affidavit, Roberts stated that receipt No. B665949 was a reissued receipt that was prepared by AEI to replace the original January 2000 receipt. Roberts asserted in his affidavit that the receipt was reissued at AEI's request, after AEI stated that it "wanted 'to make the Warehouse Receipt more current.' " With regard to that particular transaction, Roberts stated that on January 14, 2000, RCC issued a check to AEI for the purchase of the corn. A copy of that check is contained in the record, and in the memo section of the check is the notation "pre-pay corn." Roberts further stated that AEI agreed to waive storage charges on the purchased corn as an inducement for their arrangement and that the corn was to be delivered to RCC at RCC's request.

In his affidavit, Roberts stated that RCC had routinely purchased "thousands of bushels of corn [from AEI] for delivery at [RCC] facilities. In these instances, corn was paid for with delivery to follow." Roberts stated that on those occasions, he recognized that "title to the grain did not pass until the grain was delivered and [RCC] was at risk until actual delivery of the grain." As to the transactions represented by receipts Nos. 665911 and 665949, however, Roberts stated that on those two occasions, RCC "did not desire immediate delivery" and that he and an AEI representative had discussed the topic that title to the grain would pass to RCC upon payment and the issuance of the warehouse receipts.

The record also contains the testimony of Sherry Peterson, AEI's office manager, whose responsibilities included maintaining AEI's financial books, records of sales, and contracts. Peterson testified in general with regard to AEI's business practices and as to specific transactions involving various claimants. With regard to AEI's grain sales to RCC, Peterson's testimony contradicted Roberts' affidavit, in that Peterson testified to the

effect that AEI did not consider title to the grain to have passed to RCC until the grain was delivered to RCC.

When considering RCC's claim, the PSC stated in its order that according to the practice of the grain warehouse industry, title to grain did not pass until it had been delivered, and that when the buyer took possession of the purchased grain, the buyer turned over the warehouse receipt to the warehouse, in accordance with § 88-540 and 291 Neb. Admin. Code, ch. 8, § 002.08E. As to receipt No. 665911, the PSC found that RCC had retained the warehouse receipt notwithstanding partial delivery and that its failure to surrender the receipt denied it protection under 291 Neb. Admin. Code, ch. 8, § 001.01D. The PSC determined that RCC was a creditor as to the remaining value encompassed by receipt No. 665911.

With regard to receipt No. 665949, the PSC noted numerous documents in the record reflected that the parties intended the corn purchase to be a prepay arrangement, in which RCC paid in advance for corn to be delivered at a future date. Referring to the evidence, the PSC determined that RCC had "only made 'advances' to AEI and did not purchase the grain 'in store.'" Thus, the PSC determined that notwithstanding the existence of receipts, the evidence did not demonstrate title to the corn that RCC claimed had in fact passed to it. According to the PSC, RCC was, "at best . . . a lender or a mortgagee [to AEI], not an owner of grain." Regarding receipt No. 665949, the PSC noted that the fact that RCC had not been assessed storage charges by AEI was consistent with its determination that title to the corn did not pass to RCC until it was delivered to RCC. The order on rehearing was to the same effect. Accordingly, the PSC determined that on March 11, 2002, RCC was not an owner, depositor, or storer of grain at AEI, and was not entitled to a pro rata distribution of the proceeds.

On appeal, RCC raises various arguments challenging the PSC's determination. RCC initially claims that the PSC's decision is not supported by competent evidence. We disagree.

The record contains several documents reflecting that RCC was prepaying, or paying in advance, for the corn noted on the warehouse receipts. The grain was to be delivered to RCC at some unstated future date or dates, "whenever [it] want[ed] it."

Roberts, RCC's managing partner, acknowledged that RCC had purchased corn from AEI on numerous occasions and that in RCC's course of dealing with PSC, RCC did not normally consider title to grain it had purchased from AEI to pass from AEI to RCC until the grain was actually delivered. Roberts stated that until that delivery occurred, RCC was assuming the risk of loss. Roberts' affidavit testimony to the effect that he and an AEI representative had discussed that title to the grain would pass to RCC upon the issuance of the warehouse receipts at issue was directly contradicted by Peterson's testimony to the effect that AEI did not consider the title to the corn had passed to RCC until RCC had taken delivery. Given the evidence, the PSC resolved the conflicts in the record and determined that RCC's transactions with AEI, represented by receipts Nos. 665911 and 665949, were not actual purchases of corn, but, rather, were the advance of sums or prepayments for corn.

[8-10] In reviewing a decision of the PSC, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the PSC if there is evidence in the record to support its findings. See *In re Proposed Amend. to Title 291*, 264 Neb. 298, 646 N.W.2d 650 (2002). If there is evidence to sustain the findings of the PSC, an appellate court cannot substitute its judgment for that of the PSC. *Id.* Determinations by the PSC are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the PSC was arbitrary or unreasonable. *Id.*

The PSC's determination that on March 11, 2002, RCC was not an owner, depositor, or storer of grain at AEI, and thus, was not entitled to share in a distribution of the proceeds is supported by competent evidence in the record, and we reject RCC's argument on appeal to the contrary.

RCC also asserts that the PSC erred by failing to rely on the provisions of article 7 of the Nebraska Uniform Commercial Code pertaining to "Documents of Title." See Neb. U.C.C. § 7-101 et seq. (Reissue 2001). RCC refers in particular to §§ 7-202(1), 7-207(2), and 7-401. In summary, RCC argues that under article 7, the warehouse receipts represented its entitlement

to stored grain without regard to delivery. In support of this assertion, RCC argues in effect that under article 7, the receipts are sufficient to pass title. Contrary to RCC's argument on appeal, the PSC did not deny RCC's claim because of a determination that the warehouse receipts were defective, nor did the PSC deny RCC's claim because the goods were fungible and commingled. Rather, the PSC determined that based upon the evidence, AEI and RCC were involved in a prepayment arrangement for the corn, the receipts did not eclipse the arrangement, and pursuant to the arrangement and consistent with the custom in the industry, title did not pass to RCC until the corn was delivered to RCC. Assuming, arguendo, that the receipts upon which RCC relies show a future entitlement to the quantity of grain reflected therein, contrary to RCC's claim, the record does not support its assertion that such grain was, in fact, stored at AEI on March 11, 2002. Thus, even considering the receipts, which may provide RCC with a basis for relief elsewhere, the PSC's determination in this case is controlled by § 88-547 and is supported by competent evidence.

Finally, RCC argues that the PSC's determination, which rejected RCC's assertion that the receipts conclusively show that title to grain transferred to it, violates public policy. We do not agree. The language of § 88-547 as written by the Legislature makes clear that a successful claimant must be an owner, depositor, or storer of grain at the time the PSC takes title to the grain stored in the warehouse. The facts failed to establish that RCC was an owner, depositor, or storer at AEI on March 11, 2002. In the absence of such a showing, the Legislature has determined there is no entitlement to the proceeds.

[11] We have previously recognized that it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004). Pursuant to the provisions of § 88-547, the Legislature has declared that it is the public policy of this state that an entity's status as an owner, depositor, or storer of grain and its entitlement to a pro rata share of the proceeds are to be determined at the time the PSC takes title to the grain. It is properly the province of the Legislature, and not this court, to make such a policy determination. *Danler v. Rosen*

Auto Leasing, 259 Neb. 130, 609 N.W.2d 27 (2000). Thus, we find no merit to RCC's argument that the PSC's decision violates public policy.

(ii) AGP

AGP asserts under a variety of theories that the PSC erred in denying its claim as set forth in its claim affidavit, in which it alleged it was the owner of 197,500 bushels of corn and 170,000 bushels of soybeans with a total value of $931,366.61. The PSC determined that on March 11, 2002, AGP was neither an owner, depositor, nor storer of grain at AEI. Finding no error on the record relative to this determination, we reject AGP's arguments on appeal.

AGP's claim of ownership is based on eight warehouse receipts, Nos. B665933, B665934, B665935, B665938, B665943, B665944, B665947, and B665948. AGP asserts that the eight receipts demonstrate that it had purchased grain which was being stored at AEI on March 11, 2002. The PSC denied AGP's claim because either the grain had been delivered and AGP had failed to surrender the receipts, or the "receipts" were in actuality advances to AEI, at best in the nature of collateralized receipts.

The record includes the eight warehouse receipts upon which AGP relies and various signed contracts between AEI and AGP, some of which refer to advances against warehouse receipts. In addition to these receipts and contracts, the record contains the testimony and an affidavit from Donald A. Woodburn, AGP's director of marketing. Woodburn indicated in his affidavit that AGP took delivery on some grain, and the record shows that some grain, pursuant to contract and corresponding to receipts at issue, had been delivered. Woodburn further testified that when AGP paid money to AEI relative to the grain referenced in the receipts, it intended to obtain title to the grain at that time. Woodburn acknowledged, however, that AGP did not pay storage charges on any of the grain referenced in the receipts for which it had not taken delivery.

With regard to AEI's records concerning its transactions with AGP, the record contains two separate single-page documents dated February 28, 2002, entitled "[AEI] Sale Contract Report by

Patron." One document is labeled "Commodity: Corn," and the second is labeled "Commodity: Soybeans." These documents reflect a total of eight AGP transactions with AEI, three for corn and five for soybeans. Under each AGP transaction listed is a "Remarks" section, containing either the notation "PPD," "90% PPD," "PPD 90%," or "90% Advanced."

During the hearing, the PSC examined Peterson with regard to the business practices between AEI and AGP. Consistent with the two documents noted immediately above, Peterson testified in effect that AEI would issue collateralized warehouse receipts to AGP in exchange for AGP's payment of advances for future grain. The substance of Peterson's testimony was to the effect that AEI considered title to the grain referenced in the receipts would pass to AGP after delivery of the grain to AGP.

Finally, the record reflects that AGP held several federal grain warehouse licenses. As a result of these licenses, AGP was required to report to the federal government, among other items, receipted grain it owned in Nebraska that was stored in warehouses other than its own. The completed reporting document (Statement) is in the record, and the space in the Statement regarding commodities stored in other warehouses is blank. The details of this completed Statement are as follows: The Statement, dated August 12, 2002, is entitled "U.S. Department of Agriculture . . . Warehouseman's Statement and Examiner's Comparison of Obligations and Stock." The Statement lists AGP as the "Warehouseman." The Statement includes a "Warehouseman's Certification," which provides, in pertinent part, that the warehouseman "certif[ies] to the . . . U.S. Department of Agriculture, subject to penalties of applicable laws for knowing false representations and similar offenses . . . that the information contained in the above Warehouseman's statement is, to the best of [the warehouseman's] knowledge and belief, a true, correct and complete statement." Below this certification is a space containing the signature of AGP's treasurer as the "Warehouseman or Authorized Agent." Although the Statement contains spaces for AGP to list corn and soybeans in "Other Warehouses For Storage," AGP has left those spaces empty, thereby advising the government that it had no ownership of grain in other warehouses in Nebraska.

Based on the evidence, the PSC denied AGP's claim. As an initial matter, the PSC determined that several of the receipts and the contracts referenced in those receipts had been satisfied by delivery and that AGP failed to surrender its receipts. Thus the PSC determined that those receipts had no residual value. With regard to the remaining receipts, the PSC concluded that these receipts showed AGP was not an owner but a creditor, having made advances to AEI for the future purchase of grain. The PSC concluded the receipts were at best "collateralized receipts" held to secure advances made by AGP to AEI. Accordingly, the PSC determined that on March 11, 2002, AGP was not an owner, depositor, or storer of grain at AEI and was not entitled to a pro rata distribution of the proceeds.

On appeal, AGP challenges the PSC's determination and raises certain arguments similar to those raised by RCC and rejected *supra*. AGP also states that there is evidence in the record of "*agreements to sell* the underlying commodity from [AEI] to AGP," brief for cross-appellant AGP at 21, and, although acknowledging the existence of "advances," asserts that such advances "resulted in actual sales and deliveries," *id.* at 20. AGP claims that the PSC's decision is not supported by competent evidence. We disagree.

The record, some of which is summarized above, contains evidence supporting the PSC's determination that some of the grain reflected in "the receipts upon which AGP base[d] its claim ha[d] already been delivered to AGP." The record thus supports the PSC's decision that certain receipts have no residual value. Based on the foregoing, AGP was not an owner, depositor, or storer of grain represented by these receipts.

With regard to other receipts, the PSC determined that AGP's transactions with AEI were not actual purchases of grain for which AGP took title at the time the receipts were issued, but, rather, were the advance of sums for the future purchase of grain. Indeed, AGP's brief on appeal refers to "advances." Evidence, including Peterson's testimony and other documents in the record, supports the PSC's determination that rather than title passing upon the making of the contracts, the receipts reflected advances on future purchases for which title had not yet passed. In this regard, we note that the signed contracts contained in the record incorporate

the "National Grain and Feed Dealers Association" trade rules which provide that title passes upon delivery.

As noted earlier in our analysis, an appellate court will sustain the decision of the PSC if there is evidence in the record to support its findings. *In re Proposed Amend. to Title 291*, 264 Neb. 298, 646 N.W.2d 650 (2002). Contrary to AGP's claim, the PSC's determination that on March 11, 2002, AGP was not an owner, depositor, or storer of grain at AEI and, thus, was not entitled to share in a distribution of the proceeds is supported by competent evidence.

AGP also asserts that the PSC's determination is contrary to case law and to various provisions of the Nebraska Uniform Commercial Code. The cases upon which AGP relies are distinguishable. For example, whereas AGP claims to be a buyer and thus a storer of grain, *State ex rel. P. Serv. C. v. R. F. Gunkelman & Sons, Inc.*, 219 N.W.2d 853 (N.D. 1974), refers to the rights of sellers of grain as reflected in warehouse receipts. Further, although AGP may have certain rights against AEI, given the evidence, AGP's arguments based on the code do not establish that AGP was an owner, depositor, or storer of grain at AEI on March 11, 2002, for purposes of § 88-547(1). We have considered each of AGP's assertions and found such assertions to be without merit. The PSC's determination is neither arbitrary nor capricious, and it is supported by competent evidence.

(iii) Brian Bertrand, Mike Bertrand, Max Schultz, Dave Wells, and Harley Wells Estate

Brian Bertrand, Mike Bertrand, Schultz, Wells, and the Harley Wells estate challenge the PSC's decision only to the extent it denied a portion of their respective claims alleging ownership of grain sold to AEI. We find no merit to these appellants' arguments and conclude that with regard to the denied portions of these appellants' claims, the PSC did not err.

With respect to the denied claims of each of these appellants, the evidence in the record reflects that the grain had not been delivered to AEI, but instead was "direct-shipped" to various other locations. The PSC denied these claims based upon its determination that the evidence demonstrated that the grain had not been delivered to AEI, and thus, none of the grain at issue was

actually in storage at the warehouse on March 11, 2002. In accordance with the provisions of § 88-547, the PSC determined that because the grain at issue was not in storage at the time the PSC took title to the grain, Brian Bertrand, Mike Bertrand, Schultz, Wells, and the Harley Wells estate were not "owners, depositors, or storers" of grain at AEI. Accordingly, the PSC determined that as to this portion of these appellants' claims, these appellants were not entitled to a pro rata distribution of the proceeds.

On appeal, Brian Bertrand, Mike Bertrand, Schultz, Wells, and the Harley Wells estate assert that the PSC erred in denying their grain claims. In summary, these appellants claim that the PSC was incorrect in its determination that because the grain had been physically delivered to locations other than AEI, they were not owners, depositors, or storers of grain at AEI under § 88-547.

As we have stated earlier in our analysis, § 88-547 contains both a temporal and a physical requirement. In order for owners, depositors, or storers to take part in the pro rata distribution of the proceeds, their grain must be stored in the warehouse at the time the PSC takes title to the grain. Further, under § 88-526(3), "[g]rain in storage" is defined as "grain which has been received at any warehouse." In the instant case, the record contains evidence demonstrating that with regard to the claims at issue, the grain of these appellants was not stored in the warehouse on March 11, 2002. We agree with the PSC's application of § 88-547 to these claims. Accordingly, we find no merit to the argument raised on appeal by Brian Bertrand, Mike Bertrand, Schultz, Wells, and the Harley Wells estate, and we conclude that the PSC did not err in its determination to deny a portion of these appellants' claims.

(iv) Dean Pape; Wells Ag Enterprises, Inc.; and Neil Young

Pape, Wells Ag Enterprises, and Young argue on appeal that the PSC erred in denying their respective claims alleging ownership of grain sold to AEI. We reject their argument and conclude that the PSC did not err in its determination that on March 11, 2002, Pape, Wells Ag Enterprises, and Young were not owners, depositors, or storers of grain at AEI.

The record reflects that each of these appellants entered into a separate "Priced to Arrive Contract" with AEI, in which they were listed as the sellers and AEI was listed as the buyer. The respective contracts provided for the sale of a specified amount of grain to AEI, at an undetermined price. The contracts also contained delivery dates on which the grain would be delivered to AEI. Under the terms of these appellants' priced-to-arrive contracts with AEI, these appellants agreed that "title to the above grain passe[d] from Seller to the Buyer on the date of execution of [the] contract." AEI's records introduced into evidence indicate that each of these appellants had delivered grain to AEI on dates generally corresponding to the delivery dates listed in the priced-to-arrive contracts.

The PSC found that each of these appellants had already sold their grain and transferred title to AEI under their respective priced-to-arrive contracts prior to March 11, 2002, and that thus, these appellants were not the owners, depositors, or storers of grain in storage at AEI at the time the PSC took title to the grain. Accordingly, the PSC determined that as to these claims, these appellants were not entitled to a pro rata distribution of the proceeds.

On appeal, Pape, Wells Ag Enterprises, and Young assert that the PSC erred in denying their claims. In summary, these appellants claim that they did not understand the terms of the contract and that notwithstanding the terms of the contract, they did not intend to sell grain to AEI. These appellants also argue that because the priced-to-arrive contracts did not contain a specified price, the contracts were incomplete and therefore unenforceable. We do not find merit to these arguments.

[12] It is generally held that courts will not permit a party to avoid a contract into which that party has entered on the grounds that he or she did not attend to its terms, that he or she did not read the document which was signed and supposed it was different from its terms, or that it was a mere form. *Omaha Nat. Bank v. Goddard Realty, Inc.*, 210 Neb. 604, 316 N.W.2d 306 (1982). Thus, we reject the argument of these appellants that the contracts are unenforceable because they did not understand the terms of the priced-to-arrive contracts.

Further, we have previously noted that contracts involving the sale of grain are generally governed by article 2 of the Nebraska Uniform Commercial Code. See, generally, *Sack Bros. v. Great Plains Co-op*, 260 Neb. 292, 616 N.W.2d 796 (2000) (discussing applicability of article 2 to "hedge-to-arrive" grain contracts). Neb. U.C.C. § 2-204(3) (Reissue 2001) provides, in part, that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness . . . ." With regard to an open price term, Neb. U.C.C. § 2-305(1) (Reissue 2001) provides, in part, that parties "can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if . . . nothing is said as to price." Thus, although the priced-to-arrive contracts did not contain a price term, these appellants are incorrect in their assertion that this open term renders the contracts unenforceable.

The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the tribunal below. See *Professional Bus. Servs. v. Rosno, ante* p. 99, 680 N.W.2d 176 (2004). Based upon our independent review of the terms of these appellants' priced-to-arrive contracts, we determine that the PSC did not err in finding that Pape, Wells Ag Enterprises, and Young had each sold their grain to AEI under their respective priced-to-arrive contracts, and thus, they were not the owners, depositors, or storers of grain in storage at AEI at the time the PSC took title to the grain. Accordingly, the PSC did not err in its determination that as to these claims, these appellants were not entitled to a pro rata distribution of the proceeds.

(v) Dennis Fulk

Fulk argues on appeal that the PSC erred in assessing storage charges against his allowed claim. In summary, the PSC approved Fulk's claim for corn and soybeans stored at AEI, but offset against the claim storage charges of $33,864.48 for grain held at the elevator. On appeal, Fulk claims that the PSC erred in assessing the storage charges. Fulk argues that he had an agreement with AEI that he would not be charged storage charges in exchange for AEI's use of Fulk's storage bins and equipment at no charge.

The record fails to reflect that Fulk's purported arrangement with AEI was memorialized in a written agreement, and other than his own testimony, Fulk offered no proof of the arrangement. Further, one of AEI's "Patron Grain Settlement" sheets for Fulk includes an adjustment for storage, which adjustment is inconsistent with Fulk's assertion that he would not be charged for storage. In view of the evidence, we determine that the PSC's decision assessing storage charges against Fulk's approved claim is supported by competent evidence and is neither arbitrary nor capricious. We affirm the PSC's decision with regard to the assessment of storage charges.

2. APPELLANTS' PROCEDURAL CHALLENGE: DUE PROCESS

RCC and AGP both argue on appeal that the PSC erred in denying them procedural due process during the claims hearing. RCC and AGP both assert, in summary, that as a result of the PSC's refusal to allow them the opportunity to cross-examine Peterson during the claims hearing, they were denied due process. AGP further asserts that the PSC's receipt of an exhibit after the claims hearing had begun, and its subsequent refusal to admit into evidence an exhibit AGP offered during proceedings on the motion for rehearing, denied AGP due process. We conclude these arguments are without merit.

[13,14] We have recognized that although "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." *Marshall v. Wimes*, 261 Neb. 846, 851, 626 N.W.2d 229, 234-35 (2001). With regard to proceedings before an administrative agency or tribunal, we have stated that procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial decisionmaker. *Id.*

The PSC's rules of procedure, 291 Neb. Admin. Code, ch. 1, did not bind the PSC to the technical rules of evidence. The record in the instant appeal shows that notwithstanding the lack of opportunity to cross-examine Peterson, the parties were afforded the opportunity to present both documentary and testimonial

evidence in support of their claims at the claims hearing, and that RCC and AGP did in fact present such evidence. A review of the record shows that testimony and documents that contradicted RCC and AGP's claims were also admitted. The receipt of an exhibit after the claim hearing had begun and the refusal of the PSC to accept new evidence at the rehearing did not amount to a denial of due process.

As reflected in its order, the PSC considered all of the evidence before reaching its decision. Given the record and the procedure afforded, we cannot say that RCC or AGP was denied due process.

3. Remaining Arguments on Appeal

We have reviewed appellants' remaining arguments on appeal, and we find them to be without merit.

VI. CONCLUSION

After reviewing the record, we conclude that the PSC did not err by denying claims based upon its determinations challenged on appeal that at the point in time that the PSC took title to the grain in storage at AEI, appellants were not valid owners, depositors, or storers of grain. Accordingly, the decision of the PSC is affirmed.

Affirmed.

In re Applications T-851 and T-852.
Nebraska Public Power District, appellant, v. Department of Natural Resources, appellee.

686 N.W.2d 360

Filed September 10, 2004. No. S-03-207.

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. **Judgments: Collateral Attack.** When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
3. **Administrative Law: Waters: Final Orders.** Administrative agency decisions determining water rights pursuant to statutory authority involve the exercise of quasi-judicial powers, and when no appeal is taken from such a decision, it becomes a final and binding adjudication.
4. **Administrative Law: Judgments: Collateral Attack: Jurisdiction: Parties.** Judgments rendered by administrative agencies acting in a quasi-judicial capacity are not subject to collateral attack if the agency had jurisdiction over the parties and the subject matter.
5. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.

Appeal from the Nebraska Department of Natural Resources. Affirmed.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Jon Bruning, Attorney General, Jason W. Hayes, and Justin D. Lavene for appellee.

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

PER CURIAM.

I. NATURE OF CASE

The Department of Natural Resources (the DNR) entered an order affirming an earlier decision of the DNR which canceled 0.65 cubic feet per second (cfs) of incidental underground water storage held by the Nebraska Public Power District (NPPD). NPPD appealed. We moved this case to our docket pursuant to our authority to regulate the caseloads between this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. FACTS

On December 20, 1985, NPPD filed application U-5 for the recognition of incidental underground water storage. An order granting certain water rights was entered by the Department of Water Resources (now the DNR) on November 10, 1987 (November 1987 order). NPPD filed a petition for rehearing, which was granted. Following rehearing, an order dated May 26,

1988 (May 1988 order), was issued, superseding the November 1987 order. For purposes of this case, the May 1988 order concerned two water appropriations: A-2039 and A-2726. The May 1988 order granted NPPD the right to divert a maximum of 331.74 cfs for direct irrigation service and an additional 129.26 cfs of incidental underground water storage and included the following language:

> In instances where less than 23,222 acres were served directly, total direct flow diversions must be reduced by the ratio specified in § 46-231. It follows that to continue as incidental (contrasted to intentional) underground storage, that portion of the total natural flow diversion which would be dedicated as incidental underground storage should be reduced proportionately.
>
> . . . .
>
> . . . When the amount of water dedicated to direct [irrigation] service is reduced because of the number of acres served (§ 46-231), the amount of water dedicated for incidental underground storage shall be reduced proportionately.

On February 28, 2001, NPPD filed applications T-851 and T-852. It is these applications which are at issue in this appeal. T-851 and T-852 requested a transfer of the location of diversion and use of water for portions of A-2039 and A-2726. In NPPD's view, this transfer was necessary because Terry Crawford, one of NPPD's customers, had informed NPPD that he intended to use an existing ground water well to irrigate by center pivot rather than using NPPD's surface water under the Dawson County Canal. In order to avoid losing the water rights on Crawford's land due to nonuse, NPPD located land on the Gothenburg Canal and applied for a transfer of the surface water rights from Crawford's land to the new land. T-851 and T-852 requested the transfer of 1.67 cfs of water, representing Crawford's 117 acres, previously flowing from the Dawson County Canal to the Gothenburg Canal.

In an order dated June 22, 2001 (June 2001 order), the DNR approved T-851 and T-852 for the transfer of 117 irrigated acres from the Dawson County Canal to the Gothenburg Canal. However, with respect to A-2039, 0.65 cfs of incidental

underground water storage was canceled. NPPD petitioned the DNR for rehearing. Following rehearing, an order was issued on January 29, 2003 (January 2003 order), again ordering the cancellation of 0.65 cfs of incidental underground water storage due to the transfer of 117 acres. In support of the cancellation, the DNR cited language from the May 1988 order which imposed as a condition for some transfers a proportional reduction in water rights. The May 1988 order stated that "[w]hen the amount of water dedicated to direct [irrigation] service is reduced because of the number of acres served . . . the amount of water dedicated for incidental underground storage shall be reduced proportionately."

III. ASSIGNMENTS OF ERROR

NPPD assigns, rephrased and renumbered, that the DNR erred in (1) canceling 0.65 cfs of incidental underground water storage rights granted under U-5 in its June 2001 and January 2003 orders, because such cancellation was inconsistent with Nebraska's Constitution, statutes, and case law, as well as with the methodology used in the November 1987 and May 1988 orders; (2) finding that NPPD was attempting to collaterally attack conditions placed in the May 1988 order approving U-5; (3) not granting additional cfs for incidental underground water storage rights when 117 acres were transferred from the Dawson County Canal to the Gothenburg Canal; (4) not presenting any evidence to support its June 2001 and January 2003 orders; and (5) relying on adjudications and relinquishments not in the record when issuing its January 2003 order.

IV. STANDARD OF REVIEW

[1] In an appeal from the DNR, 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. *In re Water Appropriation A-4924,* 267 Neb. 430, 674 N.W.2d 788 (2004).

V. ANALYSIS

1. Cancellation of 0.65 Cfs of Water Storage

(a) Collateral Attack of May 1988 Order

NPPD first argues that the cancellation of 0.65 cfs of incidental underground water storage rights is not consistent with article XV of the Nebraska Constitution or with the purposes behind Neb. Rev. Stat. §§ 46-295 to 46-2,106 (Reissue 1998 & Cum. Supp. 2002).

[2] When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack. *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000).

NPPD contends that §§ 46-295 to 46-2,106 were intended to protect incidental underground water storage rights, regardless of any change in actual surface irrigation. In essence, NPPD is arguing that the purposes behind the statutes prohibited the DNR from imposing the proportional reduction condition, since it interfered with NPPD's incidental underground water storage rights. However, by arguing that the DNR lacked the authority to impose the proportional reduction condition in the May 1988 order, NPPD is attempting to vacate or reverse that portion of the order. Such an argument is a collateral attack.

[3,4] Administrative agency decisions determining water rights pursuant to statutory authority involve the exercise of quasi-judicial powers, and when no appeal is taken from such a decision, it becomes a final and binding adjudication. *In re Appropriations D-887 and A-768*, 240 Neb. 337, 482 N.W.2d 11 (1992). Judgments rendered by administrative agencies acting in a quasi-judicial capacity are not subject to collateral attack if the agency had jurisdiction over the parties and the subject matter. *Id.*

NPPD does not contend that the DNR lacked jurisdiction. Moreover, in the May 1988 order, the DNR determined NPPD's surface and underground water rights, a quasi-judicial function. No appeal was taken from the May 1988 order, and it became a final and binding adjudication. The DNR did not err insofar as it concluded that NPPD was attempting to collaterally attack the

May 1988 order with respect to this argument. As a result, this court need not consider whether the condition imposing a proportional reduction included in the May 1988 order violated article XV of the Nebraska Constitution or was inconsistent with the purposes behind §§ 46-295 to 46-2,106.

NPPD also argues that the cancellation of its underground water storage rights was contrary to *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987), and the methodology used in the November 1987 and May 1988 orders. As we understand its argument, NPPD is not contending that *In re Application U-2* or these orders prevented the DNR from imposing the proportional reduction condition, but, instead, that *In re Application U-2* and the orders show that the DNR is improperly applying the condition.

Unlike its argument that the DNR lacked the authority to impose the reduction in the first place, NPPD's argument that the DNR improperly applied the condition is not a collateral attack. NPPD is not arguing that the condition should be reversed or vacated, but, instead, is arguing that the condition should be properly applied. Thus, we may consider whether the proportional reduction condition was properly applied in this case under *In re Application U-2* and the methodology of the original orders.

(b) *In re Application U-2*

NPPD argues that the DNR's cancellation of 0.65 cfs of incidental underground water storage is inconsistent with this court's interpretation of the term "service" in *In re Application U-2, supra*. Using the definition of service in *In re Application U-2*, NPPD argues that seepage from the Dawson County Canal recharged the ground water irrigation wells on the 117 acres which NPPD had transferred from the canal, so those acres should still be considered as part of NPPD's service.

NPPD argues that the question posed is the meaning of the term "service." We disagree, and believe that the question is rather the meaning of "direct irrigation service," the term used in the May 1988 order, which grants NPPD its water rights as follows:

> With some 23,222 acres found remaining in effect under the various natural flow appropriations, Dawson County Canal

> may divert a combined maximum 331.74 cfs for direct irrigation service.
>
> In recent years the State has limited natural flow diversions to 461.00 cfs. Allowing maximum natural flow diversions to continue at 461.00 cfs would, by implication, necessitate granting [the difference of] 129.26 cfs for incidental underground storage . . . .

There is no dispute as to how the original grant of water rights was calculated in both the November 1987 and May 1988 orders. Neb. Rev. Stat. § 46-231 (Cum. Supp. 2002) sets forth the proper ratio to apply: "An allotment from the natural flow of streams for irrigation shall not exceed one cubic foot per second of time for each seventy acres of land . . . . Such limitations do not apply to storage waters . . . ." By applying this ratio to the total of 23,222 acres of land, NPPD was entitled to 331.74 cfs. This is the amount which NPPD was granted, with the DNR specifically noting that the grant was "for direct irrigation service."

Section 46-231 expressly provides that the ratio is for "allotment[s] from the natural flow of streams." By implication, then, "direct irrigation service" means irrigation from the natural flow of streams. We conclude also that the natural flow of streams must equate to surface water irrigation, but not underground water storage. This conclusion is reinforced when we consider that incidental underground water storage, the very water right which NPPD contends is part of their direct irrigation service, was granted to NPPD separately from its direct irrigation service in the May 1988 order, and the limitations in § 46-231 specifically exclude storage waters.

NPPD argues that this court must rely on *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987), to define the term "service." We disagree. Reference to *In re Application U-2* is not necessary, since a plain reading of the May 1988 order indicates a meaning for the term "direct irrigation service." Furthermore, that case defines the term "service," but does not purport to define "direct irrigation service." NPPD's contention that the DNR's cancellation of 0.65 cfs of incidental underground water storage was inconsistent with *In re Application U-2* is without merit.

(c) Methodology of Initial Orders

NPPD also argues that canceling 0.65 cfs of incidental underground water storage was inconsistent with the methodology used in the November 1987 and May 1988 orders. In order to understand NPPD's argument, it is necessary to outline the factual background of the applicable orders.

In the November 1987 order, the DNR used the 70-to-1 ratio outlined in § 46-231, and the DNR concluded that the water appropriations served 22,937 acres. The DNR accordingly allotted 327.66 cfs for direct irrigation service and 133.34 cfs as incidental underground water storage for a total of 461 cfs, per the historical natural flow diversion rate.

NPPD requested and was granted a rehearing as to the November 1987 order, and in May 1988, a new order was issued. In the second order, the DNR concluded that it had, in the earlier order, improperly canceled 285 acres due to nonuse. As a result, NPPD's grant was recalculated in the same manner that the November 1987 order was originally calculated. Instead of 22,937 acres, the DNR concluded that 23,222 acres were served directly, for an allotment of 331.74 cfs of direct irrigation service and an additional 129.26 cfs of incidental underground water storage.

Though the number of acres served and the grant of water rights differed, both the November 1987 and May 1988 orders contained the same proportional reduction. The condition in the May 1988 order provided that

> [i]n instances where less than 23,222 acres were served directly, total direct flow diversions must be reduced by the ratio specified in § 46-231. It follows that to continue as incidental (contrasted to intentional) underground storage, that portion of the total natural flow diversion which would be dedicated as incidental underground storage should be reduced proportionately.
>
> . . . .
>
> . . . When the amount of water dedicated to direct [irrigation] service is reduced because of the number of acres served (§ 46-231), the amount of water dedicated for incidental underground storage shall be reduced proportionately.

It is this language which NPPD argues has been improperly applied.

This condition provided the methodology to be applied in the event of a reduction in direct irrigation service. The condition required first that "[i]n instances where less than 23,222 acres [are] served directly, total direct flow diversions must be reduced by the [70-to-1] ratio specified in § 46-231." Under the May 1988 order, 23,222 acres were served directly in the U-5 area. Upon NPPD's request to transfer 117 acres out of the U-5 area, only 23,105 acres remained. An application of the ratio from § 46-231 left NPPD with 330.07 cfs of direct irrigation service, a reduction of 1.67 cfs.

The condition continued, stating that "[i]t follows that to continue as incidental . . . underground storage, that portion of the total natural flow diversion which would be dedicated as incidental underground storage should be reduced proportionately." As noted, NPPD's direct irrigation service of 331.74 cfs was reduced by 1.67 cfs, or 0.5 percent. The proportionate reduction is determined by multiplying that same 0.5 percent by the 129.26 cfs of incidental underground water storage. That calculation equates to a 0.65 cfs reduction.

NPPD, however, argues that since an increase in the number of acres served from the November 1987 to the May 1988 order resulted in an increase in its direct irrigation service and an equal decrease in its incidental underground water storage, the current decrease of 117 acres served indicates that NPPD's incidental underground water storage should have been increased, even as a portion of its direct irrigation service was transferred out of the Dawson County Canal. NPPD claims that 23,105 acres are now being served and that under § 46-231, NPPD is entitled to an allotment of 330.07 cfs of direct irrigation service and 130.93 cfs of incidental underground water storage. NPPD argues that instead of canceling 0.65 cfs of incidental underground water storage, the DNR should have transferred 1.67 cfs of its diversion from the Dawson County Canal as it did, but also should have increased NPPD's incidental underground water storage by that same 1.67 cfs.

We acknowledge that NPPD is correct in its assertion that a comparison of the November 1987 and May 1988 orders shows

that an increase in the number of acres served resulted in an increase in direct irrigation service and an equal decrease in incidental underground water storage. However, the DNR was not applying the proportional reduction condition in the May 1988 order on rehearing after the November 1987 order. The DNR simply recalculated NPPD's water rights in the May 1988 order because the DNR had improperly canceled 285 acres of land for nonuse in its 1987 order. Upon rehearing and rectification of its error, the DNR was required to recalculate NPPD's affected water rights to effect the additional 285 acres in direct irrigation service.

The proportional reduction condition was included in the May 1988 order as the formula to employ in calculating incidental underground water storage when the number of acres served directly was reduced. To find that a decrease in direct irrigation service would lead to an equal increase in incidental underground water storage would completely ignore the express requirement in the May 1988 order that incidental underground water storage be decreased proportionately. The DNR properly applied the proportional reduction condition of the May 1988 order when it canceled 0.65 cfs of NPPD's incidental underground water storage, and NPPD's argument to the contrary is without merit.

2. Failure to Increase Amount of Underground Water Storage

NPPD also argues that the DNR erred in not increasing NPPD's incidental underground water storage. We have concluded that the DNR did not err in canceling 0.65 cfs of NPPD's incidental underground water right, as that result was required based upon the proportional reduction condition in the May 1988 order. Thus, we have also decided that the DNR should not have increased NPPD's incidental underground water storage due to the transfer of 117 acres from the Dawson County Canal. This assignment of error is without merit.

3. Failure to Present Evidence

In its next assignment of error, NPPD argues that the DNR erred in not presenting evidence at the December 10, 2001, hearing to support its decision to cancel 0.65 cfs of incidental underground water storage.

In *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996), this court held that an applicant bears the burden of providing the director enough evidence on which to base a decision. See, also, Neb. Rev. Stat. § 46-294(1)(e) (Cum. Supp. 2002) (applicant has burden of proving that intrabasin transfer will comply with requirements of state law); Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2002) (burden of proof in hearing before DNR shall be upon person making complaint, petition, and application).

NPPD could not and did not meet its burden of showing that the DNR's decision to cancel certain incidental underground water storage was incorrect. The proportional reduction condition in the May 1988 order dictated the DNR's decision to cancel that underground storage. No showing by NPPD would have been sufficient to overcome the plain language of the May 1988 order. This assignment of error is without merit.

4. Reliance on Relinquishments and Adjudications Not in Record

In its final assignment of error, NPPD argues that the DNR relied on relinquishments and adjudications not in the record, asserting that the DNR made two factual findings in the January 2003 order which were based upon prior orders not in the record. These findings purportedly show the manner in which the proportional reduction condition had previously been applied by the DNR with respect to similar applications made by NPPD.

In its brief, the State concedes that the orders should have been placed in the record. However, the State argues that NPPD was not prejudiced by the inclusion of the prior orders in the January 2003 order because the earlier orders were not used to come to the DNR's ultimate conclusion. Rather, the DNR's conclusion was dictated by the condition in the May 1988 order.

NPPD is correct in its contention that the DNR should not have made factual findings regarding these prior orders when issuing its January 2003 order. These particular findings were not made in the June 2001 order which initially canceled the disputed 0.65 cfs of incidental underground water storage. It is clear that these orders were not admitted into evidence, nor was the hearing officer asked to take judicial notice of them. The contested factual

findings are not supported by competent and relevant evidence and thus are in error.

[5] However, error without prejudice provides no ground for appellate relief. *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003). Though the DNR erred in referring to the earlier orders in the January 2003 order, NPPD suffered no prejudice. The DNR's decision to cancel 0.65 cfs of NPPD's incidental underground water storage is supported solely by the condition included in the May 1988 order. Any reference to other contested orders appears merely to be an attempt by the DNR to illustrate its consistency with respect to the application of this condition. This assignment of error is without merit.

VI. CONCLUSION

The DNR did not err in canceling 0.65 cfs of NPPD's incidental underground water storage rights. The January 2003 order of the DNR is affirmed.

AFFIRMED.

MILLER-LERMAN, J., not participating.

KELLY M. HOGAN, APPELLANT, V. GARDEN COUNTY, NEBRASKA, A NEBRASKA POLITICAL SUBDIVISION, APPELLEE.

686 N.W.2d 356

Filed September 10, 2004. No. S-03-338.

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. **Public Officers and Employees: Fees.** If a person pays a de facto officer the fees allowed by law for the officer's services, he or she is protected, and will not be compelled to pay them a second time to the officer de jure.
3. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there.

Appeal from the District Court for Garden County: PAUL D. EMPSON, Judge. Affirmed.

Kelly M. Hogan, pro se.

Philip E. Pierce, of Pierce Law Office, for appellee.

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

CONNOLLY, J.

Kelly M. Hogan, a former county attorney, appeals the district court's order that denied him compensation when he was wrongly removed from office. The court determined that payment by the county to the de facto officers who replaced Hogan during that period was a defense to Hogan's lawsuit. We agree that payment by a governmental body to a de facto officer is a defense to suit brought by the de jure officer for payment of salary and benefits when he or she was removed from office. Accordingly, we affirm.

BACKGROUND

The parties stipulated to the following facts: In December 1993, the Garden County Board of Commissioners set the annual salary for the county attorney. In November 1994, Hogan was elected county attorney for Garden County and was sworn in on January 5, 1995.

In March 1995, Eugene J. Hynes, Hogan's opponent in the general election, filed an action to remove Hogan from office. Hynes alleged that because Hogan did not reside in Garden County, he was guilty of official misconduct. In June, the district court found Hogan guilty of misconduct, declared the office vacant, and removed Hogan from office. Garden County then appointed Douglas D. Palik to serve as interim county attorney; Palik served in that capacity until November 1996 and was paid $38,151.92. Garden County then appointed Patrick C. McDermott who served until January 1997 and was paid $1,637.50. Hogan did not receive salary or benefits during the period he was removed from office.

Hogan appealed, and the Nebraska Court of Appeals reversed, and remanded for further proceedings. *Hynes v. Hogan*, 4 Neb. App. 866, 553 N.W.2d 162 (1996). On further review, we reversed and vacated the judgment removing Hogan from office and reinstated him as the Garden County Attorney. *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997).

Hogan resumed office in January 1997. In December 1997, he filed a claim with the Garden County Board of Commissioners seeking salary and employment benefits for the period of his

removal. The parties have stipulated the amounts and benefits that Hogan would be entitled to; because the amounts are not pertinent to our analysis, we do not set them out. The Board tabled Hogan's request and took no further action; Hogan resigned as county attorney in November 1998.

Hogan filed suit seeking payment of salary and benefits for the time that he was removed from office. The district court granted the county's motion for summary judgment, and we reversed, and remanded in part. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002). On remand, the court denied Hogan payment and dismissed the petition. Hogan appeals.

ASSIGNMENTS OF ERROR

Hogan assigns, rephrased and consolidated, that the district court erred by concluding that Garden County was not required to pay his salary and benefits during the time he was removed from office and dismissing his cause of action.

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. *Mogensen v. Board of Supervisors, ante* p. 26, 679 N.W.2d 413 (2004).

ANALYSIS

Hogan argues that he is entitled to salary and benefits while he was removed from office; he contends that entitlements of public office are property and that he cannot be denied his salary without due process. The parties do not dispute that the replacement officers were the de facto officers and that Hogan was the de jure officer during the period he was removed from office. The county argues, however, that payment of salary and benefits to the replacement officers is a defense.

A split of authority exists whether payment to a de facto officer by a governmental body is a defense to a suit brought by the de jure officer who seeks to recover salary for the period he or she was not performing the duties of the office. Most jurisdictions hold that payment to the de facto officer is a defense. See Annot., 64 A.L.R.2d 1375 (1959) (consolidating cases).

We first addressed payment to a replacement county official as a defense in 1893. *State, ex rel. Greeley County v. Milne*, 36 Neb. 301, 54 N.W. 521 (1893). In *Milne*, a county treasurer, Henry N. Milne, was unlawfully denied office because an election opponent filed a lawsuit; during that period, his opponent served and received compensation. After Milne was reinstated in office and served his term, he refused to pay the money he received as treasurer to his successor, claiming that the amount represented the pay he was entitled to while he was wrongfully kept from office. The county sought return of the money.

[2] Addressing payment as a defense, we recognized a split of authority existed, but concluded that the majority rule was more persuasive. We stated we would adopt as precedent the rule "best supported by reason and in harmony with judicial principles." *Id.* at 303, 54 N.W. at 522. We noted that a county who pays a de facto officer is not required to know whether the officer is legally in possession of the office. And yet, the county is legally required to recognize the person serving as the legal and valid officer. Thus we held that "[i]f a person pays a *de facto* officer the fees allowed by law for his services, he is protected, and will not be compelled to pay them a second time to the officer *de jure*." *Id.*

In *Hallowell v. Buffalo County*, 101 Neb. 250, 162 N.W. 650 (1917), we again addressed payment as a defense concerning facts nearly identical to the present appeal. F.M. Hallowell was wrongly removed from the county judge's office and another person was appointed to fill the vacancy. Hallowell was later reinstated to the position and brought suit seeking payment of his salary for the time that he was removed from office. Applying *Milne, supra*, we determined that the replacement judge was the de facto officer while Hallowell was removed; thus, we denied Hallowell recovery.

Hogan argues that *Milne* and *Hallowell* were overruled by *Fraiser v. Dundy County*, 115 Neb. 372, 213 N.W. 371 (1927). We disagree. In *Fraiser*, an elected county judge became ill and another person was appointed to perform his duties; however, the judge was not removed from office. The replacement sought payment, and the county raised as a defense its payment of the salary to the regularly elected judge. The issue in *Fraiser*, however, was whether the temporary replacement for an ill judge was statutorily

entitled to compensation. We determined that the statute in effect at that time did not provide for compensation to a temporary replacement. *Fraiser* did not discuss *Milne* or *Hallowell* and did not address the issue of payment to an elected officer who has been removed from office and replaced by a de facto officer. Instead, *Fraiser* concerned a temporary replacement under statutory provisions, and we held that the county was required to pay the salary only once. We determine that *Frasier* did not overrule *Milne* and *Hallowell*, nor does it hold that Hogan is entitled to compensation while he was removed from office.

Hogan also contends that the Legislature overruled *Milne* and *Hallowell.* He relies on a statute concerning removal from office when an officer is incarcerated. That statute specifically states that the removed officer is not entitled to compensation. Other statutes are silent about compensation. See Neb. Rev. Stat. §§ 23-2013 (Reissue 1997) and 32-560 (Cum. Supp. 2002). Hogan inferentially argues that because the other statutes are silent regarding compensation, the Legislature intended that an officer who was removed for reasons other than incarceration must be compensated.

[3] We have reviewed Hogan's statutory arguments and conclude that they are without merit. It is not within the province of the courts to read a meaning into a statute that is not there. *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003). Section 32-560 states that an office shall be vacant when an official is removed from office. It is silent about compensation. We do not agree that the Legislature's provisions in § 23-2013 denying compensation when an official is incarcerated show an intent to provide compensation in all other instances.

Hogan also argues that he has a property right in his salary and benefits. Here, Hogan was removed from office and other persons acted as the de facto officers after Hogan was removed. The replacements were paid by the county. We have never recognized that a salary for service in public office is a property right. Hogan's argument is without merit.

Hogan asks us to overrule *State, ex rel. Greeley County v. Milne*, 36 Neb. 301, 54 N.W. 521 (1893), and *Hallowell v. Buffalo County*, 101 Neb. 250, 162 N.W. 650 (1917), for public policy reasons. We decline to do so. The county has received only one

service and should not be made to pay for it twice. Further, the county should be able to rely on a de facto officer's apparent title when making payment for services rendered. See, *Milne, supra*; 64 A.L.R.2d, *supra*. We further note that the county was not a party to the proceeding to remove Hogan from office and is not accountable for his wrongful removal from office.

CONCLUSION

We conclude that the county's payment to the de facto officers while Hogan was removed from office was a defense to Hogan's suit seeking payment of salary and benefits for the period he was removed. Accordingly, Hogan is not entitled to recover.

AFFIRMED.

PAR 3, INC., A NEBRASKA CORPORATION, APPELLANT, V. DAN LIVINGSTON, APPELLEE.
CORNHUSKER NURSERY, INC., A NEBRASKA CORPORATION, APPELLANT, V. DAN LIVINGSTON, APPELLEE.

686 N.W.2d 369

Filed September 10, 2004. Nos. S-03-494, S-03-495.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **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.
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 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.
5. **Reformation: Fraud.** A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought.
6. **Parol Evidence: Contracts.** 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.

Appeals from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Eric W. Kruger and Ryan M. Sewell, of Rickerson, Kruger & Ratz, L.L.C., for appellants.

Martin P. Pelster and John M. Prososki, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee.

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

PER CURIAM.

NATURE OF CASE

The appellants, Par 3, Inc., and Cornhusker Nursery, Inc. (Cornhusker), each brought suit against Dan Livingston for breach of contract. The actions were subsequently consolidated for trial. The Douglas County District Court found that Livingston was not personally liable for breach of the contract and, accordingly, dismissed Par 3's and Cornhusker's petitions.

FACTS

In April 1995, Livingston and an associate organized a corporation called Castle Development, Inc. Livingston acted as president of Castle Development. One of the corporation's proposed projects was a real estate and golf course development tentatively called Castle Brook. At all relevant times, Par 3 was in the business of selling and transplanting trees and Cornhusker was in the business of growing trees.

On April 30, 1996, a contract was entered into whereby an entity referred to as "Castlebrook" was to purchase a number of trees from Par 3 for a total price of $300,000. These trees were to be supplied by Cornhusker and transported by Par 3 to the development site. "Castlebrook" was to pay Par 3 the sum of $150,000 by no later than August 15. The contract was signed by the treasurer of Par 3, the president of Cornhusker, and Livingston. The words "TITLE/CASTLEBROOK" were typed below Livingston's signature. Above the word "TITLE," Livingston wrote "Pres."

The Castle Brook project never came to fruition, and Par 3 did not receive any portion of the purchase price set forth in the contract. In separate petitions, Par 3 and Cornhusker filed suit against Livingston for breach of contract. The corporations sought recovery of lost profits and damages, after mitigation, for unsold trees. In his answers, Livingston alleged that he was not personally liable on the contract because he executed the document in his capacity as president of Castle Development. The cases were consolidated for trial.

After a bench trial, the district court dismissed Par 3's and Cornhusker's petitions. The court found that Livingston intended to and did sign the contract as president of Castle Development, not in his personal capacity. In addition, the court found there was no evidence that any of the parties to the contract intended to sign the contract as individuals or to incur personal liability.

Par 3 and Cornhusker filed timely motions for new trial. The motions were overruled, and these appeals followed.

ASSIGNMENTS OF ERROR

Par 3 and Cornhusker assign the following restated errors: (1) the court's determination that Livingston was not personally liable for breach of the contract, (2) the court's reforming of the contract at issue, (3) the court's use of extrinsic and parol evidence to add to and vary the terms of a clear and unambiguous contract, and (4) the court's entry of judgment for Livingston and its overruling of their motions for new trial.

STANDARD OF REVIEW

[1] A suit for damages arising from breach of a contract presents an action at law. *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002).

[2] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Id.*

[3] 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. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

[4] 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. *Id.*

ANALYSIS

LIVINGSTON'S PERSONAL LIABILITY ON CONTRACT

Most of the issues involved in this appeal arise from the question of whether Livingston can be held personally liable for breach of the April 30, 1996, contract. Accordingly, we will address this issue first.

The appellants argue that Livingston's actions fall under Neb. Rev. Stat. § 21-2020 (Reissue 1997), which states that "[a]ll persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under the Business Corporation Act, shall be jointly and severally liable for all liabilities created while so acting." Their argument is based upon the fact that the contract at issue was signed by Livingston as the president of Castle Brook. However, Livingston testified at trial that Castle Brook was never incorporated in Nebraska.

Livingston argues that he intended to enter into the contract as the president of Castle Development, not Castle Brook. At trial, he testified that at the time he signed the contract, he was unaware that the name of the entity was incorrect on the document.

The district court found that Livingston did not intend to enter into the contract in a personal capacity. In support of its finding, the court noted that there was a place for each person signing the contract to list their title within the corporation they were representing. In the court's opinion, this indicated that each of the signors was acting as an officer of their respective corporations and not personally. Also, the court noted that Livingston testified that he signed the contract as president of Castle Development. Further, Dean Jenson, the president of both Par 3 and Cornhusker, testified that he believed he was dealing with a corporation when he entered into the contract.

We conclude the district court's finding that Livingston did not sign the contract in his personal capacity is not clearly wrong. The issue then becomes whether Livingston signed the contract on behalf of Castle Brook or Castle Development.

Jenson's testimony on this subject is somewhat contradictory. He admitted he believed that the contract was entered into by a corporation, but he also stated he was unaware that Livingston was working for a corporation which was in existence at the time the contract was executed.

On the other hand, Livingston presented evidence which demonstrates that the appellants were aware they were entering into a contract with Castle Development, an existing corporation. The initial meetings giving rise to the contract at issue involved Jenson, Livingston, and the other shareholder of Castle Development. In addition, shortly after the contract was signed, Cornhusker issued a $25,000 check made payable to Livingston. The check was part of the overall deal associated with the contract. Before accepting the check, Livingston had Jenson add the words "Castle Dev." to his name on the check. This check was deposited into a bank account held by Castle Development. Also, months before the contract was signed, Jenson requested a letter of recommendation from Livingston. In response, Livingston wrote a letter, dated December 13, 1995, which was prepared on Castle Development letterhead. The opening line of the letter stated: "We at Castle Development . . . ." The letter was signed "Dan Livingston, President."

A suit for damages arising from breach of a contract presents an action at law. *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Id.*

The district court concluded that Livingston intended to and did sign the contract as president of Castle Development, and not in his personal capacity. Further, it found that there was no evidence presented which would show that the parties who entered into the contract did so with the intention of incurring personal liability. Based upon the evidence adduced at trial, we cannot state that these findings were clearly wrong. Since the court was not clearly wrong in finding that Livingston was contracting as an agent for a corporation that was in existence when the contract was executed, § 21-2020 is not applicable to the case at bar. For these reasons, we find the appellants' first assignment of error to lack merit.

DISTRICT COURT'S INTERPRETATION OF CONTRACT

[5] The appellants argue that the district court erred in reforming the contract at issue. A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought. *Twin Towers Dev. v. Butternut Apartments*, 257 Neb. 511, 599 N.W.2d 839 (1999).

A review of the district court's order, however, reveals that the court did not reform the contract. Instead, the court considered the evidence presented at trial in order to determine whether Livingston was personally liable on the contract. The court's finding that Livingston was not personally liable was not based upon any alleged mistake in the contract, but was instead premised on the conclusion that none of the parties involved in the contract intended to incur personal liability. We conclude that the district court did not reform the contract and that the appellants' second assignment of error is without merit.

[6] The appellants' third assignment of error asserts that the district court used extrinsic and parol evidence to add to and vary the terms of a clear and unambiguous contract. 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. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

Our review of the district court's order reveals that the court did not add to and vary the terms of the contract. Instead, the court made a factual determination that Livingston did not intend to be held personally liable on the contract. This determination was made independent of any of the terms of the contract and was based upon the evidence adduced at trial concerning the intent of the parties. Accordingly, we find the appellants' third assignment of error to be without merit.

APPELLANTS' MOTIONS FOR NEW TRIAL

The appellants' final assignment of error concerns the district court's overruling of their motions for new trial. 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. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). 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. *Id.*

In the district court's order overruling the appellants' motions for new trial, the court reiterated its finding that the parties involved in the contract were aware that they were not dealing with each other in their personal capacities. The court restated its finding that Livingston was acting at all relevant times as the representative of a corporation. Since we hold that these findings were not clearly wrong, we find that the district court did not abuse its discretion in overruling the appellants' motions.

CONCLUSION

For the reasons stated above, we affirm the decision of the district court which found that Livingston was not personally liable for breach of the contract and which dismissed the appellants' petitions.

AFFIRMED.

WRIGHT, J., participating on briefs.

MIDWEST NEUROSURGERY, P.C., APPELLANT, V.
STATE FARM INSURANCE COMPANIES, APPELLEE.
DEBBIE LUNDIN, APPELLEE, V.
MIDWEST NEUROSURGERY, P.C., APPELLANT.

686 N.W.2d 572

Filed September 17, 2004. Nos. S-02-559, S-03-076.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, for which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.

4. **Contracts: Health Care Providers.** Even in the absence of an express contract, the rendering of medical services creates an implied contract between the health care provider and the person being given the medical care.
5. **Health Care Providers: Liability.** Neb. Rev. Stat. § 52-401 (Reissue 1998) does not change the fact that the patient is still the person responsible for paying his or her bill.
6. **Health Care Providers: Security Interests.** By granting the health care provider a security interest in the patient's settlement or judgment, Neb. Rev. Stat. § 52-401 (Reissue 1998) provides a new mechanism for the provider to ensure its bill will be satisfied in whole or in part out of the judgment or settlement.
7. **Health Care Providers: Liens: Tort-feasors: Insurance.** By perfecting its Neb. Rev. Stat. § 52-401 (Reissue 1998) lien before the tort-feasor pays the judgment or settlement to the patient, the health care provider creates an obligation on the tort-feasor to ensure that the provider's bill will be satisfied from the funds that the tort-feasor owes to the patient.
8. **Health Care Providers: Liens: Tort-feasors: Insurance: Liability.** If a tort-feasor's insurer impairs a Neb. Rev. Stat. § 52-401 (Reissue 1998) lien, then the insurer is directly liable to the health care provider for the amount that would have been necessary to satisfy the lien.
9. **Statutes: Appeal and Error.** 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.
10. **Health Care Providers: Liens: Words and Phrases.** In Neb. Rev. Stat. § 52-401 (Reissue 1998), the phrase "usual and customary charges" acts as a cap; it prevents the lien from being an amount greater than what the health care provider typically charges other patients for the services that it provided to the injured party.
11. ____: ____: ____. Under the plain language of Neb. Rev. Stat. § 52-401 (Reissue 1998), the lien extends only to the "amount due" for the health care provider's "usual and customary charges."
12. **Health Care Providers: Liens.** Under Neb. Rev. Stat. § 52-401 (Reissue 1998), the lien is equal to the debt still owed to the health care provider for its usual and customary charges.
13. **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.

Petitions 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 Douglas County, JOHN D. HARTIGAN, JR., and MARY G. LIKES, Judges. Judgment of Court of Appeals affirmed.

Gregory C. Scaglione, Christopher J. Basilevac, and Julie A. Schultz, of Koley Jessen, P.C., L.L.O., for appellant.

David C. Mullin, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee State Farm Insurance Companies.

Joseph B. Muller, of Law Offices of Ronald J. Palagi, P.C., for appellee Debbie Lundin.

Edward F. Hoffman, of Cada, Froscheiser, Cada & Hoffman, for amicus curiae Bryan LGH Medical Center.

Lyman L. Larsen and Neil B. Danberg, Jr., of Stinson, Morrison & Hecker, L.L.P., for amicus curiae Nebraska Hospital Association.

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

CONNOLLY, J.

In dispute is the amount of a physician's lien that Midwest Neurosurgery, P.C. (Midwest), has on a settlement between Debbie Lundin and Tiffani Monasmith. State Farm Insurance Companies (State Farm) is Monasmith's automobile liability insurer. State Farm, on behalf of Monasmith, and Lundin settled a claim arising out of an automobile collision allegedly caused by Monasmith. Midwest treated Lundin for injuries she sustained in the collision. Midwest's prevailing charge for the services provided to Lundin was $23,193.40. But consistent with the terms of a preexisting agreement with Lundin's health insurer, Midwest agreed to accept $7,669.17 as "payment in full" from Lundin and her health insurer.

The issue is whether Midwest's physician's lien extends to the difference between the prevailing charge and the amount it agreed to accept as "payment in full." The Nebraska Court of Appeals concluded that the lien did not extend to the difference. We agree and affirm.

I. BACKGROUND

When the collision occurred, Lundin was insured under her employer's health plan, the Christian and Missionary Alliance (C&MA) employee benefit plan. The network administrator for the C&MA plan was Midland's Choice. For our purposes, the

distinction between C&MA and Midland's Choice is not important and to avoid confusion we will refer to them jointly as "C&MA."

Within the health insurance industry, it is common for insurers and medical providers to enter into agreements in which the provider agrees to accept as full payment an amount less than what is billed to the insured patient. In exchange for the provider's agreeing to offer its services at a discounted rate, the insurer agrees to create incentives for its insureds to use the provider, thus helping to ensure a higher volume of patients for the provider. Anne Maltz, Practising Law Inst., Litigation and Administrative Practice Course Handbook Series, Health Insurance 101 (2004).

C&MA and Midwest had entered into such an agreement before Midwest provided medical services to Lundin (Managed Care Agreement). The Managed Care Agreement provided:

> The Plan Physician agrees to accept as payment in full for providing Covered Services to Plan Patients amounts equal to the Plan Physician's then prevailing charge; however, in the event the Plan Physician's then prevailing charge is for a Covered Service listed on the Plan Physician Fee Schedule, and exceeds the amount computed in accordance therewith, the Plan Physician agrees to accept as payment in full the amount computed in accordance with the Plan Physician Fee Schedule.

The "then prevailing charge" for the services Midwest provided to Lundin was $23,193.40. But because this was more than the amount allowed by the "Plan Physician Fee Schedule," Midwest accepted $7,669.17: $6,783.20 from C&MA, and an $885.97 copayment for which Lundin is responsible.

After it treated Lundin, Midwest sent a letter to State Farm in which Midwest claimed that it had a physician's lien under Neb. Rev. Stat. § 52-401 (Reissue 1998).

State Farm, on behalf of Monasmith, later entered into a settlement agreement with Lundin; Midwest did not take part in the settlement negotiations. Under the agreement, Lundin released Monasmith from any liability in exchange for $50,000, the limits under Monasmith's liability policy.

Lundin and Midwest agree that Midwest has a lien on a portion of the settlement proceeds, but they dispute the amount.

Midwest claims that the lien is for $16,410.20, the difference between the "then prevailing charge" and the amount Lundin and C&MA were required to pay after the bill was adjusted in accordance with the Managed Care Agreement. Lundin claims that the lien is for $885.97, the total amount of the copayments she still owes to Midwest.

1. Lundin's Declaratory Judgment Action Against Midwest and Midwest's Counterclaim

As partial payment of the settlement agreement, State Farm sent a check for $16,410.20 to Lundin's attorneys. The check was made payable to Lundin, her attorneys, and Midwest. After Lundin's attorneys received the check, they tendered $885.97 to Midwest, claiming that the amount was for "full and final payment on her bill." Midwest refused the check from Lundin's attorneys, claiming that it was entitled to the entire $16,410.20.

Lundin then brought a declaratory judgment action against Midwest, seeking a determination that Midwest was entitled to only $885.97 of the settlement funds. Midwest filed a counterclaim seeking a declaration that neither Lundin nor her attorneys had an interest in the State Farm check and ordering them to endorse and deliver the check to Midwest for payment on its perfected physician's lien. Following a bench trial, the court ruled for Lundin and ordered the parties to return the check to State Farm and have State Farm issue two new checks: one made payable to Midwest for $885.97, and one made payable to Lundin and her attorneys for $15,524.23.

2. Midwest's Action Against State Farm

While Lundin's action was pending, Midwest filed an action against State Farm. In the petition, Midwest alleged that State Farm had impaired its lien by settling directly with Lundin; naming Midwest, Lundin, and Lundin's attorneys as payees on the check; and delivering the check to Lundin's attorneys. Both parties moved for summary judgment. The district court granted summary judgment to State Farm, concluding that because State Farm made the check payable to Midwest as well as Lundin and Lundin's attorneys, it had sufficiently protected Midwest's lien.

3. Court of Appeals' Decision

The two cases were consolidated for appeal, and the Court of Appeals affirmed both. Regarding Lundin's declaratory judgment action, the court held that under § 52-401, a physician's lien "cannot exceed the amount the health care provider agreed to accept for the services rendered to a patient, even if the usual and customary charge for such services is greater than that sum." *Midwest Neurosurgery v. State Farm Ins. Cos.*, 12 Neb. App. 328, 336, 673 N.W.2d 228, 235 (2004). Regarding Midwest's case against State Farm, the court stated, without analysis, that the grant of summary judgment was proper.

II. ASSIGNMENTS OF ERROR

Midwest assigns that the Court of Appeals erred in (1) failing to acknowledge Midwest's contractual rights to pursue payment from sources other than the patient and health insurer in accordance with the coordination of benefits language contained in both the Managed Care Agreement and Lundin's patient registration sheet; (2) concluding that a physician's lien against the tortfeasor and liability insurer cannot exceed the amount the physician agreed to accept from the health insurer and patient, thus denying full payment of the medical bills; and (3) failing to acknowledge that State Farm breached its duty to not impair Midwest's physician's lien rights by issuing the settlement check for $16,410.20 to Midwest, Lundin, and Lundin's attorneys.

III. STANDARD OF REVIEW

In Midwest's case against State Farm, the district court denied Midwest's motion for summary judgment and granted State Farm's motion for summary judgment. In Lundin's declaratory judgment action against Midwest, the court entered judgment for Lundin after a bench trial. In both cases, however, the facts are essentially undisputed. In determining the resolution of these appeals, we focus on the meaning of § 52-401 and the contracts between Lundin and Midwest and Midwest and C&MA.

[1,2] Interpreting § 52-401 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.*, 267 Neb. 158, 673 N.W.2d 15 (2004).

[3] The interpretation of the Managed Care Agreement involves a question of law, for which this court has an obligation to reach its conclusions independent of the determinations made by the court below. See *Professional Bus. Servs. v. Rosno, ante* p. 99, 680 N.W.2d 176 (2004).

IV. ANALYSIS

1. Resolution of Lundin's Declaratory Judgment Action and Midwest's Counterclaim

The issue in the declaratory judgment action between Lundin and Midwest centers on the amount of the lien that Midwest had on Lundin's settlement. Lundin seeks a declaration that Midwest is entitled to only $885.97 of the settlement fund. Midwest seeks a declaration that it is entitled to $16,410.20. We begin our analysis with an overview of § 52-401 and then turn to the question of the amount of Midwest's lien.

(a) Operation of Lien Statute

[4] Even in the absence of an express contract, the rendering of medical services creates an implied contract between the provider and the person being given the medical care. *AMISUB v. Allied Prop. & Cas. Ins. Co.*, 6 Neb. App. 696, 576 N.W.2d 493 (1998). Thus, health care providers and their patients stand in a creditor-debtor relationship; but unlike other creditors, the health care providers named in § 52-401 are often called upon to provide their services without first ascertaining whether the patient can pay. See *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). Recognizing that this can create a heavy burden on health care providers, the Legislature passed § 52-401, which provides:

> Whenever any person employs a physician, nurse, or hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person claims damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or

compromise on the amount due for the usual and customary charges of such physician, nurse, or hospital applicable at the times services are performed, except that no such lien shall be valid against anyone coming under the Nebraska Workers' Compensation Act.

The lien statute ensures that medical care is available to indigent persons by giving health care providers a way of securing compensation for the potentially charitable act of providing care to an indigent party. *Bergan Mercy Health Sys. v. Haven, supra.* Without the lien statute, the provider would be limited to bringing an action against the patient to recover the debt. This creates a problem for the provider: There is the potential that the tort-feasor will pay the judgment and the settlement directly to the patient, who will spend the money without reimbursing the provider. If the patient has no other funds to pay the provider's bill, the action against the patient will be worthless. See *Bergan Mercy Health Sys. v. Haven, supra.*

[5-7] The lien statute does not change the fact that the patient is still the person responsible for paying his or her bill. But by granting the provider a security interest in the patient's settlement or judgment, it provides a new mechanism for the provider to ensure its bill will be satisfied in whole or in part out of the judgment or settlement. Accord *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991) (holding that when injured party receives treatment from provider and then obtains judgment or settlement, lien statute transfers interest of injured party in proceeds of settlement or judgment to provider, up to amount due for usual and customary charges). By perfecting its lien before the tort-feasor pays the judgment or settlement to the patient, the provider creates an obligation on the tort-feasor to ensure that the provider's bill will be satisfied from the funds that the tort-feasor owes to the patient.

[8] In addition, the lien statute creates an incentive for the tort-feasor's insurer to make certain that the provider's bill is paid from the funds owed to the patient. If the insurer impairs the lien, then the insurer is directly liable to the provider for the amount that would have been necessary to satisfy the lien. See, *Alegent Health v. American Family Ins.*, 265 Neb. 312, 656 N.W.2d 906 (2003); *West Neb. Gen. Hosp. v. Farmers Ins. Exch., supra.* With

these principles in mind, we turn to the question of the amount of the physician's lien that Midwest had on Lundin's settlement proceeds.

(b) Amount of Lien

[9] 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. *Parnell v. Madonna Rehab. Hosp.*, 258 Neb. 125, 602 N.W.2d 461 (1999). The operative language in § 52-401 states that the lien is on "the amount due for the usual and customary charges of such physician, nurse, or hospital."

[10-12] In § 52-401, the phrase "usual and customary charges" acts as a cap; it prevents the lien from being an amount greater than what the provider typically charges other patients for the services that it provided to the injured party. See *Parnell v. Madonna Rehab. Hosp., supra*. The lien however, does not extend to the full amount of the provider's "usual and customary charges." Instead, under the plain language of § 52-401, the lien extends only to the "amount due" for the provider's "usual and customary charges." "Due" means "[o]wing or payable; constituting a debt." Black's Law Dictionary 538 (8th ed. 2004). Thus, under § 52-401, the lien is equal to the debt still owed to the provider for its usual and customary charges.

Of course, how much is still owed to the provider will depend on the facts of each particular case, and so we look to the record to determine the debt still owed to Midwest for the services it provided.

The Managed Care Agreement between C&MA and Midwest provided:

> **3. <u>Responsibilities of Plan Physician</u>.**
>
> . . . .
>
> (b) <u>Payment for Covered Services</u>. The Plan Physician agrees to accept as payment in full for providing Covered Services to Plan Patients amounts equal to the Plan Physician's then prevailing charge; however, in the event the Plan Physician's then prevailing charge is for a Covered Service listed on the Plan Physician Fee Schedule, and exceeds the amount computed in accordance therewith, the

> Plan Physician agrees to accept as *payment in full* the amount computed in accordance with the Plan Physician Fee Schedule.

(Emphasis supplied.)

[13] 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. *Big River Constr. Co. v. L & H Properties, ante* p. 207, 681 N.W.2d 751 (2004). The language of provision 3(b) is clear. Under it, Midwest agreed to accept as "payment in full" the amount computed under the "Plan Physician Fee Schedule" when that amount was less than Midwest's prevailing charge. The use of the phrase "payment in full" in the Managed Care Agreement contemplates that Midwest will accept the amount computed under the fee schedule as full satisfaction of the debt; once that amount is paid, the debt is extinguished.

Midwest, however, argues that the "payment in full" language in provision 3(b) is qualified by two "coordination of benefits" provisions; one that appears in the Managed Care Agreement and one that appears in a patient registration form that Lundin signed when she was admitted to Midwest. The two provisions contain different language, and we consider them separately.

(i) Coordination of Benefits in Managed Care Agreement

The coordination of benefits provision in the Managed Care Agreement provides:

> Regular coordination of benefits provisions contained in the Contracting Group's health benefits program shall apply to Covered Services provided by the Plan Physician. In the event that the Contracting Group is primary, then the Plan Physician shall be paid in accordance with this Agreement from the Contracting Group, *but nothing herein shall preclude the Plan Physician from seeking or obtaining additional payment from payment sources other than primary.* In the event that the Contracting Group is other than primary, then the Plan Physician shall not be entitled to receive payment from the Contracting Group in excess of the amount which when received from other sources under

> the applicable coordination of benefits rules equals the amounts computed in accordance with this Agreement.

Midwest interprets the italicized language to mean that when there are payment sources other than the medical insurer and the patient, Midwest is not required to accept the amount computed under the fee schedule as payment in full. Instead, according to Midwest, if other payment sources exist, it is owed the difference between its prevailing charge and the amount computed under the fee schedule—but it is limited to recovering the difference from sources other than the patient and C&MA. Midwest, as we understand it, contends that Monasmith and State Farm are payment sources other than C&MA and that thus, the difference between Midwest's prevailing charge and the amount computed under the fee schedule is still part of the debt owed to it—even though it cannot seek to collect the difference from Lundin.

Midwest is correct in its interpretation that when C&MA is primary, the coordination of benefits provision in the Managed Care Agreement preserves Midwest's right to seek additional payment from sources other than primary. But we disagree with Midwest's argument that Monasmith and State Farm are "payment sources other than primary." The Managed Care Agreement does not define "payment sources other than primary." However, the purpose of the Managed Care Agreement is to define the duties running between C&MA and Midwest. Among those duties is C&MA's obligation to pay Midwest directly for the expenses incurred by C&MA's insureds. The phrase "payment sources other than primary" refers to other payment sources that have obligations that mirror C&MA's duty to pay Midwest for the treatment it gave the patient. For example, the situation might arise when the injured party is insured by another health insurer who has its own managed care plan with Midwest. The coordination of benefits provision in the Managed Care Agreement allows Midwest to enforce the other insurer's obligation to pay, even if C&MA has already satisfied its obligation.

But unlike C&MA, neither Monasmith nor State Farm had a duty to pay Midwest for Lundin's treatment. In the settlement agreement, Monasmith promised to pay Lundin in exchange for Lundin's promise to release Monasmith from liability.

Monasmith's duty to pay ran to Lundin, not to Midwest, and thus she cannot be considered under the category of "payment sources other than primary." Likewise, as Monasmith's liability insurer, State Farm had a contractual duty to Monasmith to insure her against her loss. But it had no duty to pay Midwest for the services Midwest provided to Lundin. See *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991) (noting that settlement is between tort-feasor and injured party even if insurer pays injured party directly). We reject the argument that under the Managed Care Agreement, Monasmith and State Farm are additional payment sources and that the difference between Midwest's prevailing charge and the amount computed under the fee schedule is part of the amount due to Midwest.

(ii) Coordination of Benefits Provision in Patient Registration Form

Midwest also relies on a coordination of benefits provision in a patient registration form signed by Lundin. The provision states, "To the extent there is multiple coverage by third party payors such benefits shall be coordinated and the collection of any deductibles, co-insurance or co-payments up to the full amount of the account balance shall be permitted . . . ." Midwest interprets this provision similarly to how it interpreted the coordination of benefits provision in the Managed Care Agreement. Midwest argues that when there is "multiple coverage by third party payors," it is not obligated to accept the amount computed under the fee schedule as payment in full. Instead, the difference between the prevailing charge and the amount computed under the fee schedule is owed to Midwest—but it is limited to recovering the difference from those third-party payors. Midwest argues that it and Lundin agreed that State Farm was a third-party payor that provided coverage and that as a result, the difference was part of the debt owed to Midwest. We disagree.

The coordination of benefits language refers to other third-party payors who provided "coverage" to Lundin. But as the Court of Appeals correctly noted, State Farm did not provide medical coverage to Lundin; it provided liability coverage to Monasmith. Thus, the coordination of benefits clause in the patient registration form is inapplicable.

(c) Conclusion on Lundin's Declaratory Judgment Action and Midwest's Counterclaim

We reject Midwest's claim that the two coordination of benefits provisions qualified the "payment in full" language in the Managed Care Agreement. Instead, we conclude that Midwest agreed to accept as "payment in full" the amount computed under the fee schedule and cannot use § 52-401 to escape the consequence of the agreements that it struck with C&MA and Lundin. Thus, the Court of Appeals did not err in affirming the district court's conclusion that Midwest's § 52-401 lien did not extend to the difference between the prevailing charge and the amount computed under the fee schedule. We also agree with the Court of Appeals that the district court's order adequately protected the lien.

2. Resolution of Midwest's Action Against State Farm for Impairment of Lien

In addition to its claims against Lundin, Midwest also alleges that State Farm is liable to it for impairing the lien. According to Midwest, State Farm impaired its lien by not including it in the settlement negotiations and by making the settlement check payable to Midwest, Lundin, and Lundin's attorneys.

We need not determine whether State Farm impaired the lien. We have already decided that the amount of the lien is $885.97. Our resolution of Lundin's declaratory judgment action ensures that Midwest will be paid this amount out of the settlement proceeds. It makes no sense to allow Midwest to maintain an action against State Farm for impairment of the lien when we know that the lien will be satisfied.

V. CONCLUSION

The Court of Appeals did not err in affirming the opinions of the district court.

Affirmed.

Wright, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. SHAWN PRATER, APPELLANT.

686 N.W.2d 896

Filed September 24, 2004. No. S-03-1161.

1. **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.

Appeal from the District Court for Douglas County, PETER C. BATAILLON, Judge, on appeal thereto from the County Court for Douglas County, JOSEPH P. CANIGLIA, Judge. Judgment of District Court affirmed.

Casey J. Quinn for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

WRIGHT, J.

NATURE OF CASE

Shawn Prater appeals from a judgment of the Douglas County District Court, which affirmed the judgment of the Douglas County Court finding Prater guilty of driving while under the influence (DUI), in violation of an Omaha city ordinance.

SCOPE OF REVIEW

[1] 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. *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001). When analyzing a municipal ordinance, this court follows the same rule.

FACTS

At about 2:30 a.m. on August 26, 2001, Omaha police officers were called by a resident of an apartment complex who reported

a man trying to break into her car in the parking lot. While investigating the possible break-in, Officer Tom Rummel observed Prater slumped over in the driver's seat of a different car. The car's engine was running. Rummel's partner tapped on the car window, but Prater did not respond. Rummel testified that Prater had "spill coming from his mouth down onto the floor." When Prater began to respond, Rummel reached into the car and took the keys from the ignition while his partner asked Prater to step out of the car and provide identification and registration. Prater appeared to have been drinking and showed signs of impairment. Prater was arrested and transported to police headquarters, where he was given an Intoxilyzer test.

A city complaint was filed in Douglas County Court charging Prater with violating Omaha Municipal Code (OMC), ch. 36, art. III, § 36-115 (1998) by unlawfully operating or being in actual physical control of a motor vehicle while under the influence. Prater stipulated that the Intoxilyzer test was completed in accordance with statutory requirements and that the results indicated that his breath alcohol level was .171.

The apartment complex where Prater was arrested is made up of four 12-unit buildings. There are no gates or fences surrounding the property. A sign posted near the parking lot states: "Private parking[.] Unauthorized vehicles will be towed at owners expense." Guests of apartment residents are allowed to park in the lot and are not required to sign in. Maintenance persons also park in the lot.

The county court found Prater guilty of DUI, first offense, and placed him on supervised probation for 365 days. Prater was ordered to pay a fine of $400 and not to drive for 60 days.

Prater appealed to the Douglas County District Court, which affirmed. The district court concluded that OMC § 36-115 was parallel to Neb. Rev. Stat. § 60-6,108 (Reissue 1998), the latter of which provides that the DUI statute "shall apply upon highways and anywhere throughout the state *except private property which is not open to public access*." (Emphasis supplied.) The district court agreed with the county court that the area where Prater was arrested was open to public access even though it was not open to public parking. It concluded that the facts presented at trial established that the private parking lot was open to public

access and that OMC § 36-115 applied to the parking lot. The district court found that the guilty verdict was supported by competent evidence. Prater appeals.

ASSIGNMENT OF ERROR

Prater assigns six errors, which can be summarized to assert that the lower courts committed reversible error in interpreting OMC § 36-115 to apply to the private parking lot in question.

ANALYSIS

The applicable version of OMC § 36-115 stated:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor . . . .
>
> . . . .
>
> (c) The provisions of this section shall apply *anywhere throughout the city except private property which is not open to public access.*

(Emphasis supplied.)

The ordinance is similar to § 60-6,108, which states in part:

> (1) The provisions of the Nebraska Rules of the Road relating to operation of vehicles refer exclusively to operation of vehicles upon highways except where a different place is specifically referred to in a given section, but sections 60-6,196, 60-6,197, and 60-6,212 to 60-6,218 shall apply upon highways and *anywhere throughout the state except private property which is not open to public access.*

(Emphasis supplied.)

When analyzing a municipal ordinance, this court follows the same rules applied to statutory analysis. See *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001). The court first looks to the language of the ordinance. 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.*

The word "access" is defined as "permission, liberty, or ability to enter, approach . . . or pass to and from," "a way by which a thing or place may be approached or reached," and "the action

of going to or reaching . . . passage to and from." Webster's Third New International Dictionary of the English Language, Unabridged 11 (1993). Thus, the phrase "open to public access" means that the public has permission or the ability to enter.

Whether OMC § 36-115 applies to the case at bar is primarily a question of fact. A sign on the property stated: "Private parking[.] Unauthorized vehicles will be towed at owners expense." Although the parking lot was private property intended for use by residents of the apartment complex, there is no indication that the public was not allowed to enter the lot or was prohibited from using the lot under any circumstances. Testimony established that the lot was used by guests of residents, as well as by delivery persons and maintenance workers. The lower courts found, based upon the facts presented, that " 'the area where the defendant was arrested was open to public access even though it was not open to public parking.' "

Other jurisdictions have considered whether DUI statutes applied to private property. In Pennsylvania, the Superior Court held that a club parking lot was a trafficway for purposes of the DUI statute. *Com. v. Wilson*, 381 Pa. Super. 253, 553 A.2d 452 (1989). Although a sign indicated that the parking lot was private, the court found that if a parking lot is used by members of the public, it is a trafficway for purposes of the DUI statute.

The defendant, who was belligerent and appeared to be intoxicated, was removed from the Elks Club after a disturbance. He began to walk home, but then returned to the club's parking lot, got into a car, started it, and began to leave the lot. He was arrested, and a blood alcohol test determined that he was intoxicated. After he was convicted, the defendant argued on appeal that his offense was not committed on a highway or a trafficway.

Under Pennsylvania law, a trafficway was defined as " 'the entire width between property lines or other boundary lines of every way or place of which any part is open to the public for purposes of vehicular travel as a matter of right or custom.' " *Id.* at 255, 553 A.2d at 453, quoting 75 Pa. Cons. Stat. Ann. § 102. The Superior Court affirmed the conviction, stating:

> It would raise form to towering levels above substance if parking lots, in which vehicular traffic is encouraged and occurs, sometimes at high rates of speed, were to become

> "D[U]I-free zones," in which drunk driving is tolerated from entrance to exit. Such a construction would seriously undermine the effectiveness of any drunk driving prohibitions.

Wilson, 381 Pa. Super. at 257, 553 A.2d at 454.

In *People v Hawkins*, 181 Mich. App. 393, 448 N.W.2d 858 (1989), the Michigan Court of Appeals concluded that a shopping center parking lot was open to the public and that a driver arrested there could be convicted of DUI. The state statute in that case provided that a person could be charged with DUI if operating a vehicle " 'upon a highway or other place open to the general public, including an area designated for the parking of vehicles, within the state.' " *Id.* at 396, 448 N.W.2d at 860. The court noted that the statute's language focused on whether the area was accessible to the public and that a shopping center parking lot was open to the public if there were no barriers to public access.

The Massachusetts DUI statute was found to apply to operation of a vehicle " 'upon any way or in any place to which members of the public have access as invitees or licensees' " in *Com. v. Hart*, 26 Mass. App. 235, 525 N.E.2d 1345, 1346 (1988), citing Mass. Gen. Laws ch. 90, § 24(1)(*a*)(1). The driver in that case was observed driving on a road without the aid of headlights. He pulled into a parking lot that belonged to his employer, stopped the car, and stepped out. A sign at the entrance to the lot stated: " 'Private Property/Chomerics Employees and Authorized Persons Only.' " *Hart*, 26 Mass. App. at 236, 525 N.E.2d at 1346. The court stated:

> It is the status of the way, not the status of the driver, which the statute defines . . . . No specific license or invitation need be granted to the particular driver charged with violating the statute, i.e., it is sufficient if the physical circumstances of the way are such that members of the public may reasonably conclude that it is open for travel to invitees or licensees of the abutters.

Id. at 237-38, 525 N.E.2d at 1347.

In *State v. Thomas*, 420 N.W.2d 747, 753 (N.D. 1988), the North Dakota law provided that DUI was a violation if a person drove or was in actual physical control " 'of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state . . . .' " The

defendant pulled off the highway into the parking lot of a private gun club, of which he was a member. The court affirmed his conviction for DUI, finding that the parking lot was an area to which the public had a right of access for vehicular use. The court stated that the purpose of the DUI statute was to deter intoxicated persons from getting into a vehicle, except as a passenger. The statute was intended to "protect the public against the real danger caused by drunken drivers whether on the highway, a parking lot or elsewhere within the State." *Id.* at 753-54.

As other courts have noted, law enforcement should not be required to wait for a driver to enter a public highway before stopping the driver to determine whether he or she is impaired. Public safety requires that DUI statutes and ordinances apply to any property to which the public has access. The purpose of these laws is to protect the public—not to provide a safe harbor for the intoxicated driver in a private parking lot.

We conclude that under the facts of this case, the lower courts did not err in finding that the city ordinance applied to the parking lot, and we find that the evidence supports Prater's conviction for DUI in violation of the ordinance.

CONCLUSION

Based upon the facts presented, the district court correctly found no error on the part of the county court, which properly determined that the parking lot in question was open to public access. Prater's conviction for DUI in violation of OMC § 36-115 is supported by sufficient evidence, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL J. LOSINGER, APPELLANT.

686 N.W.2d 582

Filed September 24, 2004. No. S-03-1304.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

2. **Sentences.** An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
3. ____. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
4. ____. Factors a judge should consider in imposing a sentence include 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.
5. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

R. Bradley Dawson, of Dawson & Piccolo, and Richard A. Birch, of Nielsen & Birch, 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 this appeal, Daniel J. Losinger contends that the trial court abused its discretion by imposing excessive sentences. The court sentenced Losinger to serve 50 years' to life imprisonment for murder in the second degree and 10 to 20 years' imprisonment for use of a deadly weapon to commit a felony in connection with the 2001 murder of Vicki Soto. The sentences were to be served consecutively.

BACKGROUND

On December 2, 2001, Losinger visited his girl friend's sister, who resided above the basement apartment where Soto and her husband lived. That same night, Soto's husband discovered her

body lying in a pool of blood in their apartment. Soto was 8½ months pregnant at the time. According to North Platte police reports, Soto was attacked while apparently eating dinner and coloring pictures. It appears that a struggle ensued between Soto and Losinger, as she sustained a number of defensive wounds on her fingers, some of which were deep enough that the bones could be seen. At some point, Losinger cut her throat at least three times with a sharp instrument, which was approximately 8 to 12 inches in length. These cuts severed her carotid artery and ultimately caused her death, as well as the death of her fetus. After Soto had bled out on her living room floor, Losinger positioned her fingers so that the middle finger of each hand was extended from the other fingers. In addition, after Soto had died, Losinger amputated her legs from the knees down, cutting her left leg through the bone under the kneecap and severing the right leg by cutting in between the two ends of the joint of the leg. When emergency personnel and police arrived, they discovered that the amputated portions of Soto's legs were missing. The missing portions of her legs were eventually discovered 2 days later in a cardboard box which was concealed in a cement storm sewer pipe near the South Platte River.

Losinger is a 52-year-old high school dropout who suffers from a learning disability, has an IQ estimated to be in the 70's, and has a history of alcohol and substance abuse. Losinger claims that he completed his education through only the 11th grade because he was unwilling to fulfill a physical education requirement. In addition to his learning disability, Losinger has a history of substance and alcohol abuse. He claims to have consumed his first beer at the age of 7 and began to consume alcohol on a regular basis by the age of 14. Losinger also used marijuana, which he has smoked as often as daily. Since moving to Nebraska, Losinger's use of marijuana has been only occasional because of its cost.

Prior to relocating to Nebraska in 1998, Losinger accumulated a criminal record which dates back to 1972. Losinger had been imprisoned four times as an adult prior to his current incarceration. He had also been placed on 18 months' probation and ordered to complete anger management control counseling due to a disorderly conduct charge.

Losinger was initially charged with murder in the first degree for the death of Soto and use of a deadly weapon to commit a felony, to which he pled not guilty. Subsequently, Losinger entered into a plea agreement whereby he plead no contest to murder in the second degree and use of a deadly weapon to commit a felony. Upon his plea, the trial court sentenced Losinger to serve 50 years' to life imprisonment for murder in the second degree and 10 to 20 years' imprisonment for use of a deadly weapon to commit a felony. The sentences were ordered to run consecutively, and credit was given for 692 days served. Losinger timely appealed his sentences on the ground that the trial court abused its discretion by imposing excessive sentences in light of the facts and Losinger's background.

ASSIGNMENT OF ERROR

Losinger assigns on appeal two errors which can be consolidated into one. Losinger contends, restated, that the trial court abused its discretion in sentencing Losinger by imposing excessive sentences.

STANDARD OF REVIEW

[1,2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004); *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998). See *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

ANALYSIS

As his sole assignment of error, which has been consolidated and restated, Losinger argues that the trial court abused its discretion when it sentenced him to 50 years' to life imprisonment for the second degree murder of Soto and 10 to 20 years' imprisonment for the use of a deadly weapon to commit a felony. The second degree murder charge is a Class IB felony punishable by 20 years' to life imprisonment. Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 2002) and 28-304 (Reissue 1995). Use of a deadly weapon

to commit a felony is a Class III felony punishable by 1 to 25 years' imprisonment, a $25,000 fine, or both. § 28-105 and Neb. Rev. Stat. § 28-1205(2)(a) (Reissue 1995).

[3] In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

[4] Factors a judge should consider in imposing a sentence include 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. Weaver, supra*; *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004); *State v. Timmens, supra.*

[5] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001). An abuse of discretion takes place where 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 his brief on appeal, Losinger argues that several of the following factors establish that the sentences imposed by the trial court were excessive: his age, his failure to complete high school, his learning disability, a low IQ, a minimal criminal history since moving to Nebraska in 1998 (though a substantial one prior to his relocation), a dysfunctional homelife as a child, a lack of involvement with violence, and the fact that he was under the influence of alcohol when he murdered Soto.

In our recent decision in *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004), the defendant was convicted of second degree murder for the death of his grandmother, who died as a result of asphyxiation by strangulation. The defendant was sentenced to

a term of 60 years to life in prison. In support of his argument on excessive sentence, the defendant pointed to his negligible criminal record, his youth, and his troubled upbringing. His parents had problems with alcohol abuse, he was verbally abused by his mother, and the woman who became somewhat of a stepmother to him committed suicide when he was 13 years old. We noted that the trial court was aware of these circumstances, as evidenced by the presentence investigation report, but that the court found, in light of the totality of the circumstances, that they did not justify a finding of an excessive sentence. We affirmed the defendant's conviction and sentence.

In the instant case, Losinger attacked a woman who was 8½ months pregnant. She attempted to fight him off, as was evidenced by the deep cuts down to the bone on her fingers. She was unsuccessful, and she, as well as her unborn child, were killed when Losinger cut her throat three times. After killing Soto, Losinger positioned her fingers so that only the middle finger of each hand extended from the other fingers and severed each leg from her body at the knee. He then concealed the lower portions of her legs in a storm sewer pipe, where they were not discovered for another 2 days.

CONCLUSION

Based on the record in this case, we conclude that the trial court did not abuse its discretion in imposing the sentences.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JON P. WORTHMAN, RESPONDENT.

686 N.W.2d 586

Filed September 24, 2004. No. S-04-053.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, Jon P. Worthman, was admitted to the practice of law in the State of Nebraska on September 22, 1994, and at all times relevant hereto was engaged in the private practice of law in Alliance, Nebraska. On January 13, 2004, formal charges were filed against respondent. The formal charges set forth two counts that included charges that respondent violated the following provision of the Code of Professional Responsibility: Canon 9, DR 9-102(A)(2) (failing to preserve identity of funds and property of client). On August 24, 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 allegation that he violated DR 9-102(A)(2), and in effect waived all proceedings against him in connection therewith in exchange for a public reprimand and probation. Upon due consideration, the court approves the conditional admission.

FACTS

In summary, the formal charges allege that respondent was engaged in proceedings to dissolve his marriage and that during the dissolution proceedings, respondent deposited into his attorney trust account three insurance checks that he had received resulting from hail damage to property belonging to respondent and his spouse. It is undisputed that the checks were neither exclusively respondent's personal funds nor funds belonging to a client. It is also undisputed that at the time respondent deposited the checks into his attorney trust account, client funds were being held in the account.

The formal charges further allege that in January 2002, respondent undertook the representation of a client in a dissolution action and that during the course of that representation, the client paid respondent a total of $1,000, a portion of which represented advanced fees. Respondent failed to deposit the advanced fees into his attorney trust account and, instead, deposited the fees into his general account. The formal charges further allege that respondent later refunded a portion of the advanced fees to the client, at the client's request.

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 9-102(A)(2). 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 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 9-102(A)(2) and that respondent should be and hereby is publicly reprimanded. We further order that respondent be on probation for a period of 1 year, effective immediately, during which time respondent will submit, on a quarterly basis, his general and trust accounts to a certified public accountant, who shall review the same and submit, on a quarterly basis, a written report regarding the review to the Counsel for Discipline of the Nebraska Supreme Court. Respondent is

directed to pay the accountant's costs and expenses for this service. Respondent 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 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JACQUELINE ANN HUGHES, RESPONDENT.

686 N.W.2d 588

Filed September 24, 2004. No. S-04-694.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, Jacqueline Ann Hughes, was admitted to the practice of law in the State of Nebraska on April 25, 2002, and at all times relevant hereto was engaged in the private practice of law in Lincoln, Nebraska. On June 15, 2004, formal charges were filed against respondent. The formal charges set forth one count that included charges that 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)(3) (engaging in illegal conduct involving moral turpitude); DR 1-106(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); as well as her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). On July 26, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which she knowingly did not challenge or contest the

truth of the allegations that she violated DR 1-102(A)(1), (3), (4), and (6), as well as her oath of office as an attorney, and in which she in effect waived all proceedings against her in connection therewith in exchange for a stated form of consent judgment of discipline outlined below. Upon due consideration, the court approves the conditional admission.

FACTS

In summary, the formal charges allege that respondent gained access to "blank prescription forms from her former husband's medical practice" and that from September 2002 through June 2003, respondent forged prescriptions to obtain the narcotic pain medication "Hydrocodone." In late fall 2003, respondent was cited for one count of "Obtaining a Controlled Substance — Forged Prescription," a Class IV felony. The formal charges further allege that following her citation, respondent enrolled in a pretrial diversion program. In the event of her successful completion of her diversion program, the criminal charge will not be prosecuted. Additionally, we note that in her conditional admission, respondent indicates she has completed an out-of-state drug treatment program and has executed a monitoring contract, as amended, with the Nebraska Lawyers Assistance Program (NLAP).

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 she violated DR 1-102(A)(1), (3), (4), and (6), 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 the orders 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), (3), (4), and (6), as well as her oath of office as an attorney, and that respondent should be and hereby is suspended from the practice of law for a period of 6 months, effective immediately, after which time respondent may apply for reinstatement. Should respondent apply for reinstatement, her reinstatement shall be conditioned as follows: (1) Respondent shall provide satisfactory evidence of her successful completion of the pretrial diversion program; (2) respondent shall provide satisfactory evidence of her compliance with the terms of her NLAP amended monitoring contract during the period of her suspension; (3) respondent shall agree to be on probation for a period of 2 years following reinstatement, during which period respondent shall continue to comply with the terms of her NLAP amended monitoring contract; and (4) respondent shall have paid costs and expenses ordered below within 60 days after an order imposing costs and expenses, if any, is ordered by the court. Respondent shall 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. 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 10(P) (rev. 2003) and 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

IN RE TRUST CREATED BY ALFRED DEL CASTILLO AND LUPE DEL CASTILLO.
ALBERT DEL CASTILLO, APPELLANT, V. PATRICIA A. LOBELLO AND ROBERT DEL CASTILLO, APPELLEES.

686 N.W.2d 900

Filed October 1, 2004. No. S-03-310.

1. **Trusts: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002), are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
4. ____. Either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.

Appeal from the County Court for Douglas County: LAWRENCE BARRETT, Judge. Affirmed.

Richard N. Berkshire and Matthew R. Deaver, of Berkshire & Blunk, for appellant.

Susan J. Spahn and Christopher S. Wallace, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellees.

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

MCCORMACK, J.

BACKGROUND

Alfred Del Castillo and Lupe Del Castillo executed a trust in June 1996 in California. After each had passed away, Albert Del

Castillo, a son of Alfred and Lupe, became the successor trustee of the trust. On October 18, 2001, Albert filed a petition in the Douglas County Court seeking to register the trust and initiate administration proceedings. On January 11, 2002, the court entered an order registering the trust in Nebraska.

A few weeks later, a motion was filed by Robert Del Castillo, another son of Alfred and Lupe, and Patricia A. Lobello to vacate the January 11, 2002, order. The motion asserted that registration of the trust in Nebraska was improper because of court proceedings held in California concerning the trust. Those proceedings are discussed in greater detail below. On February 5, the county court denied the motion to vacate, and Lobello and Robert filed an appeal. The Nebraska Court of Appeals vacated the January 11 and February 5 orders because of the county court's failure to record the evidentiary hearings and remanded the cause for a new hearing. *In re Trust of Del Castillo*, 11 Neb. App. xxxv (No. A-02-156, Aug. 7, 2002).

On February 4, 2003, a new hearing was held at which various orders from the Superior Court of San Bernardino County, California, were received into evidence. They included an order entered by the superior court on August 28, 2001, in the conservatorship proceeding of Robert. In that order, the court specifically found that it "has jurisdiction over the Del Castillo Family Trust and the parties to the trust." The court further ordered Albert to prepare an accounting of the trust. Albert did not appeal this order. Other superior court orders received into evidence indicate that on November 21, 2001, Albert's powers as successor trustee of the trust were suspended pending an investigation "of the charges made against him." Lobello was appointed as special trustee in Albert's place. In January 2002, the superior court removed Albert as trustee after finding that he had "breached every conceivable duty of a Trustee." Albert appealed from his removal, but the California Court of Appeal later affirmed. See *In re Estate of Del Castillo*, No. E030988, 2004 WL 100548 (Cal. App. Jan. 22, 2004) (unpublished opinion).

Based on the superior court's orders in evidence, on February 19, 2003, the county court found that California had acquired jurisdiction over the trust and that the registration of the trust in Nebraska was not the most convenient forum for the parties.

Thus, the court denied registration of the trust in Nebraska and dismissed the petition. Albert appeals.

ASSIGNMENTS OF ERROR

Albert assigns that the county court erred in concluding that California had acquired jurisdiction over the trust and in failing to register the trust in Nebraska.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002), are reviewed for error on the record. *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

[3,4] The appellees, Robert and Lobello, argue that Albert no longer has standing to register the trust in Nebraska. We agree. In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). Either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002). Section 30-2801 grants standing to register a trust in Nebraska to *the trustee* of a trust having its principal place of administration in Nebraska. The Superior Court of San Bernardino County removed Albert as trustee in January 2002, an action later affirmed by the California Court of Appeal. Because Albert is no longer the trustee of the trust, he simply no longer has standing to register the trust in Nebraska. Thus, the county court's order denying registration of the trust in Nebraska and dismissing Albert's petition is affirmed.

While this case was on the Court of Appeals' docket, prior to its movement to our docket, Robert and Lobello filed a motion for attorney fees under Neb. Rev. Stat. § 25-824(2) and (4)

(Reissue 1995). The motion was not accompanied by a supporting affidavit, as required by Neb. Ct. R. of Prac. 9F (rev. 2001) and is, therefore, overruled without prejudice.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PAUL M. CONLEY, RESPONDENT.

686 N.W.2d 902

Filed October 1, 2004. No. S-04-460.

Original action. Judgment of public reprimand.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

Respondent, Paul M. Conley, was admitted to the practice of law in the State of Nebraska on June 1, 1968, and at all times relevant hereto was engaged in the private practice of law in Lancaster County, Nebraska. On April 15, 2004, formal charges were filed against respondent. The formal charges set forth one count that included charges that 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); DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); DR 1-102(A)(6) (engaging in conduct that adversely reflects on respondent's fitness to practice law); and Canon 7, DR 7-101(A)(3) (prejudicing or damaging client during course of professional relationship). On August 10, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly admitted the truth of the allegations that he violated DR 1-102(A)(4), (5), and (6), and DR 7-101(A)(3), and, in effect, 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 on November 21, 2001, respondent undertook the representation of Steve and Becky Vandenberg in a chapter 13 bankruptcy proceeding. The formal charges further allege that during the course of the bankruptcy proceedings, respondent entered into a stipulation with one of the Vandenbergs' creditors without authorization from the Vandenbergs, and without the Vandenbergs' knowledge regarding the complete terms of the stipulation. The formal charges further allege that during the pendency of the bankruptcy proceeding, respondent received notice from the chapter 13 trustee that the Vandenbergs were in default in making their monthly payments to the trustee, and allege that respondent failed to notify the Vandenbergs or to take any steps to prevent the dismissal of the Vandenbergs' bankruptcy proceedings. The formal charges further allege that the Vandenbergs' chapter 13 bankruptcy proceeding was dismissed on February 12, 2003.

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 essential relevant facts outlined in the formal charges and knowingly admits that he violated DR 1-102(A)(4), (5), and (6), and DR 7-101(A)(3). 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)(4), (5), and (6), and DR 7-101(A)(3), 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 10(P) (rev. 2003) and 23(B) (rev. 2001), within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

HENDRY, C.J., and MCCORMACK, J., not participating.

COX NEBRASKA TELECOM, L.L.C., ET AL., APPELLEES, V. QWEST CORPORATION, APPELLANT.

687 N.W.2d 188

Filed October 8, 2004. No. S-03-147.

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. ____: ____. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **Statutes.** The meaning of a statute is a question of law.
4. ____. To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
5. **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.
6. **Statutes.** 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.

7. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.

Appeal from the Nebraska Public Service Commission. Appeal dismissed.

Charles W. Steese and Sandra L. Potter, of Steese & Evans, P.C., and Jill Vinjamuri Gettman, of Kutak Rock, L.L.P., for appellant.

Paul M. Schudel and James A. Overcash, of Woods & Aitken, L.L.P., for appellees ALLTEL Nebraska, Inc., and ALLTEL Communications of Nebraska, Inc.

Thomas J. Moorman and David Cosson, of Kraskin, Lesse & Cosson, L.L.C., for appellee Illuminet, Inc.

Deonne L. Bruning, P.C., L.L.O., for appellee Cox Nebraska Telecom, L.L.C.

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

PER CURIAM.

PROCEDURAL BACKGROUND

This litigation began with formal complaints filed before the Nebraska Public Service Commission (PSC) by the appellees, Cox Nebraska Telecom, L.L.C. (Cox); Illuminet, Inc; and ALLTEL Nebraska, Inc., and ALLTEL Communications of Nebraska, Inc. (collectively ALLTEL). The appellees charged that Qwest Corporation (Qwest), the appellant, was acting unlawfully by charging Illuminet for signaling services it obtained from Qwest and provided to Cox and ALLTEL. In an order entered December 17, 2002, the PSC agreed with the appellees and granted them the relief they requested. A timely motion for reconsideration was filed and denied. See Neb. Rev. Stat. § 75-137 (Cum. Supp. 2000).

[1] On February 7, 2003, Qwest filed a notice of appeal purporting to appeal directly to the Nebraska Court of Appeals. We granted the appellees' motion to bypass the Court of Appeals. The appellees in this case have argued that Qwest failed to perfect its

appeal because it did not proceed pursuant to the Administrative Procedure Act (APA), Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Supp. 2003), and that we lack jurisdiction over this appeal. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Webb v. American Employers Group, ante* p. 473, 684 N.W.2d 33 (2004). For the reasons that follow, we conclude that the appellees are correct and that Qwest's appeal must be dismissed.

STANDARD OF REVIEW

[2,3] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *In re Guardianship & Conservatorship of Woltemath, ante* p. 33, 680 N.W.2d 142 (2004). The meaning of a statute is also a question of law. *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002).

ANALYSIS

PSC Appeals Prior To 2000

Prior to any of the events or statutory changes relevant to this case, the method of bringing an appeal from the PSC was found in Neb. Rev. Stat. § 75-136 (Reissue 1996):

> If a party to any proceeding is not satisfied with the order entered by the commission other than an order entered under sections 75-156 to 75-158, such party may appeal to the Court of Appeals as provided in section 75-137 to reverse, vacate, or modify the order. In the case of an order entered under sections 75-156 to 75-158, the party may (1) seek the review of the Court of Appeals as provided in section 75-137 or (2) seek judicial review of the order under section 75-136.01. Subdivisions (1) and (2) of this section are mutually exclusive and the choice of either section 75-136.01 or 75-137 shall govern the appeal process.

Section 75-137 (Reissue 1996) provided a procedure for perfecting an appeal from the PSC to the Court of Appeals. Neb. Rev. Stat. § 75-136.01 (Reissue 1996) allowed a party to file a petition in the district court, but Neb. Rev. Stat. §§ 75-156 to 75-158 (Reissue 1996) dealt with the imposition of civil penalties and are

not relevant. Consequently, prior to 2000, appeals in cases such as the instant case were not perfected pursuant to the APA, but were brought directly to the Court of Appeals. See *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999).

PSC Appeals After 2000

The landscape changed with the enactment of 2000 Neb. Laws, L.B. 1285, which became effective on April 7, 2000. Section 75-136 (Cum. Supp. 2002) provided, as amended:

> (1) Except as otherwise provided by law, if a party to any proceeding is not satisfied with the order entered by the commission, such party may appeal to the Court of Appeals as provided in section 75-137 to reverse, vacate, or modify the order.
>
> (2) In the case of an order assessing a civil penalty entered under subdivision (1)(b) of section 75-156, the party may seek judicial review in accordance with the Administrative Procedure Act. In the case of any other order entered under sections 75-156 to 75-158, the party may (a) seek the review of the Court of Appeals as provided in section 75-137 or (b) seek judicial review of the order under section 75-136.01. Subdivisions (a) and (b) of this subsection are mutually exclusive and the choice of either section 75-136.01 or 75-137 shall govern the appeal process.

L.B. 1285 also created Neb. Rev. Stat. § 75-132.01(2) (Cum. Supp. 2000), which vested the PSC with exclusive jurisdiction over telecommunications appeals and provided that "[a]fter all administrative remedies before the commission have been exhausted, *any interested party to an action may appeal in accordance with the Administrative Procedure Act.*" (Emphasis supplied.) See, also, Neb. Rev. Stat. § 86-811 (Cum. Supp. 2000) (appeals from actions against telecommunications companies to follow procedures of § 75-132.01).

Consequently, effective April 7, 2000, the statutes provided two distinct means of appealing from the PSC. Generally, appeals were taken from the PSC to the Court of Appeals, as before, pursuant to § 75-136. However, telecommunications appeals were subject to the APA, pursuant to § 75-132.01. The

appellees contend that the instant case is such a telecommunications appeal, and Qwest does not contest that contention.

In addition, 2002 Neb. Laws, L.B. 1105, amended and recodified several sections in the process of creating the Nebraska Telecommunications Regulation Act (NTRA), Neb. Rev. Stat. § 86-101 et seq. (Cum. Supp. 2002). Section 86-158, an amendment and recodification of § 86-811, provided that operative January 1, 2003:

> (1) Except as otherwise provided in section 86-123, any order of the commission entered pursuant to authority granted in the Nebraska Telecommunications Regulation Act may be appealed by any party to the proceeding. *The appeal shall be in accordance with the Administrative Procedure Act.*
>
> (2) An original action or appeal concerning a violation of the Nebraska Telecommunications Regulation Act by a telecommunications company shall follow the procedures set forth in section 75-132.01.

(Emphasis supplied.) Section 86-123 provided that appeals from the PSC specifically relating to subscriber service complaints were to be brought pursuant to the APA. Consequently, the NTRA explicitly provided that telecommunications appeals would be brought under the APA.

In short, at the time Qwest filed its notice of appeal in this telecommunications case, it was required to proceed pursuant to the APA by the plain language of two separate statutory provisions: §§ 75-132.01 ("any interested party to an action may appeal in accordance with the Administrative Procedure Act") and 86-158 ("[t]he appeal shall be in accordance with the Administrative Procedure Act"). Because Qwest failed to proceed under the APA, we lack jurisdiction over this appeal. See, § 84-919; *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999) (APA is exclusive means of judicial review of final decision of any agency in contested case).

Qwest, however, argues that the word "may" in § 75-132.01 was permissive, and not directory. See, e.g., *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). Thus, according to Qwest, while it *could* have appealed under the

APA, it could also choose to proceed under § 75-136. Qwest reads § 75-132.01 as having provided parties in telecommunications cases with a choice of appellate procedure, as did § 75-136 for other cases in more explicit terms. Qwest's purported rationale is that depending on the situation, parties might want to expedite appellate review, or might want to go to district court in order to obtain more immediate relief in the form of a stay or injunction. The appellees reply that while the word "may" is generally permissive, in § 75-132.01, it meant only that a party may or may not choose to appeal—but if an appeal is filed, use of the APA is not discretionary.

[4] Qwest's proposed interpretation is not persuasive, for a number of reasons. First, §§ 75-132.01 and 86-158, as the specific statutes governing telecommunications appeals, were controlling in those specific circumstances over the general provisions of § 75-136. To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004).

[5,6] Second, 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). All subordinate rules are mere aids in reaching this fundamental determination. *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000). Qwest's argument regarding the purportedly "permissive" language of § 75-132.01 does not account for § 86-158, which stated that telecommunications appeals "shall be in accordance" with the APA and then specifically incorporated the appellate procedure set forth in § 75-132.01. 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. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004). Plainly, §§ 75-132.01 and 86-158 were in pari materia, and established the Legislature's intent that telecommunications appeals be perfected under the APA.

Qwest also notes that in the midst of these statutory changes, this court decided two telecommunications appeals that were

filed after April 7, 2000, but were not brought under the APA. See, *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003), *cert. denied* 539 U.S. 943, 123 S. Ct. 2620, 156 L. Ed. 2d 630, and 539 U.S. 954, 123 S. Ct. 2620, 156 L. Ed. 2d 648; *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002). Qwest contends that because jurisdictional questions can be raised by an appellate court sua sponte, see *State ex rel. NSBA v. Krepela*, 259 Neb. 395, 610 N.W.2d 1 (2000), by reaching the merits of those appeals, this court impliedly adopted Qwest's interpretation of § 75-132.01.

However, neither *In re Application of Lincoln Electric System* nor *In re Application No. C-1889* expressly addresses any issue of appellate jurisdiction, and those opinions are not authority for any point not specifically raised as an issue addressed by this court. See *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). Furthermore, as the appellees noted at oral argument, we rejected an argument functionally identical to Qwest's in *Ulbrick v. City of Nebraska City*, 180 Neb. 229, 141 N.W.2d 849 (1966), in which it was argued that the plaintiffs had failed to perfect their appeal by not following the statutory procedures for taking an appeal from a municipal annexation ordinance. We stated:

> Previous appeals under this statute have been before this court in two cases. Shields v. City of Kearney, 179 Neb. 49, 136 N.W.2d 174 [(1965)]; Read v. City of Scottsbluff, 179 Neb. 410, 138 N.W.2d 471 [(1965)]. In neither of these cases was the procedure on appeal questioned. The opinions in those cases are authority only for the holdings therein made. Since the district court had jurisdiction of the subject matter, any failure to comply with procedural rules is deemed to have been waived and do not in any way affect the validity of those decisions.
>
> It is argued, however, that it is a rule of this court, many times applied, that the court may on its own motion raise questions of jurisdiction and, not having done so in the two previous cases before the court, the procedures followed in those cases constitute a conclusive construction of the statute. No authority has been cited, and we have found none, that sustains this contention. Jurisdiction of the subject

> matter cannot be waived, but procedural requirements may. This court may on its own motion take notice of them. The fact that this court did not take notice of procedural defects in the Shields and Read cases can give no aid to the plaintiffs in the instant case when procedural defects were timely raised.

Ulbrick, 180 Neb. at 231-32, 141 N.W.2d at 851-52.

For the foregoing reasons, we reject Qwest's proposed interpretation of § 75-132.01. Read in pari materia, §§ 75-132.01 and 86-158 clearly stated that at the time Qwest filed its notice of appeal, telecommunications appeals were subject to the APA. By failing to proceed pursuant to the exclusive means for appealing a PSC decision in a telecommunications case, Qwest failed to perfect its appeal. See, § 84-919; *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999).

However, none of the parties' arguments have addressed the effect, if any, of statutory changes that were made subsequent to the filing of Qwest's appeal. For the sake of completeness, we consider those amendments.

2003 NEB. LAWS, L.B. 187

The former § 75-132.01(2) was repealed by 2003 Neb. Laws, L.B. 187, operative August 31, 2003. Section 75-132.01 (Supp. 2003) now provides:

> (1) Notwithstanding the provisions of section 75-131, the commission shall have exclusive original jurisdiction over any action concerning a violation of any provision of (a) the Automatic Dialing-Announcing Devices Act, the Emergency Telephone Communications Systems Act, the Enhanced Wireless 911 Services Act, the Intrastate Pay-Per-Call Regulation Act, the Nebraska Telecommunications Regulation Act, the Nebraska Telecommunications Universal Service Fund Act, the Telecommunications Relay System Act, or the Telephone Consumer Slamming Prevention Act by any person providing telecommunications service for a fee in Nebraska intrastate commerce pursuant to such acts or (b) sections 86-574 to 86-578 by an agency or political subdivision of the state.

> (2) If the commission enters an order declining jurisdiction under subsection (1) of this section, any interested person may petition the district court of the county in which such alleged violation has occurred. If it appears to the court, after a hearing, that a provision of such acts or sections has been violated, the court may issue an injunction or other proper process to restrain the telecommunications company and its directors, officers, employees, or agents or the agency or political subdivision of the state from continuing such violation and may order additional relief. Any party to the case shall have the right to appeal the decision of the district court to the Court of Appeals under the rules provided by law for appeals in civil cases.

Consequently, the revised section seems to clearly limit itself to telecommunications appeals and provides specifically for an appeal to district court in circumstances in which the PSC has declined jurisdiction. This is consistent with the previous statutory scheme as amended by L.B. 1285.

The section more pertinent to this appeal, however, is the newly amended § 75-136 (Supp. 2003), which now provides:

> Except as otherwise provided by law, if a party to any proceeding is not satisfied with the order entered by the commission, such party may appeal. *Any appeal filed on or after August 31, 2003, shall be in accordance with the Administrative Procedure Act. Any appeal filed prior to August 31, 2003, shall be in accordance with sections 75-134, 75-136 to 75-138, and 75-156 as such sections existed prior to the changes made by Laws 2003, LB 187.*

(Emphasis supplied.)

Section 86-158 (Supp. 2003), which was also amended by L.B. 187, now provides:

> (1) Except as otherwise provided in section 86-123, any order of the commission entered pursuant to authority granted in the Nebraska Telecommunications Regulation Act may be appealed by any interested party to the proceeding. *The appeal shall be in accordance with the Administrative Procedure Act.*
>
> (2) In an original action concerning a violation of the Nebraska Telecommunications Regulation Act by a

> telecommunications company, the commission shall have jurisdiction as set forth in section 75-132.01. After all administrative remedies before the commission have been exhausted, an appeal may be brought by an interested party to an action. *Such appeal shall be in accordance with the Administrative Procedure Act.*

(Emphasis supplied.)

Specifically at issue here is the language of § 75-136 which states that "[a]ny appeal filed prior to August 31, 2003, shall be in accordance with sections 75-134, 75-136 to 75-138, and 75-156 as such sections existed prior to the changes made by Laws 2003, LB 187." This language does not mention the former § 75-132.01. For purposes of this discussion, we assume, without deciding, that the Legislature could, if it wished, retroactively affect our jurisdiction over appeals that had already been filed. See, e.g., *Evans & Sutherland Comp. v. State Tax*, 953 P.2d 435 (Utah 1997). But see *Rhodes v. Eckelman*, 302 Or. 245, 728 P.2d 527 (1986) (en banc). The question is whether § 75-136 expresses an intent to retroactively confer appellate jurisdiction for an appeal that had previously been defective because it did not meet the statutory requirements in effect at the time that the notice of appeal was filed.

We conclude that the plain language of the statutes expresses no such intent. The primary effect of § 75-136, as amended by L.B. 187, is that operative August 31, 2003, all appeals from the PSC, and not just telecommunications cases, generally are to be brought under the APA. But this does not evince an intent to change the specific provisions of the prior statutory scheme that in telecommunications cases, interested parties were *already* required to appeal under the APA.

Section 86-158, both before and after it was amended by L.B. 187, required that appeals in telecommunications cases be perfected in accordance with the APA. In other words, before L.B. 187 was enacted, appeals in telecommunications cases were to be brought in accordance with the APA, and after L.B. 187, the same requirement was still in place. Read in pari materia, the changes affected by L.B. 187 do not evince a legislative intent to confer jurisdiction over telecommunications appeals that were not perfected under the statutory requirements in effect at the

time the notice of appeal was filed. Rather, the opposite effect is discernible. L.B. 187 does not alter our conclusion that at the time Qwest's notice of appeal was filed, it was required to proceed pursuant to the APA.

CONCLUSION

[7] Because Qwest failed to proceed under the APA, as required by the statutory scheme in effect at that time, we lack jurisdiction over this appeal. When an appellate court is without jurisdiction to act, the appeal must be dismissed. *In re Guardianship & Conservatorship of Woltemath, ante* p. 33, 680 N.W.2d 142 (2004). Consequently, we dismiss Qwest's appeal.

APPEAL DISMISSED.

CITY OF GORDON, NEBRASKA, APPELLEE, V. MARSHALL D. RUSE AND HAZEL B. RUSE, HUSBAND AND WIFE, APPELLANTS, AND KANSAS NEBRASKA NATURAL GAS COMPANY, INC., ET AL., APPELLEES.

687 N.W.2d 182

Filed October 8, 2004. No. S-03-624.

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. **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. **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. ____: ____: ____. 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.
5. **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.

Appeal from the District Court for Sheridan County, PAUL D. EMPSON, Judge, on appeal thereto from the County Court for Sheridan County, CHARLES PLANTZ, Judge. Judgment of District Court reversed, and cause remanded with directions.

Patrick M. Connealy, of Crites, Shaffer, Connealy, Watson & Harford, and Donald G. Blankenau, of Fennemore Craig, P.C., for appellants.

John F. Simmons and Howard P. Olsen, Jr., of Simmons Olsen Law Firm, P.C., for appellee City of Gordon.

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

STEPHAN, J.

In 2002, the City of Gordon abandoned proceedings it had instituted in the county court for Sheridan County to acquire by condemnation certain real property owned by Marshall D. Ruse and Hazel B. Ruse. The Ruses sought recovery of certain fees and costs pursuant to Neb. Rev. Stat. § 76-726(1) (Reissue 2003). The county court awarded the Ruses $1,500 in attorney fees but held that it lacked statutory authority to award other fees and expenses which they alleged to have incurred because of the condemnation action. This appeal by the Ruses presents the issue of what fees and expenses are recoverable by a landowner under § 76-726(1) when condemnation proceedings are instituted and subsequently abandoned.

FACTS

On November 1, 2000, the city filed a petition for appointment of appraisers seeking to condemn a portion of the Ruses' property for use in the construction, operation, and maintenance of a municipal well field. The county court appointed three appraisers on November 3. The Ruses filed an answer to the petition for appointment of appraisers on December 11 affirmatively alleging that the city's proposed withdrawal of water from their land violated Nebraska law and that the city had failed to negotiate the purchase of the land in good faith. On the same day, the Ruses filed a petition in the district court for Sheridan County, seeking a temporary restraining order and injunction directed at the pending condemnation action. In that petition, the Ruses alleged that the city had failed to negotiate the purchase price of the Ruses' land in good faith, that the amount of water the city intended to withdraw daily would cause irreparable damage to the property, and that "[n]o emergency or extreme need exists to develop a

new well field at this time." Supporting affidavits of an agricultural economist and a civil engineer were attached to the petition seeking injunctive relief.

Several weeks after the filing of the petition for injunctive relief, the parties filed a stipulation in that proceeding whereby the city agreed it would not go forward with the condemnation proceeding until the Department of Natural Resources (DNR) made a decision on whether or not to grant the city's application for a permit to withdraw and transfer water.

Several hearings were subsequently held before the DNR. The DNR dismissed the city's first application, and after discovery and mutual disclosure of evidence, the city withdrew its second DNR application. On March 21, 2002, the city on its own motion dismissed the condemnation proceedings without prejudice.

On March 25, 2002, the Ruses filed a timely motion for fees and costs under § 76-726(1), alleging that they incurred significant legal and expert fees because of the condemnation proceedings. On November 26, the county court granted the Ruses' motion, but, reasoning that § 76-726(1) limits any award to those fees incurred in "proceedings over which [the county court] has jurisdiction," the court declined to award the Ruses the full amount they requested. The court determined that it could not award any amount of the fees and costs incurred by the Ruses in retaining expert witnesses because the experts never performed "any services or functions in the County Court." The county court also determined that $1,500 was a fair amount to reimburse the Ruses for the fees actually expended for their attorneys' services "in and before the County Court." After an unsuccessful appeal to the district court for Sheridan County, the Ruses perfected 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).

ASSIGNMENTS OF ERROR

The Ruses assign, restated and consolidated, that the district court erred in (1) affirming the county court's erroneous finding that § 76-726(1) prohibits it from awarding all of the Ruses' fees, costs, disbursements, and expenses and (2) failing to find that the

county court abused its discretion in awarding attorney fees of only $1,500.

STANDARD 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. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004); *In re Estate of Pfeiffer*, 265 Neb. 498, 658 N.W.2d 14 (2003).

[2] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004); *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003).

ANALYSIS

The issue before us is whether § 76-726(1) limits recovery of costs, disbursements, and expenses to those incurred in a county court condemnation proceeding. The Ruses contend that § 76-726(1) is not so limited and allows them to recover the costs, disbursements, and expenses they incurred in the suit for injunctive relief filed in the district court and in the administrative proceedings before the DNR. Section 76-726(1) provides in relevant part:

> The court having jurisdiction of a proceeding instituted by an agency as defined in section 76-1217 to acquire real property by condemnation shall award the owner of any right, title, or interest in such real property such sum as will, in the opinion of the court, reimburse such owner for his or her reasonable costs, disbursements, and expenses, including reasonable attorney's, appraisal, and engineering fees, actually incurred because of the condemnation proceedings if (a) the final judgment is that the agency cannot acquire the real property by condemnation or (b) the proceeding is abandoned by the agency. If a settlement is effected, the court may award to the plaintiff reasonable expenses, fees, and costs.

In a finding not challenged on appeal, the county court determined that the city is an agency for the purposes of § 76-726(1)

and that the city's dismissal of the petition for appointment of appraisers constituted an abandonment of the condemnation proceeding. Therefore, our inquiry is limited to interpreting the statutory phrase "actually incurred because of the condemnation proceedings."

[3-5] In this regard, we are guided by fundamental rules of statutory interpretation. 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. *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004); *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004); *In re Interest of Tamantha S.*, 267 Neb. 78, 672 N.W.2d 24 (2003). 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. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn., supra.* 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., supra*; *In re Interest of Tamantha S., supra.*

The county court reasoned that § 76-726(1) permitted it to "only award such amount as will fairly compensate the [Ruses] for their attorneys fees and other fees and costs expended as they relate to the County Court part of the condemnation proceedings." Applying this statutory interpretation, the court determined that "[t]he fees of the expert witnesses retained by the [Ruses] cannot be awarded here, because those experts' reports were never presented to the appraisers, nor did they perform any services or function in the County Court."

In urging that we adopt this interpretation of § 76-726(1), the city argues that because the statute provides for the recovery of costs, expenses, and fees in derogation of the common law, it must be strictly construed. See, *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002); *State ex rel. AMISUB v. Buckley,* 260 Neb. 596, 618 N.W.2d 684 (2000); *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000). See, also, Annot., 92 A.L.R.2d 355 (1963) (noting

recoveries under statutes providing for awards to condemnee upon abandonment of condemnation proceedings are generally denied in cases clearly not within operation of controlling statute). Strict construction, however, does not allow an interpretation which is narrower than the plain, ordinary, and popular sense of the statutory language. *Brown v. Harbor Fin. Mortgage Corp., supra.*

The statute before us here provides that a landowner be awarded reasonable costs "actually incurred because of the condemnation proceedings." § 76-726(1). The plain, ordinary, or common meaning of the phrase "because of" is "as a result of" or "in connection with." Clearly, the Ruses hired experts to establish the fair market value of their land for no reason other than they were compelled to do so as a result of and in connection with the condemnation proceedings initiated by the city. When presented with a similar issue of whether or not the fees incurred in an abandoned condemnation proceeding were the result of that proceeding and therefore recoverable, one court noted:

> It was eminently fitting that when the proceeding was commenced, the owner should employ counsel and that counsel should forthwith prepare to prove the value of the property before the commissioners. . . . There seems no good reason why this expense should not be one of the items to be paid upon discontinuance. It was incurred solely because the county commenced the proceeding and was thus forced upon the owners, and was a service from which the owners now get no benefit whatever.

In re Bastian, 156 Misc. 168, 170, 281 N.Y.S. 252, 255 (1933) (reversed and remitted for further proof by *Matter of Bastian v. Wright*, 241 A.D. 906, 271 N.Y.S. 1039 (1934), and terms subsequently affirmed by *In re Bastian*, 156 Misc. 171, 281 N.Y.S. 256 (1935)).

After this appeal was fully briefed, we decided *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004). Both parties argue that *Simon* supports their positions. In *Simon*, the appellants took preemptive legal action in response to an Omaha City Council resolution approving a redevelopment plan for the area in which the appellants' properties were located. In affirming the denial of the appellants' application for an award of fees, this

court noted that the resolution did not authorize the acquisition of any property and that no condemnation action was ever actually filed against the appellants' properties. We wrote:

> [G]iving 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).

(Emphasis supplied.) 267 Neb. at 728, 677 N.W.2d at 137-38.

This case is distinguishable from *Simon* in that the city *did* institute condemnation proceedings in the county court. The Ruses argue that the expenses they incurred in the action for injunctive relief and in the administrative hearings before the DNR were clearly "in connection with" or "because of" the pending condemnation proceeding. The county court's construction of the statute now urged by the city, limiting recovery of costs and fees to only those incurred "in and before the County Court," runs contrary not only to the plain language of § 76-726(1) but also to our interpretation in *Simon* that an award of fees is appropriate when those fees were incurred "in connection with" a condemnation proceeding initiated by an agency. *Simon* supports the Ruses' argument that the construction given to § 76-726(1) by the county court was unduly narrow and failed to give effect to the plain and ordinary meaning of the statutory language.

A recent Tennessee appellate decision illustrates the critical distinction between the operative facts in *Simon* and those of this case. In *Knox ex rel. Schumpert v. Union Livestock*, 59 S.W.3d 158 (Tenn. App. 2001), the landowner first learned that the county sought to acquire its property by condemnation in late 1998 when the county commission made a recommendation to that effect. The landowner hired an attorney. The county commission thereafter passed a resolution to acquire the property. In January 1999, the landowner filed a declaratory judgment action

against the commission asserting that the resolution was illegal, arbitrary, and capricious and was not necessary for a public purpose. In August 1999, the county filed a condemnation petition in state court, which proceeded to a hearing in May 2000. At the hearing, the trial court found that the taking was necessary for a public purpose and was not arbitrary or capricious, but further determined that the 1998 resolution was improper and gave the commission 45 days to either pass a proper resolution curing the defects, in which case the court would issue its formal order giving the county possession, or have the petition dismissed. The landowner's attorney lobbied members of the commission during the 45-day period in an effort to persuade them not to pass a corrected resolution. The revised resolution was defeated by virtue of a tie vote, and after expiration of the 45 days, the county's condemnation petition was dismissed.

The landowner thereafter sought to recover its expenses pursuant to a Tennessee condemnation statute which provides in relevant part:

> "[t]he state court having jurisdiction of a proceeding initiated by any person, agency or other entity to acquire real property by condemnation shall tax the bill of costs . . . against the condemner and shall award the owner . . . such sum as will in the opinion of the court reimburse such owner for the owner's reasonable disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of condemnation proceedings[.]"

Id. at 160, quoting Tenn. Code Ann. § 29-17-812(b) (2000). The trial court awarded the landowner $30,000 in expenses. The landowner appealed, arguing that the trial court erred in failing to award all of its claimed expenses, including fees it incurred as a result of the declaratory judgment action filed prior to the condemnation action and fees incurred in its attorney's lobbying efforts with the county commission during the 45-day period.

The Tennessee Court of Appeals affirmed the lower court's refusal to award fees incurred in the declaratory judgment action, finding that the expenses incurred did not fit within the language of the statute because the lawsuit actually preceded the filing of the condemnation resolution and the fees were not therefore incurred "because of" the condemnation petition. However, the

appellate court determined that the trial court erred in not allowing recovery of those fees the landowner incurred as a result of its attorney's lobbying efforts. The court reasoned that while it could not say whether the revised resolution was defeated as a result of the lobbying efforts of the landowner's attorney, the "lobbying was most certainly *related* to [the landowner's] successful defense of the condemnation action" and therefore recoverable under the relevant statute. *Knox ex rel. Schumpert v. Union Livestock*, 59 S.W.3d 158, 165 (Tenn. App. 2001).

In *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004), there were no condemnation proceedings and therefore no fees and expenses incurred "because of the condemnation proceedings" within the meaning of § 76-726(1). In this case, there was a condemnation proceeding which the Ruses resisted by first seeking to have it enjoined and then by litigating the related water transfer issue in the appropriate administrative forum. The Ruses clearly took these actions "because of the condemnation proceedings" in a successful effort to defeat them. While not all of their defensive actions occurred in the county court, we conclude that § 76-726(1) gives the county court jurisdiction to award all reasonable costs, disbursements, expenses, and fees actually incurred by the Ruses in resisting the condemnation proceedings after they were filed and before they were abandoned. Because no initial determination was made concerning the reasonableness of the claimed fees and costs which the county court erroneously concluded it lacked jurisdiction to award, we reverse, and remand the cause to the district court with directions to remand to the county court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

AMY C. ROBB, APPELLEE, V. TIMOTHY L. ROBB, APPELLANT.

687 N.W.2d 195

Filed October 8, 2004. No. S-03-970.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.

2. **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.
3. **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.
4. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) 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. **Trial: Courts: Expert Witnesses.** The trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be applied to the facts in issue. In addition, the trial court must determine if the witness has applied the methodology in a reliable manner.
6. **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.
7. **Child Custody.** In determining the best interests of the child in a custody determination, a court must consider, at a minimum, (1) the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (2) the desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning; (3) the general health, welfare, and social behavior of the minor child; and (4) credible evidence of abuse inflicted on any family or household member. Other pertinent factors include the moral fitness of the child's parents, including sexual conduct; respective environments offered by each parent; the age, sex, and health of the child and parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and parental capacity to provide physical care and satisfy educational needs of the child.
8. **Child Custody: Appeal and Error.** In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Kelly T. Shattuck, of Cohen, Vacanti, Higgins & Shattuck, for appellant.

Jeffrey A. Silver for appellee.

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

STEPHAN, J.

Amy C. Robb filed a petition in the district court for Douglas County seeking dissolution of her marriage to Timothy L. Robb and sole custody of the couple's two minor children. Timothy filed an answer and cross-petition in which he sought joint custody. A temporary order provided that during the pendency of the dissolution proceedings, the parties were to have joint custody of the children, with Amy to have "primary possession." Following a trial, the district court entered a decree of dissolution which awarded sole custody of the children to Amy and specified Timothy's visitation rights. Timothy filed this timely appeal.

FACTS

The parties were married on June 26, 1993. Their daughter Courtney was born on March 30, 1998, and their daughter Alyssa was born on May 8, 2000. The children were ages five and three, respectively, when trial commenced on May 27, 2003.

Timothy left the marital home on June 30, 2002. Prior to their separation, both parties were employed outside the home during the day and both participated in the care of the children. On a typical workday, Timothy would wake the girls and prepare their breakfast, while Amy prepared herself for work, selected clothing for the children, and packed any items they would need during the day. Amy would then take the children to their daycare facility before going to her job, while Timothy prepared himself for work. Because Amy had longer work hours, Timothy brought the children home from daycare and usually prepared their dinner before Amy returned home. They shared bathing and bedtime responsibilities. Weekend parenting was also shared during the time that the parties resided together.

Timothy lived with his parents for 5 weeks after leaving the marital home and before moving into his new home. During that time, the children visited Timothy on Monday and Wednesday evenings and either Saturday or Sunday of each week, with no overnight visits. In October 2002, the district court entered a temporary order of joint custody which provided for overnight visitation with Timothy on Monday and Wednesday of each week, along with one overnight every weekend alternating between Friday and Saturday nights.

Amy testified that prior to the overnight visits, the children were progressing in terms of development, but that subsequent to the temporary order, upon returning from Timothy's home, the girls exhibited signs of defiance, of being "very tired," and wanting to "cling." Amy's mother and Amy's brother each testified that the children became "clingy" after the overnight visits began. Amy also testified that the children were very tired upon return from Timothy's home, that Courtney was at times resistant to go to Timothy's home, and that Alyssa's potty training had regressed.

Timothy testified that he did not observe any of the above-described behavior when the children were with him. He testified that the children experienced some difficulty during the time between his separation from the marital residence and his moving into his new home, but that thereafter, they seemed to adapt well to the arrangement and were happy at home and at daycare. Several friends of Timothy and Amy, along with Timothy's parents, testified that they observed Timothy and his children interact, saw Timothy involved in their care and welfare (including bathing and feeding), and thought the children to be well bonded with Timothy.

Amy called Dr. Thomas Haley to testify as an expert witness. He was permitted to give opinion testimony over Timothy's objection which generally supported Amy's position with respect to custody.

Timothy called Dr. Cynthia Topf as a rebuttal witness. Topf holds a Ph.D. and is a psychologist practicing in Omaha, with emphases on individual counseling, custody evaluations, and forensic assessments. She testified that clinical opinion and observation, while relied upon by expert psychologists, would be the very minimum of something that would be reliable. She further testified that a proper custody evaluation normally involves a minimum of 4 to 8 hours of direct contact with the children, plus testing time.

In its decree, the district court found that during the parties' separation, the children had spent 57 percent of the time with Amy and 43 percent with Timothy. The court further found:

> That the testimony of [Amy] that the frequent changes in houses and parents leads to inconsistency in guiding and

> caring for the children and a generally unstable lifestyle along with Psychologist Dr. Thomas Haley's testimony that the alternate visitation schedule now in place eliminates the sense of home and belonging necessary for a healthy upbringing of the children are persuasive.
>
> That it is in the best interests of the minor children that their care, custody and control be placed solely with [Amy].

The decree included a visitation schedule granting Timothy visitation rights on certain weekends, weekdays, holidays, and for a 6-week period each summer.

ASSIGNMENTS OF ERROR

Timothy assigns, renumbered and restated, that the district court erred in (1) admitting Haley's testimony and (2) failing to find that joint custody was in the best interests of the minor children.

STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004); *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

[2] Generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

[3] 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. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004); *Marcovitz v. Rogers, supra.*

ANALYSIS

The principal issue presented in this appeal is whether the district court abused its discretion in awarding sole custody of the minor children to Amy, subject to Timothy's visitation rights, instead of awarding joint custody to the parties. A secondary issue

is whether the district court erred in receiving certain opinion testimony of Haley over Timothy's objection. We begin with the evidentiary issue.

Expert Testimony of Dr. Thomas Haley

Haley is a psychologist licensed by the State of Nebraska. He has been engaged in a general private practice in Omaha since 1983. He holds an undergraduate degree from the University of Iowa and a master's degree and a Ph.D. from the University of Nebraska. His practice includes working with children and families, and he has testified as an expert on custody issues on more than 100 occasions since 1978. At the request of Amy's counsel, he interviewed and evaluated the parties and their children on two occasions in December 2002, but did not perform a "full custody evaluation." He recorded his observations and opinions in a written memorandum dated December 28, 2002, which was apparently furnished to counsel for both parties prior to trial. At the time Haley authored his memorandum, the alternating visitation schedule under the temporary order was in effect.

The record discloses no pretrial objection to Haley's expert testimony. At trial, during direct examination by Amy's counsel, Haley was asked to state his opinion with respect to the alternating visitation schedule in effect under the temporary order. Timothy's counsel objected and requested leave "to voir dire the witness on his qualifications." Leave was granted, and voir dire examination elicited Haley's admission that he had not seen the parties or their children since December 2002 and that his opinion had not changed since he wrote the memorandum of December 28, 2002. Haley also conceded that he did not perform a full custody evaluation, which would have required additional testing. At the close of his voir dire, Timothy's counsel objected to Haley "providing any expert evaluation," arguing that he had not performed a full custody evaluation. The court sustained the objection "as to the methodology" and suggested that additional foundation was needed. Amy's counsel then elicited Haley's testimony that his techniques were established and recognized in the profession of psychology, that they were peer reviewable, and that he had formed opinions to a reasonable degree of psychological certainty.

Haley was then asked if in his opinion "it was in the best interests of the children to move them frequently" from Amy's home to Timothy's home. Timothy's counsel objected "as to foundation and to qualifications," and the court overruled the objection. Haley then testified that frequent movement of the children was not in their best interests because it eliminated "the experience of having a home base, a sense of home, a place where they belong." He further opined that with frequent movement, "there's no sense of their own room, their own friends, their own neighborhood."

Haley was then asked if he had an opinion "as to whether or not it is better to have them have extended stays at [Amy's] house?" Timothy's counsel objected on grounds that Haley had not done a custody evaluation and that the requested opinion was not set forth in his December 28, 2002, memorandum. The court overruled the objection, and Haley gave an affirmative response to the question. During recross-examination, Haley admitted that his memorandum did not state an opinion as to which parent should be awarded custody of the children and that the memorandum was directed solely to the circumstances existing under the temporary order then in effect. Timothy's counsel offered the memorandum into evidence without limitation, and it was received without objection.

[4,5] An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) 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. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). When the opinion involves scientific or specialized knowledge, this court held in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), that we will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Under our recent *Daubert/Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Zimmerman v. Powell, ante* p. 422, 684 N.W.2d 1 (2004); *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be

applied to the facts in issue. *Zimmerman v. Powell, supra*; *Schafersman v. Agland Coop, supra*. In addition, the trial court must determine if the witness has applied the methodology in a reliable manner. *Carlson v. Okerstrom, supra*.

In this appeal, Timothy does not challenge Haley's professional qualifications or the scientific reliability of the methodology used by psychologists like Haley in conducting child custody evaluations. Rather, he argues that Haley's opinions were inadmissible because he did not conduct a full custody evaluation or perform any of the testing that would have been included in such an evaluation. We understand this argument to be directed at the second component of the *Daubert/Schafersman* analysis, namely, whether the expert has reliably applied methodology which is itself reliable if properly applied. We conclude that this argument has merit with respect to Haley's opinion that it would be in the best interests of the children to award permanent custody to Amy. The record clearly reflects that Haley did not apply the accepted psychological methodology necessary to formulate this opinion. Accordingly, we disregard Haley's opinion as to permanent custody in our de novo review of that issue.

To the extent that Timothy is challenging Haley's opinion regarding the children's behavior during the period when the temporary order was in effect, we find no similar infirmity. This opinion is based upon Haley's clinical observation and impression of the parties and their children at a specific point in time several months prior to trial. Haley's trial testimony in this regard reflects the content of his December 28, 2002, memorandum, which was received in evidence without limitation or objection. Accordingly, we will consider this aspect of Haley's testimony in our de novo review of the custody determination.

PERMANENT CUSTODY

[6,7] In reviewing a custody determination de novo on the record, we reappraise the properly admitted evidence as presented by the record and reach our independent conclusion with respect to the issue presented. See *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). 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. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004); *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). In determining the best interests of the child in a custody determination, a court must consider, at a minimum,

> (a) [t]he relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) [t]he desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) [t]he general health, welfare, and social behavior of the minor child; and
>
> (d) [c]redible evidence of abuse inflicted on any family or household member.

Neb. Rev. Stat. § 42-364(2) (Reissue 1998); *Marcovitz v. Rogers, supra*. Other pertinent factors include the moral fitness of the child's parents, including sexual conduct; respective environments offered by each parent; the age, sex, and health of the child and parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and parental capacity to provide physical care and satisfy educational needs of the child. See, *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

Here, the record reflects that each parent is fit and had a close, positive relationship with each of the children during the marriage, as well as during the ensuing period of separation. There is no evidence of any form of abuse within the family. The record is silent as to the desires and wishes of the children on the question of permanent custody, no doubt due to their tender age. There is no indication that either child has health problems or special needs. As noted, there is conflicting evidence as to the children's social behavior during the period of joint custody under the temporary order.

The primary issue in this case is whether the district court abused its discretion by awarding sole custody to Amy instead of awarding the joint custody sought by Timothy. The statutory rules governing joint custody of minor children in dissolution proceedings are set forth in § 42-364(5):

> After a hearing in open court, the court may place the custody of a minor child with both parents on a shared or joint custody basis when both parties agree to such an arrangement. In that event, each parent shall have equal rights to make decisions in the best interests of the minor child in his or her custody. The court may place a minor child in joint custody after conducting a hearing in open court and specifically finding that joint custody is in the best interests of the minor child regardless of any parental agreement or consent.

Because the parties in this case did not agree to joint custody, the last sentence of the statute governs the issue. Thus, the question before us on de novo review is whether the trial court abused its discretion in *not* making a specific finding that joint custody is in the best interests of the children, applying the criteria set forth above.

[8] As noted above, there was conflicting evidence regarding the behavior of the children under the joint custody arrangement specified in the temporary order. Amy and several other witnesses testified that the children became clingy and appeared more tired than usual, that Courtney was reluctant to go to school, and that Alyssa's toilet training regressed. Timothy and several other witnesses disputed that these behaviors occurred. In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). See, *Brockman v. Brockman*, 264 Neb. 106, 646 N.W.2d 594 (2002); *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). The district court found Amy's testimony credible in this regard, and we give weight to that finding. We also find persuasive and significant Haley's opinion that younger children need "a home base, a sense of home, a place where they belong," and that frequent movement can be disruptive of this need. Accordingly, based upon our de novo review, we find no compelling reason why joint custody would be preferable to the sole custody subject to liberal visitation ordered by the district court. That arrangement, in our view, is in the best interests of these children because it results in

the children's spending ample time with each parent while providing the stability of a "home base."

We find no abuse of discretion in the custody determination made by the district court and therefore affirm its judgment.

AFFIRMED.

GREG A. GLASS, APPELLANT, V.
MICHAEL KENNEY, APPELLEE.

687 N.W.2d 907

Filed October 15, 2004. Nos. S-03-036, S-03-128.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **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.
3. **Affidavits: Appeal and Error.** Following a denial of an application to proceed in forma pauperis, under Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2002), a party may either proceed with the trial action or appeal the ruling denying in forma pauperis status.
4. ____: ____. Under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002), there is a statutory right of interlocutory appellate review of a decision denying in forma pauperis eligibility.
5. **Jurisdiction: Affidavits: Appeal and Error.** An appellate court obtains jurisdiction over an appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit, without literal payment of the fees, costs, or security mentioned in Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2002).

Appeals from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Judgment in No. S-03-036 affirmed. Judgment in No. S-03-128 reversed and vacated.

Greg A. Glass, pro se.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Cases Nos. S-03-128 and S-03-036 have been consolidated on appeal. In each case, we are asked to determine whether the district court erred in denying the motion of appellant, Greg A. Glass, to proceed in forma pauperis. For the reasons stated below, we conclude that the district court erred when it denied Glass' motion to proceed in forma pauperis on appeal in case No. S-03-128 and that it did not err when it denied Glass' motion to proceed in forma pauperis with his habeas corpus action at the trial level in case No. S-03-036.

STATEMENT OF FACTS

In 1999, Glass was convicted by a jury of second degree murder and use of a firearm in the commission of a felony, in connection with the shooting death of his former employer, Adolph Fentress, Sr. Glass received consecutive prison sentences of 40 to 60 years and 10 to 20 years, respectively. He is currently incarcerated.

At trial, Glass testified that he was owed money by Fentress and that he went to Fentress' place of business with a gun because Fentress had previously threatened him. Glass testified that an argument ensued and that he shot Fentress. The record includes a jury verdict form. As to count I, the jury checked off the entry, "Guilty of murder in the second degree." It did not check off either "Not guilty of murder in the second degree and guilty of manslaughter" or "Not guilty." Glass' convictions were affirmed by the Nebraska Court of Appeals in an opinion not designated for permanent publication. *State v. Glass*, No. A-99-919, 2000 WL 944020 (Neb. App. July 11, 2000) (not designated for permanent publication).

On December 16, 2002, Glass filed a pro se "Petition for a Writ of Habeas Corpus and a Declaratory Judgment" and a motion to proceed in forma pauperis to the district court for Lancaster County. In his petition, Glass alleged that the statute defining second degree murder, Neb. Rev. Stat. § 28-304 (Reissue 1995), was "null and void from its enactment" because the elements of the offense are not clearly distinguishable from those of manslaughter as defined by Neb. Rev. Stat. § 28-305 (Reissue 1995). He further alleged that because § 28-304 was void, the original trial

court lacked subject matter jurisdiction to convict and sentence him for the crime of second degree murder.

On December 19, 2002, the district court entered an order concluding that the allegations in Glass' petition were frivolous in light of *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001), in which we held that § 28-304 was not unconstitutionally vague. Based upon this determination, the court denied the motion to proceed in forma pauperis. The appeal from this order is embodied in case No. S-03-036.

On January 8, 2003, Glass filed a motion for leave to proceed in forma pauperis with respect to an appeal of the district court's December 19, 2002, order. The district court entered an order on January 13, 2003, in which it stated that Glass' petition was frivolous, and it, therefore, denied Glass' motion to proceed in forma pauperis on appeal. Thereafter, Glass filed a notice of appeal of the district court's January 13 order together with an application to proceed in forma pauperis and poverty affidavit. Glass' appeal of the January 13 order denying his motion to proceed in forma pauperis on appeal is embodied in case No. S-03-128.

ASSIGNMENTS OF ERROR

In both cases Nos. S-03-128 and S-03-036, Glass assigns as error the district court's denial of his motion to proceed in forma pauperis.

In case No. S-03-036, Glass claims that the district court erred in determining that his habeas corpus petition was frivolous under *State v. Caddy, supra.*

STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. § 25-2301.02(2); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003); *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002).

ANALYSIS

Case No. S-03-128.

On January 13, 2003, the district court denied Glass' motion to proceed in forma pauperis on appeal for the reason that the

underlying habeas corpus action was frivolous. The denial of the motion to proceed in forma pauperis on appeal is the subject of case No. S-03-128. The State asserts that this court lacks jurisdiction to hear case No. S-03-128 because Glass has not paid the statutory fees, costs, and security necessary to docket an appeal. We determine that we have jurisdiction and that with respect to the merits, the district court erred in denying Glass' motion for in forma pauperis status on appeal.

The outcome of this appeal is controlled by reference to certain statutory provisions and case law. Both civil and criminal proceedings in forma pauperis are governed by Neb. Rev. Stat. § 25-2301 et seq. (Cum. Supp. 2002). Section 25-2301.02 is relevant to our consideration. Section 25-2301.02 provides as follows:

> (1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application: (a) Has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. The objection to the application shall be made within thirty days after the filing of the application. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. In any event, the court shall not deny an application on the basis that the appellant's legal positions are frivolous or malicious if to do so would deny a defendant his or her constitutional right to appeal in a felony case.

> (2) In the event that an application to proceed in forma pauperis is denied and an appeal is taken therefrom, the aggrieved party may make application for a transcript of the hearing on in forma pauperis eligibility. Upon such application, the court shall order the transcript to be prepared and the cost shall be paid by the county in the same manner as other claims are paid. The appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court.

For the sake of completeness, we note that we are aware of amendments to § 25-2301.02(1), approved April 15, 2004, which have no bearing on our analysis. See 2004 Neb. Laws, L.B. 1207 (operative date April 15, 2004).

[2] In support of its argument that this court lacks jurisdiction over case No. S-03-128, the State relies on a portion of the language of § 25-2301.02(1). At the time of the district court's ruling, § 25-2301.02(1) provided that

> [i]f an objection [to an application to proceed in forma pauperis] is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement [of the court's reasons for denying an application to proceed in forma pauperis] to proceed with an action or appeal upon payment of fees, costs, or security . . . .

The fees, costs, or security referred to in § 25-2301.02(1) are those customarily required to docket an appeal. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002). We read §§ 25-2301.02 and 25-1912 in pari materia. In this regard, we have stated: "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." *Arthur v. Microsoft Corp.*, 267 Neb. 586, 593, 676 N.W.2d 29, 35 (2004).

The State asserts that because Glass did not pay the "fees, costs, or security" as stated in § 25-2301.02(1), this court lacks jurisdiction over case No. S-03-128. We do not agree.

[3,4] We recently observed in a case involving the in forma pauperis statutes that following a denial of an application to

proceed in forma pauperis, under § 25-2301.02(1), a party may either proceed with the trial action or appeal the ruling denying in forma pauperis status. *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003). We have also observed that under § 25-2301.02, there is a statutory right of interlocutory appellate review of a decision denying in forma pauperis eligibility. *Jacob v. Schlichtman*, 261 Neb. 169, 622 N.W.2d 852 (2001). Case No. S-03-128 is a statutorily authorized interlocutory appeal which we will entertain if other jurisdictional requirements are met.

[5] Section 25-1912 generally provides that an appeal to this court may be taken by filing "a notice of intention to prosecute [an] appeal signed by the appellant or appellants or his, her, or their attorney of record and . . . by depositing with the clerk of the district court the docket fee required by [Neb. Rev. Stat. §] 33-103 [(Reissue 1995)]." We have stated that "[a] poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal by Neb. Rev. Stat. § 33-103 . . . and § 25-1912." *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 633, 544 N.W.2d 509, 512 (1996). We have recently stated that "[t]his court obtain[s] jurisdiction over the appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit." *State v. Jones*, 264 Neb. 671, 676, 650 N.W.2d 798, 803-04 (2002).

In case No. S-03-128, Glass filed a timely notice of appeal, a proper application to proceed in forma pauperis, and a poverty affidavit, and thus, contrary to the State's contention, case No. S-03-128 was properly docketed in this court, and we obtained jurisdiction. Having filed the aforementioned pleadings, Glass was entitled to have the substance of his appeal considered by this court without literal payment of the fees, costs, or security mentioned in § 25-2301.02(1).

With respect to substance of the appeal in case No. S-03-128, the district court denied Glass' application to proceed in forma pauperis on appeal because it determined that the underlying habeas corpus action was frivolous. Given the relevant statutes, constitutional provision, and our case law, we conclude that the district court improperly denied Glass' application to proceed in forma pauperis on appeal.

As noted, Glass properly docketed his appeal in this court. Glass had a statutory right to interlocutory appellate review of the district court's decision denying in forma pauperis status on appeal, see *Jacob v. Schlichtman, supra*, and the district court was without authority to issue an order which could interfere with the exercise of such a right. Our conclusion that the district court's order was improper is consistent with article I, § 23, of the Nebraska Constitution, which provides for one appeal to an appellate court. Our conclusion is also bolstered by § 25-2301.02(2), which provides that in the event of an appeal from a ruling denying in forma pauperis eligibility, upon application, the cost of a transcript of the proceedings before the trial court shall be paid by the county. We read this portion of § 25-2301.02(2) as a legislative directive facilitating appeals of in forma pauperis orders. Finally, our conclusion is consistent with our previous decisions establishing that it is proper for this court to provide a mechanism for the appellate review of the denial of an application to proceed in forma pauperis. *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995). The district court erred in case No. S-03-128 when it ruled that Glass was not permitted to proceed in forma pauperis on appeal. The district court's order of January 13, 2003, is reversed and vacated.

Case No. S-03-036.

In case No. S-03-036, Glass appeals the December 19, 2002, order of the district court which denied Glass' motion to proceed in forma pauperis with respect to his "Petition for a Writ of Habeas Corpus and Declaratory Judgment." The district court concluded that based on *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001), the petition was frivolous. The State contends, inter alia, that the district court did not err in determining that the petition was frivolous based on *Caddy*. We agree with the State.

Section 25-2301.02(2) provides that an "appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court." We believe the district court's order of December 19, 2002, together with the record, provide an adequate basis for our de novo review.

Glass claims that the second degree murder statute under which he was convicted, § 28-304, is vague and that as a result,

it is arbitrarily enforced. He suggests there is confusion between § 28-304 and the statute pertaining to manslaughter, § 28-305. He claims his conviction is void and that the arguments he tenders were not resolved in *Caddy*. We do not agree.

In *Caddy*, we observed that the defendant's argument included the claim that § 28-304 was void for vagueness and we noted that an analysis of such an argument necessarily included consideration of whether the challenged statute encouraged arbitrary and discriminatory enforcement. Thus, in *Caddy*, we considered enforcement. To the extent that Glass complains that he was charged with second degree murder instead of a lesser crime, we note that notwithstanding the second degree murder crime charged in the information, the jury had before it the option of finding Glass guilty of manslaughter or not guilty whatsoever. Glass was not denied the opportunity of being tried for manslaughter.

Although Glass recasts the challenge to § 28-304 by focusing on enforcement, his questions have previously been answered by this court in *Caddy*, in which we concluded that the second degree murder statute was not unconstitutionally vague. In *Caddy*, we concluded, inter alia, that "even if . . . there is ambiguity between §§ 28-304 and 28-305, there is still little question whether § 28-304 provides with reasonable clarity that the intentional killing of another may be criminal." 262 Neb. at 45, 628 N.W.2d at 258. Further, the availability of prosecutorial discretion to which Glass evidently objects does not invalidate a conviction under the selected charge. See *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001). The district court did not err in characterizing the substance of Glass' petition as "frivolous." The district court's denial of Glass' motion to proceed in forma pauperis in case No. S-03-036 was not error.

CONCLUSION

The district court's denial of Glass' motion to proceed in forma pauperis on appeal in case No. S-03-128 is reversed and vacated. The district court's denial of Glass' motion to proceed in forma pauperis in case No. S-03-036 is affirmed.

JUDGMENT IN NO. S-03-036 AFFIRMED.
JUDGMENT IN NO. S-03-128 REVERSED AND VACATED.

CENTRAL STATES TIRE RECYCLING OF NEBRASKA, LLC, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ENVIRONMENTAL QUALITY, AND MICHAEL J. LINDER, DIRECTOR, APPELLEES.

687 N.W.2d 681

Filed October 15, 2004. No. S-03-556.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **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.
3. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Constitutional Law: Statutes: Due Process.** When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement.
5. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. Affirmed.

John D. Feller, of Feller & Houston, for appellant.

Jon Bruning, Attorney General, Jodi M. Fenner, and Katherine J. Spohn, Senior Certified Law Student, for appellees.

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

WRIGHT, J.

NATURE OF CASE

An order issued by Nebraska's Department of Environmental Quality (DEQ) revoked the "Scrap Tire Hauler, Collector, and Processor Permit" that DEQ had previously issued to Central States Tire Recycling of Nebraska, LLC (Central States). Central

States filed an appeal pursuant to the Administrative Procedure Act in the Dodge County District Court. The district court affirmed the order of DEQ.

SCOPE OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004).

[2] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*, 259 Neb. 24, 607 N.W.2d 857 (2000).

FACTS

At all times relevant to this case, Central States was in the business of hauling, collecting, and processing "scrap tires." Central States mainly concerned itself with collecting scrap tires within the vicinity of Wisner, Nebraska, and producing a product known as Enviro-block. Central States describes this product in the following manner:

> The Enviro-block tire bale is a compacted, rectangular cube made from cut and arranged parts of 100 scrap car tires, or an equivalent in scrap truck tires. . . . The Enviro-block is intended to be used as a long lasting engineered solution for civil and agricultural engineering applications, livestock management, and marine structures.

Brief for appellant at 6.

On July 28, 2000, DEQ issued Central States a 5-year permit to haul, collect, and process scrap tires and to operate a scrap tire collection site in Nebraska. The permit included a number of general conditions. The second of these conditions stated that

"[t]he permittee is prohibited from depositing scrap tires at any location not permitted or licensed to accept scrap tires. [DEQ] on a case-by-case basis may approve alternative sites." The permit required that Central States "comply with Title 136 [the Scrap Tire Management Rules and Regulations] and all other applicable local, state, and federal requirements."

After receiving its permit, Central States began collecting scrap tires for a fee. These tires would then be used to make Enviro-blocks. Central States made between 75 cents and $1 per 20 pounds when collecting scrap tires. It usually sold the Enviro-blocks for $7.50 to $8 per ton, although the sale price was at times as high as $12 to $15 per ton.

In September or October 2000, Central States applied for permission to use Enviro-blocks in a project to improve the company's manufacturing site in Wisner. The project was approved by DEQ, and Central States used Enviro-blocks as a means of stabilizing the soil and elevating the grade for its use as a manufacturing site.

In January 2001, William Miner, the president and major stockholder of Central States, bought two plots of undeveloped property in Wisner. The developer of the property was to be an entity called TransAgra Capital Corporation (TransAgra). Miner was also the president of TransAgra.

In March or April 2001, Central States applied to DEQ for permission to use Enviro-blocks as a lightweight fill on one of the plots that Miner had purchased in January. Miner testified that this project was similar to the project DEQ had approved for Central States' manufacturing site. Specifically, he stated that both properties were low lying, below road level, and not suitable for development without fill. Before Central States received approval for this project from DEQ, TransAgra bought approximately 4,300 Enviro-blocks from Central States, which began placing them on the property as fill.

DEQ commenced an investigation of the property after complaints were filed by neighbors. A program specialist in the compliance department of DEQ was sent to investigate the site on August 31, 2001. David Haldeman, an administrator with DEQ, called Miner that day, informed him that he did not have

permission to deposit scrap tires at the location, and ordered him to immediately cease the activity.

On September 6, 2001, DEQ sent Central States a notice of violation which stated that the August 31 inspection revealed the placement and burial of tire bales. The letter noted that such a project had not been approved by DEQ and offered a plan for voluntary compliance to be completed by September 20. Miner subsequently sent a letter to DEQ denying the allegations contained in the notice of violation.

A second notice of violation was sent to Central States on October 3, 2001. This letter offered a plan for voluntary compliance to be completed by November 1. Haldeman testified that Central States had not taken any of the steps required for compliance.

DEQ then sent Central States a notice of intent to revoke its permit to haul, collect, and process scrap tires. The notice stated that Central States had deposited scrap tire bales at an unpermitted and unlicensed site without obtaining or possessing the approval of DEQ. DEQ found this action to constitute a violation of the conditions of Central States' permit which prohibited it from depositing scrap tires at any location not permitted or licensed to accept scrap tires.

In its answer and request for a hearing, Central States denied that it had deposited scrap tires at any location not permitted, licensed, or approved by DEQ. It alleged that Enviro-blocks are a tire-derived product and not properly classified as scrap tires. Further, it asserted that DEQ lacked the authority to either limit or restrict the placement of Enviro-blocks or revoke Central States' permit. Central States alleged that it had complied with all terms and conditions.

A hearing was held before DEQ, and on October 18, 2002, the hearing officer issued his findings of fact and conclusions of law. The final order issued by the director of DEQ determined that Enviro-blocks were not tire-derived products and that their placement could be regulated by DEQ. In response to Central States' argument that 136 Neb. Admin. Code (1996) was unconstitutionally vague, the director concluded that he lacked the authority to find any state law, agency rule, or regulation unconstitutional.

The director also concluded that any challenges that Central States offered against the permit conditions were collateral attacks of a final and binding order of DEQ. As such, he concluded that Central States could have appealed these conditions or sought a modification or review of the conditions before taking actions in defiance thereof. The director revoked the permit issued to Central States because it had deposited scrap tire bales at an unpermitted and unlicensed site, which violated the terms and conditions of the permit.

Central States petitioned for review of DEQ's final order, and the Dodge County District Court affirmed DEQ's final order. The court found that Enviro-blocks did not cease to be waste tires simply because they were placed in baled form, that DEQ had the authority to impose conditions on the disposal of waste tires, and that Central States was familiar with these regulations. It concluded that Central States' vagueness challenge lacked merit because the terms in 136 Neb. Admin. Code were sufficiently defined and the permit itself provided clarification and definition. Central States timely appealed.

ASSIGNMENTS OF ERROR

Central States assigns the following restated errors to the order of the district court: (1) the court's finding that Enviro-blocks are waste or scrap, as defined in 136 Neb. Admin. Code, is not supported by competent evidence and is arbitrary, capricious, or unreasonable; (2) the court erred in failing to find that 136 Neb. Admin. Code, ch. 5, § 006, is unconstitutionally vague, in violation of the Due Process Clauses of the state and federal Constitutions; and (3) the court erred in failing to find that DEQ exceeded its express legislative authority in regulating Enviro-blocks.

ANALYSIS

CHARACTERIZATION OF ENVIRO-BLOCKS AS WASTE OR SCRAP

Central States first argues that the district court erred in finding that Enviro-blocks are waste or scrap as defined in 136 Neb. Admin. Code. It contends that this finding is not supported by competent evidence and is arbitrary, capricious, or unreasonable.

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. *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004). 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. *Id.*

This appeal concerns the powers delegated to DEQ under the Integrated Solid Waste Management Act (Waste Management Act), see Neb. Rev. Stat. §§ 13-2001 to 13-2043 (Reissue 1997, Cum. Supp. 2002 & Supp. 2003), and the Waste Reduction and Recycling Incentive Act (Waste Reduction Act), see Neb. Rev. Stat. §§ 81-15,158.01 to 81-15,165 (Reissue 1999, Cum. Supp. 2002 & Supp. 2003). Many of these statutes have been amended or repealed over the years. All statutory references herein will be to those laws in effect in August 2001, which is when Central States allegedly deposited Enviro-blocks on an unpermitted and unlicensed site.

The appeal also involves an interpretation of 136 Neb. Admin. Code, otherwise known as the Scrap Tire Management Rules and Regulations. The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*, 259 Neb. 24, 607 N.W.2d 857 (2000).

Section 81-15,162.01(1) provided in relevant part: "A tire collector, tire processor, or tire hauler shall obtain a permit from [DEQ] unless exempted under subsection (2) of this section." We note that subsection (2) did not contain language which would suggest that Central States is exempt from the permit requirement. In addition, under § 81-15,162.01(5), the Waste Reduction Act granted the Environmental Quality Council the authority to adopt rules and regulations to establish a process by which a tire collector, processor, or hauler may obtain a permit from DEQ. The majority of 136 Neb. Admin. Code outlines this process and the

requirements necessary to maintain a permit. See 136 Neb. Admin. Code, chs. 3 through 11.

The disposal of scrap tires is prohibited by 136 Neb. Admin. Code, ch. 2. Specifically, 136 Neb. Admin. Code, ch. 2, § 002, states that "[o]n and after September 1, 1998, land disposal of scrap tires in any form shall be prohibited." This language reflected a provision of the Waste Management Act. See § 13-2039(3)(b). Also, 136 Neb. Admin. Code, ch. 2, § 003, states that the "[p]ermanent disposal of scrap tires shall be prohibited, unless otherwise approved by the Director [of DEQ], for facilities accepting scrap tires after the initial effective date of this title." Thus, it is clear from such language that disposal of scrap tires is prohibited without a permit from DEQ.

The question for our consideration is whether Central States' product, the Enviro-block, is a tire-derived product or merely a scrap tire that has been shaped into a new physical form. If it is a scrap tire, it is subject to regulation by DEQ. To aid us in our determination of what constitutes a tire-derived product, we examine certain sections of the Nebraska Administrative Code and the Waste Reduction Act.

At all times relevant to this case, the Waste Management Act contained no definition of the terms "waste tire," "scrap tire," or "tire-derived product." The Nebraska Administrative Code defines a "scrap tire" as "a tire that is no longer suitable for its original intended purpose because of wear, damage, or defect." See 136 Neb. Admin. Code, ch. 1, § 019. This is identical to the definition of a "[s]crap tire" in the Waste Reduction Act at § 81-15,159.02(6). The term "[t]ire-derived product" is defined as "the usable materials produced from the chemical or physical processing of a scrap tire." See 136 Neb. Admin. Code, ch. 1, § 024. However, this definition does not include the entire language found in § 81-15,159.02(9), which states that "[t]ire-derived product means the usable product produced from a scrap tire. Tire-derived product does not include . . . baled tires . . . ."

Central States argues that once scrap tires are mechanically formed into a bale and bound with wire, they cease to be scrap tires. It contends that its Enviro-blocks are now a new tire product as defined in 136 Neb. Admin. Code. It asserts that Enviro-blocks are therefore not subject to the permit requirements because

such blocks are no longer "scrap tires." We disagree. The Enviro-blocks are still baled tires, and for purposes of the Waste Reduction Act, baled tires are not included within the definition of a "tire-derived product."

Both the hearing officer and the director correctly concluded that a scrap tire bale is not a tire-derived product within the meaning of the Waste Reduction Act and other applicable provisions of the law. Although Enviro-blocks may be useful in a variety of engineering applications, they remain compressed bales of scrap tires. They are an environmental threat and are subject to regulation by DEQ. Since DEQ can and does require permits for end use of baled scrap tires, this condition placed upon Central States' permit was lawful.

Central States argues that the definition of "tire-derived product" found under the Waste Reduction Act is inapplicable to the case at bar because the definition was used in conjunction with the granting of money from two funds set up by the act. Specifically, the term is used in two provisions of the Waste Reduction Act as an example of the type of development project that the act attempted to encourage through the establishment of the funds. See §§ 81-15,160(4) and 81-15,161.01(2). Central States submits that the Waste Reduction Act does not limit or affect the actual beneficial use of tire bales.

We do not find Central States' argument persuasive. One of the stated purposes of the Waste Reduction Act was to facilitate the recycling and reduction of scrap tires. See § 81-15,159.01(2). The recycling of scrap tires appears to be the main purpose for the manufacturing of a product such as the Enviro-block, and as such, that process is regulated by the Waste Reduction Act. As noted above, the Legislature has clearly indicated that in the realm of scrap tire recycling, baled tires should not be included in the definition of "[t]ire-derived product[s]." See § 81-15,159.02(9). Since the Enviro-block cannot be considered a tire-derived product, it must, by necessary implication, fall under the definition of a "scrap tire." See 136 Neb. Admin. Code, ch. 1, § 019. For these reasons, the district court's finding that "[t]ires do not cease to be waste tires simply by baling them" was supported by the law and was neither arbitrary, capricious, nor unreasonable. Central States' first assignment of error lacks merit.

CONSTITUTIONALITY OF 136 NEB. ADMIN. CODE, CH. 5, § 006

Central States next challenges the constitutionality of 136 Neb. Admin. Code, ch. 5, § 006, on vagueness grounds. The challenged provision states:

> **General Conditions**. [DEQ] shall impose such conditions in a permit as may be necessary to accomplish the purposes of applicable laws and these regulations, and as may be necessary to ensure compliance with applicable laws, regulations, and standards. The following conditions apply to all permits:
>
> 006.01 A permittee shall fulfill all reporting requirements of the permit;
>
> 006.02 A permittee shall comply with all other applicable local, state, and federal requirements; and
>
> 006.03 A permittee shall allow full access to existing and available records, and shall allow [DEQ] inspectors entry and access, during reasonable hours, to any building, area, or place, for inspection purposes.

Id.

[4,5] When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement. *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000). In other words, due process requires that an enactment supply (1) a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) explicit standards for those who apply it. *Id.* When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *In re Conservatorship of Hanson, ante* p. 200, 682 N.W.2d 207 (2004).

Central States argues that the permit process outlined in 136 Neb. Admin. Code, ch. 5, § 006, does not set forth specific guidelines or criteria. It claims that the conditions stated in its permit did not provide any more specific guidance. In particular, it points out that under general permit condition No. 2, DEQ was allowed to approve alternative sites for the depositing of scrap tires on a case-by-case basis.

Central States also contends that DEQ is forbidden from using documents entitled "Environmental Guidance Document" and "Special Permit Conditions" in order to clarify permit conditions. It argues that these two documents were created by DEQ but were never approved by the Environmental Quality Council, which therefore makes them invalid.

Section 81-15,162.01(5) granted authority to the Environmental Quality Council to adopt and promulgate rules and regulations to establish a process whereby a tire collector, processor, or hauler may obtain a permit from DEQ. The bulk of 136 Neb. Admin. Code clearly accomplishes this purpose. Specifically, 136 Neb. Admin. Code, ch. 5, § 006, delegates to DEQ the task of imposing conditions upon these permits that are necessary to accomplish the purposes of applicable laws and regulations. There is nothing in state law which requires that such conditions also be approved by the Environmental Quality Council.

We conclude that 136 Neb. Admin. Code, ch. 5, § 006, meets the requirements of procedural due process for constitutional challenges on vagueness grounds. It provides adequate notice to citizens that the conditions of the permit will be established by DEQ. In addition, it contains adequate standards to prevent arbitrary enforcement. Specifically, it provides that the conditions established by DEQ are to be necessary to accomplish the purposes of the laws and regulations applicable to the activities regulated by the permit.

In its order, the district court properly characterized Central States' constitutional argument in the following manner:

> Central States' constitutionally based vagueness challenge to [136 Neb. Admin. Code, ch. 5, § 006] is not well taken. The pertinent terms are sufficiently defined. Plus, the permit, itself, provided additional clarification and definition. Central States can hardly contend that it did not have sufficient notice that it was not to place the baled tires on a site until such use had been approved.

Accordingly, we find Central States' second assignment of error to lack merit.

DEQ's Authority to Regulate Enviro-blocks

Central States' final assignment of error concerns DEQ's authority under the Waste Reduction Act to regulate Enviro-blocks.

As with its vagueness argument, Central States points to the "Environmental Guidance Document" and "Special Permit Conditions" as evidence of additional permit conditions generated by DEQ but not approved by the Environmental Quality Council. Central States argues that such approval was required under § 81-15,162.01(4).

However, as discussed above, we conclude that DEQ has properly been entrusted with the task of establishing permit conditions to ensure compliance with applicable law and regulations. Contrary to Central States' position, § 81-15,162.01(4) dealt only with those who possessed a tire collection permit. It specifically stated that "[s]uch permit shall contain any conditions determined necessary by [DEQ] to ensure environmental protection . . . ." *Id.* Nowhere in this statute was the approval of the Environmental Quality Council required.

We conclude that DEQ did not overstep its authority in placing conditions upon Central States with respect to the manufacturing, placement, and use of Enviro-blocks. Central States' final assignment of error lacks merit.

CONCLUSION

The order of the district court conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. We therefore affirm the judgment of the district court.

AFFIRMED.

WOODHOUSE FORD, INC., A NEBRASKA CORPORATION, APPELLANT, V. D.M. LAFLAN AND CATHY LAFLAN, APPELLEES.

687 N.W.2d 672

Filed October 15, 2004. No. S-03-574.

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. **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. **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.
4. **New Trial: Words and Phrases.** 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.
5. **Summary Judgment.** When a party files a motion for summary judgment, the trial court determines whether there is a material issue of fact in dispute. It does not resolve factual issues.
6. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion.
7. ____: ____. 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).
8. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
9. **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.
10. **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.
11. **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.
12. **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 the judicial system.
13. **Motions for New Trial: Evidence: Proof.** In order to make a sufficient showing for a new trial on the grounds of newly discovered evidence, the proof in support thereof must show that such evidence is now available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that the evidence is not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted.
14. **New Trial: Evidence.** Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed.

Jon A. Sedlacek and Kathy Pate Knickrehm for appellant.

James R. Villone, of Klass Law Firm, and Sharese Manker, Senior Certified Law Student, for appellees.

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

WRIGHT, J.

NATURE OF CASE

The Washington County District Court sustained a motion for summary judgment filed by the defendants, D.M. Laflan (Douglas) and Cathy Laflan. The plaintiff, Woodhouse Ford, Inc. (Woodhouse), appeals from an order of the district court which denied its motion for new trial.

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. *Demerath v. Knights of Columbus, ante* p. 132, 680 N.W.2d 200 (2004).

[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. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004).

[3] 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. *In re Petition of Omaha Pub. Power Dist., ante* p. 43, 680 N.W.2d 128 (2004).

BACKGROUND

This appeal arose from a dispute concerning a 2002 F-150 Ford pickup truck that came off the Woodhouse lot. According to the Laflans, on or about December 22, 2001, the truck was delivered to Cathy's son in Omaha, Nebraska. The son subsequently drove the truck to the Laflans' home in Creighton.

The parties disagree as to why the truck was delivered. According to Woodhouse, the Laflans had entered into a purchase agreement in which they agreed to pay $31,878 for the truck. The Laflans deny purchasing the truck and deny signing

any agreement. They have not paid any money to Woodhouse for the truck.

The Laflans contend that a few days prior to December 21, 2001, Cathy contacted Woodhouse and requested that it deliver the truck to Douglas for his inspection and approval prior to purchase. According to Douglas, he first test drove the truck on December 27, during a trip to Tilden. There is no dispute that while Douglas was driving the truck on this day, it was involved in an accident. Douglas had the damage to the truck repaired. According to the Laflans, Woodhouse has repeatedly refused to accept the truck, despite numerous attempts on their part to return it. As of October 2002, the truck was being stored at the Laflans' home.

On June 5, 2002, Woodhouse filed a petition against the Laflans seeking the recovery of $31,878, together with interest and costs. Woodhouse argued this amount was owed under the purchase agreement. The Laflans claimed that they never entered into a purchase agreement and that the agreement offered by Woodhouse was unenforceable because it violated the statute of frauds.

The Laflans moved for summary judgment on the basis that Woodhouse was attempting to enforce an oral contract for the sale of goods in excess of $500 and that the contract was unenforceable. At the summary judgment hearing on December 3, 2002, Woodhouse attempted to offer the affidavit of a salesman who claimed to have negotiated the purchase of the truck. Counsel for the Laflans objected to admission of the affidavit on the basis that it was untimely. The district court took the matter under consideration.

On January 24, 2003, the district court sustained the Laflans' objection to the affidavit and granted summary judgment in favor of the Laflans. Woodhouse moved for a new trial, claiming that the Laflans' responses to its discovery requests constituted newly discovered evidence which justified a new trial. The district court overruled Woodhouse's motion for new trial, and Woodhouse timely appealed.

ASSIGNMENTS OF ERROR

Woodhouse assigns the following restated errors: (1) the district court's sustaining the Laflans' objection to the affidavit of a

Woodhouse salesman, (2) the court's granting the Laflans' motion for summary judgment, and (3) the court's denial of Woodhouse's request for a new trial.

ANALYSIS

JURISDICTION

[4,5] We first point out to the practitioner that a motion which purportedly seeks a "new trial" after the entry of a summary judgment is not a proper motion for new trial. 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. Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002); *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). When a party files a motion for summary judgment, the trial court determines whether there is a material issue of fact in dispute. It does not resolve factual issues. Therefore, Woodhouse's motion following the entry of summary judgment was not a proper motion for new trial under § 25-1142, which would toll the time for filing a notice of appeal. See *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra.*

[6,7] However, a postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion. 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, *U.S. v. Deutsch*, 981 F.2d 299 (7th Cir. 1992); *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra.* A rule 59(e) motion seeks to alter or amend the judgment. *Id.*

Woodhouse's motion asked the district court to grant a new hearing based upon newly discovered evidence. This motion is similar to a motion for reconsideration, which the federal courts have held is the functional equivalent of a motion to alter or amend the judgment pursuant to rule 59(e). See *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra.* We therefore treat Woodhouse's motion as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002).

In cases involving a motion to alter or amend the judgment, a critical factor to be considered is whether the motion was filed

within 10 days of the order granting summary judgment, because a timely motion under § 25-1329 tolls the time for filing a notice of appeal. Since the motion in the case at bar was timely filed, we have jurisdiction of this matter.

WOODHOUSE AFFIDAVIT

Woodhouse first argues that the district court erred in sustaining the Laflans' objection to the admission of the affidavit of the Woodhouse salesman. The affidavit was served upon the Laflans on the day of the summary judgment hearing. While Woodhouse admits that the affidavit was offered in an untimely manner, it argues that this timing did not prejudice the Laflans.

Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002) provides in part that "[t]he adverse party prior to the day of hearing may serve opposing affidavits." Woodhouse argues that because the statute uses the word "may," the court has discretion to admit an affidavit on the day of the hearing. It contends that since service of the affidavit on the day of the summary judgment hearing did not prejudice the Laflans, the district court abused its discretion in sustaining their objection.

[8] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Demerath v. Knights of Columbus, ante* p. 132, 680 N.W.2d 200 (2004). Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Guardianship & Conservatorship of Woltemath, ante* p. 33, 680 N.W.2d 142 (2004).

The plain, direct, and unambiguous meaning of the language of § 25-1332 is that parties adverse to a motion for summary judgment may serve opposing affidavits prior to the day of the summary judgment hearing. See *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995). While adverse parties are not required to file opposing affidavits, if they choose to do so, § 25-1332 requires them to serve those affidavits prior to the day of the hearing. *Medley v. Davis, supra*; *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 234 N.W.2d 902 (1975).

The district court correctly utilized the plain and ordinary meaning of the language in § 25-1332 when it sustained the Laflans' objection to the affidavit. We cannot say that the court erred in refusing to admit the affidavit. Woodhouse's first assignment of error lacks merit.

SUMMARY JUDGMENT

Woodhouse claims that the district court erred in sustaining the Laflans' motion for summary judgment. Specifically, Woodhouse contends that the Laflans failed to meet their burden to show that no issue of fact existed concerning the exceptions to the statute of frauds.

The statute of frauds provision in Neb. U.C.C. § 2-201(1) (Reissue 2001) states:

> 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 . . . .

The purchase price of the truck was $31,878. As such, if there was a contract for sale of the truck, it would have to conform with the statute of frauds. The purchase agreement offered by Woodhouse was not signed by either of the Laflans. Therefore, in order to conform with the statute of frauds, the purchase agreement must fall under one of the limited exceptions set forth in § 2-201(3).

Section 2-201(3) states: "A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . (c) with respect to goods for which payment has been made and accepted or which have been received and accepted." Neb. U.C.C. § 2-606(1)(c) (Reissue 2001) defines the acceptance of goods as occurring when the buyer "does any act inconsistent with the seller's ownership."

[9,10] 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. *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004). 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. *Id.*

Douglas' affidavit offered at the summary judgment hearing stated that neither he nor Cathy ever entered into any oral or written agreement for the purchase of a truck from Woodhouse. A truck was delivered to Cathy's son, who drove the truck to the Laflans' home. On December 27, 2001, Douglas took the truck for a test drive. He was involved in an accident and had the damage to the truck repaired. He attempted to return the truck, and Woodhouse refused to accept it. Woodhouse continues to refuse to accept the truck despite repeated attempts to return it.

This evidence established that no purchase agreement conforming to § 2-201(1) existed between Woodhouse and the Laflans. The Laflans' attempts to return the truck indicated that they never accepted it within the definition of § 2-606(1)(c). Therefore, the Laflans established a prima facie case for summary judgment.

The burden then shifted to Woodhouse to show the existence of a material issue of fact that would prevent a judgment in favor of the Laflans. Woodhouse offered no evidence to dispute the assertions of the Laflans that they did not purchase or accept the truck. Attached to Woodhouse's petition was the purchase agreement that Woodhouse was attempting to enforce. However, since that document was not signed by either of the Laflans, it was unenforceable unless one of the limited exceptions set forth in § 2-201(3) was present.

Woodhouse's attorney argued that there had been "partial performance or performance" under the terms of the purchase agreement, which waived consideration of the statute of frauds. Counsel also claimed that the Laflans took possession of the truck, test drove it, and had it in their possession for "numerous days." However, these assertions were not supported by any evidence in the record. Indeed, the only indication that the Laflans had the truck for "numerous days" was Douglas' affidavit, which stated that the truck was being stored in his garage. This

statement was consistent with other language from the affidavit which asserted that Woodhouse had refused to accept the truck despite continued attempts to return it.

[11] 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. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004). 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.*

Viewing the evidence in a light most favorable to Woodhouse and granting it the benefit of all reasonable inferences deducible from the evidence, we cannot say that Woodhouse sustained its burden to establish that there was a genuine issue of material fact. The purchase agreement offered by Woodhouse was not signed by either of the Laflans. Woodhouse presented no evidence that placed any alleged agreement with the Laflans outside the requirements of the statute of frauds. As such, the district court did not err in sustaining the Laflans' motion for summary judgment.

Motion for New Trial

[12] Finally, Woodhouse argues that the district court erred in failing to sustain its motion for new trial. 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. *In re Petition of Omaha Pub. Power Dist., ante* p. 43, 680 N.W.2d 128 (2004). 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 the judicial system. *Id.*

Section 25-1142 sets forth the grounds upon which a new trial may be granted. Woodhouse argues that it should have a new trial based upon § 25-1142(7), which allows for a new trial on the

basis of "newly discovered evidence, material for the party applying, which the moving party could not, with reasonable diligence, have discovered and produced at the trial."

[13] The evidence that Woodhouse offered in its motion for new trial was the Laflans' responses to its discovery requests. These responses were mailed to Woodhouse on December 3, 2002, the day of the summary judgment hearing. Woodhouse claims that the responses were material to the issues in the case and would have been utilized at the hearing in support of its opposition to the Laflans' motion for summary judgment.

> As a general rule, in order to make a sufficient showing for a new trial on the grounds of newly discovered evidence, the proof in support thereof must show that such evidence is now available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that the evidence is not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted.

DeVaux v. DeVaux, 245 Neb. 611, 621-22, 514 N.W.2d 640, 647 (1994).

Woodhouse's discovery requests included a request for production of documents, a request for admissions, and written interrogatories. The Laflans' responses contained some evidence that was relevant and material to the issues in the case. The Laflans produced the police report from the accident that occurred on December 27, 2001. This report showed that Douglas told the police officer who filed the report that he owned the truck in question. In answer to one of the interrogatories, the Laflans stated that as of November 2002, the truck had 647.6 miles on its odometer. This was an increase of more than 530 miles from the odometer reading listed on the purchase agreement attached to Woodhouse's petition. Finally, one of the interrogatories revealed that the Laflans' insurance agent processed a claim with regard to the accident involving the truck.

[14] Thus, the issue is whether, with reasonable diligence, Woodhouse could have discovered and produced this evidence at the summary judgment hearing. "Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before

the trial would have produced notice or knowledge of the alleged recently discovered evidence." *Maddox v. First Westroads Bank*, 199 Neb. 81, 96, 256 N.W.2d 647, 656 (1977).

Woodhouse filed its petition on June 5, 2002, but did not serve its discovery requests on the Laflans until November 5. Some of the evidence claimed to be newly discovered concerned the accident involving the truck. However, it is clear that Woodhouse was aware that the truck had been involved in an accident. The accident was disclosed in Douglas' affidavit, which was dated more than a month before the summary judgment hearing and before Woodhouse served its discovery requests on the Laflans. If Woodhouse sought to prove that the Laflans were driving the truck and, therefore, acting in a manner inconsistent with Woodhouse's ownership, it could have, with reasonable diligence, discovered the odometer reading prior to the hearing. Woodhouse also could have obtained the police report and the insurance claim information through its own diligence.

The Laflans' discovery responses were mailed to Woodhouse on the day of the summary judgment hearing. Nearly 2 months passed between the hearing and the date when the district court sustained the Laflans' motion for summary judgment. During this time, Woodhouse could have asked the court to consider the Laflans' discovery responses before it issued its final order. Instead, Woodhouse waited until after the judgment had been entered.

We conclude that any material evidence presented by Woodhouse in support of its motion for new trial could have been discovered and produced at the summary judgment hearing or prior to entry of the judgment. As such, the district court did not abuse its discretion in overruling this motion.

CONCLUSION

For the reasons stated above, the judgment of the district court is affirmed.

AFFIRMED.

BLUE CROSS AND BLUE SHIELD OF NEBRASKA, INC., APPELLEE AND CROSS-APPELLANT, V. LEMOYNE E. DAILEY, APPELLANT AND CROSS-APPELLEE, AND UNION PACIFIC RAILROAD COMPANY, APPELLEE AND CROSS-APPELLEE.

687 N.W.2d 689

Filed October 22, 2004. No. S-03-394.

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. **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. **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.
4. **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.
5. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 1995), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
6. **Subrogation: Words and Phrases.** Subrogation involves a substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities.
7. ____: ____. Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.
8. **Insurance: Subrogation.** In the context of insurance, the right of subrogation is based on two premises: (1) An insured should not be allowed to recover twice for the same loss, which would be the result if the insured recovers from both the insured's insurer and the tort-feasor, and (2) a wrongdoer should reimburse an insurer for payments that the insurer has made to its insured.
9. **Equity: Insurance: Subrogation: Tort-feasors.** Under principles of equity, an insurer is entitled to subrogation only when the insured has received, or would receive, a double payment by virtue of an insured's recovering payment of all or part of those same damages from the tort-feasor.
10. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.
11. **Equity: Insurance: Subrogation.** Where an insurer seeks subrogation and the insured has not been made whole through his or her recovery, equitable principles necessitate disallowing the insurer to assert its subrogation right.

12. **Contracts: Equity: Insurance: Subrogation.** Subrogation clauses should be construed to confirm, but not expand, the equitable subrogation rights of insurers.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded for further proceedings.

Todd R. McWha and Keith A. Harvat, of Waite, McWha & Harvat, for appellant.

John F. Thomas and Michael T. Eversden, of McGrath, North, Mullin & Kratz, P.C., for appellee Blue Cross and Blue Shield of Nebraska, Inc.

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

WRIGHT, J.

NATURE OF CASE

Blue Cross and Blue Shield of Nebraska, Inc. (Blue Cross), sued Lemoyne E. Dailey, who was insured by Blue Cross, and the Union Pacific Railroad Company (Union Pacific). Blue Cross sought reimbursement of medical payments it had made on behalf of Dailey due to the alleged negligence of Union Pacific. The Douglas County District Court sustained Blue Cross' motion for summary judgment and overruled the motions for summary judgment filed by Dailey and Union Pacific. Dailey appeals, and Blue Cross cross-appeals.

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. *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004).

[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. *Mogensen v. Board of Supervisors, ante* p. 26, 679 N.W.2d 413 (2004).

[3] 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. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004).

[4] 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.*

FACTS

On February 9, 1999, a prairie fire occurred in Lincoln County, Nebraska. The fire was allegedly caused by sparks emitting from a Union Pacific train. While attempting to put out the fire, Dailey incurred second- and third-degree burns over a significant portion of his body. He required extensive treatment in a hospital burn unit for a number of months.

In December 1999, Dailey entered into a settlement with Union Pacific. He signed a release and settlement agreement which provided that Union Pacific was released from liability for all claims for injuries, including those unknown at the time the document was signed. Union Pacific agreed to pay a lump sum of $1,225,000 to Dailey and $10,000 per month for 10 years or the remainder of his life, beginning February 1, 2000. The agreement stated that "if Blue Cross . . . is subrogated under any rights whatsoever against [Dailey, then Union Pacific] will negotiate the subrogation lien of Blue Cross" and pay all costs and attorney fees incurred by Dailey.

Blue Cross sued Dailey and Union Pacific for recovery of the medical expenses it had paid on behalf of Dailey. Blue Cross alleged two theories of recovery: subrogation and contractual right of recovery. On the subrogation claim, Blue Cross alleged that it had paid $794,329.08 in medical expenses under an insurance contract with the Nebraska Association of County Officials that covered Dailey. The petition asserted that Blue Cross had made demand on Union Pacific for $720,000 as settlement for the medical bills incurred by Dailey and that the demand was not accepted. Blue Cross asked for judgment against Union Pacific in the full amount of its expenses.

As to the contractual right of recovery claim, Blue Cross alleged that Dailey and Union Pacific had entered into a settlement of Dailey's claims against the railroad under which he was

to receive payments from Union Pacific for his injuries. Blue Cross claimed that pursuant to its contract with the Nebraska Association of County Officials, Blue Cross had a contractual right to collect from the proceeds Dailey recovered for his injuries the amount of medical benefits it had paid on Dailey's behalf, regardless of whether Dailey had been fully compensated. Blue Cross asserted that either Dailey or Union Pacific was obligated to reimburse Blue Cross for the medical expenses it had paid for the treatment of Dailey's injuries.

In his answer, Dailey also asserted a cross-claim against Union Pacific. Union Pacific filed an answer to Blue Cross' petition, in which it asserted a number of affirmative defenses.

The district court granted Blue Cross' motion to bifurcate, agreeing to first hear the contractual right of recovery claim, which, if resolved in favor of Blue Cross, would eliminate the need for the subrogation action against Union Pacific.

The district court subsequently granted Blue Cross' motion for summary judgment and entered judgment against Dailey for $801,485.70. The order overruled the motions for summary judgment filed by Dailey and Union Pacific. The court deferred action as to the enforcement of rights between Dailey and Union Pacific and as to Blue Cross' claim under Dailey's indemnity agreement with Union Pacific.

The district court found that the subrogation provision of the insurance policy allowed Blue Cross to recover regardless of whether the insured had been made whole and that the policy created a contractual right that was different from Blue Cross' equitable right to subrogation. The court concluded that the subrogation provision did not violate public policy, the subrogation provision was not void as a unilateral amendment, there was no conflict of interest in the insurance policy, the policy was not an unconscionable contract of adhesion, and there was no lack of consideration in the policy. The court also found that the "made whole" doctrine of equitable subrogation did not apply because the subrogation provision was a distinct contractual undertaking that was more than a mere restatement of Blue Cross' equitable rights.

Blue Cross' motion for prejudgment interest was denied, and the district court filed a second order, stating that its previous

order granting summary judgment to Blue Cross was "amended" to reflect that it was "the entry of a final judgment and [that] there is no just reason for delay in the entry of that order." Dailey timely appealed, and Blue Cross cross-appeals.

ASSIGNMENTS OF ERROR

Dailey assigns the following restated errors: (1) The district court erred in determining that Blue Cross is entitled to full recovery of all medical expenses that it paid on behalf of Dailey, despite the fact that he was not made whole, and (2) the court erred in sustaining Blue Cross' motion for summary judgment and denying Dailey's motion for summary judgment.

On cross-appeal, Blue Cross assigns as error the district court's failure to award Blue Cross prejudgment interest.

JURISDICTION

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. *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). Blue Cross asserts that we do not have jurisdiction over this appeal because the order from which Dailey appeals is not a final order under Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002). Dailey responds that the district court amended its original order to make it clear that the judgment was final pursuant to § 25-1315.

Section 25-1315(1) states in relevant part:

> [W]hen 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 *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001), we noted that a claim for relief under § 25-1315(1) is equivalent to a separate cause of action, not a separate theory of recovery. Therefore, the statute "is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties or causes of action." *Keef*, 262 Neb. at 627-28, 634 N.W.2d at 757.

More recently, we considered § 25-1315 in *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916

(2003). We noted that § 25-1315(1) is substantially similar to Fed. R. Civ. P. 54(b), and we reviewed federal cases for guidance.

> We therefore determine that for purposes of Nebraska law, the term "final judgment" as used in § 25-1315(1) is the functional equivalent of a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995). Thus, a "final order" is a prerequisite to an appellate court's obtaining jurisdiction of an appeal initiated pursuant to § 25-1315(1). . . . With the enactment of § 25-1315(1), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a "final order" within the meaning of § 25-1902 as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.

Bailey, 265 Neb. at 546-47, 657 N.W.2d at 923-24.

In the present case, there are multiple parties and the district court's order provided that there was no just reason for delay of an appeal. Thus, we must determine whether the order was a final order pursuant to Neb. Rev. Stat. § 25-1902 (Reissue 1995).

[5] Under § 25-1902, an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. *Bailey, supra*. This court has stated that "to be final, an order must dispose of the whole merits of the case. When no further action of the court is required to dispose of a pending cause, the order is final. If the cause is retained for further action, the order is interlocutory." *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 507, 557 N.W.2d 696, 701 (1997).

In the case at bar, the district court's order sustained Blue Cross' motion for summary judgment and entered judgment against Dailey. In its conclusion, the court stated: "The enforcement of rights between Dailey and . . . Union Pacific are deferred, as are [Blue Cross'] rights under Dailey's indemnity agreement with Union Pacific." Whether Blue Cross is entitled to recovery under the subrogation provision in the insurance policy

must be determined before consideration of the settlement agreement between Dailey and Union Pacific.

We conclude that the district court's order was a final order because it determined the action as related to Dailey and Blue Cross, and no further action was necessary between those two parties. The order effectively determined that Dailey owed Blue Cross for the expenses it had paid on his behalf. The district court's order satisfied §§ 25-1315(1) and 25-1902 and was a final, appealable order. Therefore, we have jurisdiction over the appeal.

ANALYSIS

This appeal presents the issue of whether the principles of equitable subrogation can be abrogated by contract. The specific question posed is whether Blue Cross may, because of the contractual provisions in the insurance policy issued to Dailey, bring a subrogation action against him to recover benefits paid under the contract, even if Dailey has not been fully compensated for his injuries. Blue Cross alleges that the insurance policy permits it to collect these benefits regardless of whether there has been full compensation to Dailey.

The insurance policy stated:

> A. SUBROGATION: . . . The Employee/Member . . . agrees to make reimbursement under this Part if payment is received for existing claims from the person who caused the Illness or Injury or from that person's liability carrier. This recovery . . . includes any claim by the Covered Person for special or general damages and *regardless of whether or not there has been full compensation.*
>
> B. CONTRACTUAL RIGHT TO RECOVERY: By accepting coverage under this Contract, the Employee/Member agrees to grant a contractual right to collect from the proceeds recovered on his or her behalf . . . for benefits paid under this Contract, *regardless of whether or not there has been full compensation.*

(Emphasis supplied.)

[6,7] Subrogation involves a substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies,

or securities. *Jensen v. Board of Regents, ante* p. 512, 684 N.W.2d 537 (2004). Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other. *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993) (quoting *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990)). "The preceding applies to subrogation based on a contract, known as conventional subrogation, as well as to subrogation arising by operation of law, that is, legal subrogation." *Frohlich*, 243 Neb. at 117, 498 N.W.2d at 78.

[8,9] In the context of insurance, the right of subrogation is based on two premises: (1) An insured should not be allowed to recover twice for the same loss, which would be the result if the insured recovers from both the insured's insurer and the tort-feasor, and (2) a wrongdoer should reimburse an insurer for payments that the insurer has made to its insured. *Id.* Under principles of equity, an insurer is entitled to subrogation only when the insured has received, or would receive, a double payment by virtue of an insured's recovering payment of all or part of those same damages from the tort-feasor. *Id.* As this court stated in *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997) (quoting *Shelter Ins. Cos. v. Frohlich, supra*), an insurer should not recover sums received by the insured from the tort source until the insured has been fully indemnified.

In *Frohlich*, we stated that subrogation clauses should be construed to confirm, but not expand, the equitable subrogation rights of insurers. If either the insurer or the insured must bear any loss, it should be the insurer because the insured has paid the insurer to bear that risk. *Id.* We also stated: "Allowing an insurer to subrogate against an insured's settlement when an insured has not been fully compensated would mean that all the insured's settlement could be applied to a medical payment subrogation claim with nothing left to compensate the insured for excess medical bills or personal injuries." *Id.* at 123, 498 N.W.2d at 82.

The language of the Blue Cross policy in this case allowed subrogation and a right to recovery regardless of whether the insured was fully compensated for his or her loss. Since the policy granted Blue Cross subrogation and recovery rights regardless of

whether the insured has been fully compensated, such provisions represent a deviation from the general rule articulated in *Frohlich*.

In *Frohlich*, 243 Neb. at 113, 498 N.W.2d at 76, a provision in the insurance policy stated, in relevant part, that " '[i]n the event of any payment under Coverage C [Medical Payments] of this policy, the Company shall be subrogated to all the rights of recovery therefor which the injured person or anyone receiving such payment may have against any person or organization . . . .' " The insured, who was injured in an automobile accident, received medical payments from the insurance company and reached a settlement with the driver of the other car involved in the accident. The insured contended that the insurer had to prove that she had been fully compensated for her loss before it could recover on the basis of subrogation. The insurer argued that Nebraska law imposed no requirement that an insurer prove that its subrogor had been fully compensated for a loss before the insurer was entitled to subrogation. The district court granted summary judgment to the insurer and ordered the insured to repay the insurer.

We were then asked to determine the enforceability of the insurer's subrogation right and whether the right was conditioned on full compensation of the insured. We stated: "[I]n the absence of a valid contractual provision or statute to the contrary, an insurer may exercise its right of subrogation only when the insured has obtained an amount that exceeds the insured's loss." *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 122, 498 N.W.2d 76, 81 (1993). We reversed the district court's order granting summary judgment to the insurer because the record did not indicate whether the insured had been fully compensated as a result of her settlement. We stated that the insurer's subrogation right could not be enforced without a determination at the trial court level as to whether the insured's damages exceeded the amount she received in compensation for her loss.

Unlike the case at bar, *Frohlich* did not involve a contractual provision that expressly permitted the insurer to subrogate against its insured when the insured had not been fully compensated for his or her loss. Blue Cross relies upon the language in *Frohlich* which suggests that an insurer may override principles

of equitable subrogation by contract. We hold that such language was dicta and is therefore not binding upon this court.

[10] In *Frohlich*, the record failed to establish whether the insured had been fully compensated as the result of the settlement. A genuine issue of material fact existed concerning whether the insured had in fact been fully compensated, and we concluded that the trial court erred in granting summary judgment to the insurer. A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). To the extent that the language in *Frohlich* could be construed to permit conventional subrogation when the insured has not been compensated in full or made whole, it is hereby disapproved.

Although subsequent Nebraska cases have dealt with the issue of whether an insured must be fully compensated before subrogation may occur, they fail to provide guidance on the specific issue currently before the court. *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998), and *Brockhaus v. Lambert*, 259 Neb. 160, 608 N.W.2d 588 (2000), dealt with Neb. Rev. Stat. § 44-3,128.01 (Reissue 1998), which allows an automobile liability policy to contain a provision permitting pro rata subrogation in the situation where the insured did not fully recover his or her loss. As such, the Nebraska Legislature has by statute directed that the rule requiring full compensation before recovery does not apply to a certain group of insurance policies. We are not dealing with such a policy in the case before us, and therefore, these cases are not applicable.

In *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997), we examined the circumstances in which equitable principles control conventional subrogation. We held that "if a contractual right of subrogation is merely the usual equitable right which would have existed in any event in the absence of a contract, equitable principles control subrogation." *Id.* at 370, 570 N.W.2d at 711. The policy in *Swartzendruber* mirrored the usual equitable rights, and accordingly, we held that equitable principles controlled.

We note that a minority of jurisdictions have developed a rule that allows an insurer to be subrogated for any amount that it has

paid to an insured, regardless of whether the insured has been made whole for his or her injuries. See, e.g., *Eddy v. Sybert*, 335 Ill. App. 3d 1136, 783 N.E.2d 106, 270 Ill. Dec. 531 (2003) (automobile insurer's right to subrogation for payment of medical expenses did not depend on whether insured was made whole by insured's settlement with tort-feasor).

Other jurisdictions specifically allow contractual language to abrogate the rule premising recovery upon full compensation. See, *Ex parte Cassidy*, 772 So. 2d 445 (Ala. 2000) (insurer is not entitled to subrogation unless insured has had full recovery, but this rule is superseded by parties' agreement to contrary); *Samura v. Kaiser Foundation Health Plan*, 17 Cal. App. 4th 1284, 22 Cal. Rptr. 2d 20 (1993) (contract provision expressly gave insurer priority to proceeds from tort-feasor without regard to whether insured was first made whole); *Kapadia v. Preferred Risk Mut. Ins. Co.*, 418 N.W.2d 848 (Iowa 1988) (conventional subrogation rights are not subject to rule that stays their enforcement until insured is made whole).

However, a different result was reached in *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d 263, 266, 316 N.W.2d 348, 350 (1982), wherein an insurer was attempting to enforce a subrogation provision which stated:

> " 'Upon payment . . . the company shall be subrogated to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery which the injured person . . . may have against any person . . . and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. . . .' "

(Emphasis omitted.) The court stated: "[O]ne who claims subrogation rights, whether under the aegis of either legal or conventional subrogation, is barred from any recovery unless the insured is made whole." *Id.* at 272, 316 N.W.2d at 353.

[11] The *Rimes* court stated that the law of subrogation was based upon equitable principles and that among the purposes of subrogation was the prevention of a double recovery by the insured. However, since an insured does not receive a double recovery until he or she has been made more than whole by damage payments, there can be no double recovery when an insured

has not fully recovered his or her losses. *Id.* Where an insurer seeks subrogation and the insured has not been made whole through his or her recovery, equitable principles necessitate disallowing the insurer to assert its subrogation right. *Id.*

[12] We conclude that the reasoning in *Rimes* is consistent with the principles of equitable subrogation which are followed in Nebraska. In this case, the provisions of the insurance policy are in direct opposition to the equitable principles upon which subrogation is allowed and are therefore unenforceable. Under the terms of the policy, it is possible for a loss to be borne by the insured, not the insurer, despite the fact that the insured has paid the insurer to bear the risk of such a loss. The policy allows for the application of a subrogation right in the absence of a double recovery by an insured. By abrogating the principles of equitable subrogation, the insurance policy expands Blue Cross' subrogation and recovery rights beyond those allowed at equity, and the policy is therefore not enforceable. Subrogation clauses should be construed to confirm, but not expand, the equitable subrogation rights of insurers. *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993).

Decisions by other jurisdictions also support this conclusion. In *York v. Sevier County Ambulance Authority*, 8 S.W.3d 616, 619 (Tenn. 1999), the court rejected an argument that the "'made whole' doctrine" was inapplicable, because subrogation had been provided for in the insurance policy. An insured must be made whole before subrogation rights arise in favor of insurers. *Id.* See, also, *Hare v. State*, 733 So. 2d 277, 284 (Miss. 1999) (court adopted "'made whole' rule" and held that it is not to be overridden by contract language, because intent of subrogation is to prevent double recovery by insured); *Ruckel v. Gassner*, 253 Wis. 2d 280, 646 N.W.2d 11 (2002) (insured must be made whole before insurer may exercise subrogation rights against its insured, even when unambiguous language in insurance contract states otherwise).

The dissent argues that because the contract is clear and unambiguous, we must enforce it despite important equity and policy concerns to the contrary. It has long been the rule in Nebraska that under principles of equity, an insurer is entitled to subrogation only when the insured has received or would receive a

double recovery. An insurer should not recover sums received by the insured unless the insured has been fully indemnified. See, *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997); *Frohlich, supra.* This rule of subrogation has been applied to the relationship between the insurer and its insured.

The question is whether an insurer can by contractual agreement abrogate the equitable principles of subrogation in spite of the rule which requires that the insured must be fully compensated before the insurer may subrogate against its insured. We have resolved this issue in favor of the insured and against the insurer because we conclude that the equitable principles are controlling. As we clearly recognized in *Frohlich*, these are risks of loss that the insurer is paid to bear. Allowing the insurer to subrogate when the insured has not been fully compensated would permit the insurer to take all the insured's compensation with the result that the insured could be left with nothing for future medical bills or compensation for personal injuries. It is this harsh result that the equitable made whole principle of subrogation protects against.

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. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004). 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.*

In the case at bar, the subrogation and right to recovery provisions of the insurance policy are contrary to Nebraska law, which requires that an insurer cannot recover under subrogation unless the insured has been made whole. Because there is a genuine issue of material fact as to whether Dailey's settlement with Union Pacific fully compensated him for his injuries, the district court erred in granting summary judgment in favor of Blue Cross.

CONCLUSION

For the reasons stated herein, the judgment of the district court is reversed, and the cause is remanded for further proceedings. Based on our resolution of Dailey's appeal, it is not necessary for us to address Blue Cross' cross-appeal, and it is dismissed.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., dissenting.

I respectfully dissent. In my view, the majority has made an unwarranted departure from the controlling legal rule clearly articulated in *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993), and *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997), that equitable principles of subrogation may be modified by a specific contractual provision.

The group health insurance policy at issue here gives Blue Cross a contractual subrogation interest in Dailey's personal injury claim against Union Pacific and a contractual right to reimbursement from Dailey with respect to settlement proceeds he receives from Union Pacific. Both provisions of the policy, which are set forth in full in the majority opinion, provide that they shall apply "regardless of whether or not there has been full compensation." Because we have noted that "a right to reimbursement is encompassed within the concept of subrogation," *Continental Western Ins. Co.*, 253 Neb. at 371, 570 N.W.2d at 712, I will focus my analysis on the issue of whether Blue Cross has an enforceable conventional subrogation right arising from the express provisions of its policy, notwithstanding the fact that Dailey has not been fully compensated for his injuries.

In *Frohlich*, this court recognized that there are two distinct types of subrogation: subrogation based on a contract, known as conventional subrogation, and subrogation arising by operation of law, known as legal subrogation. In comparing the two, we stated:

> Generally, subrogation is unavailable until the debt owed to a subrogor has been paid in full. . . . *However, if a contract provides for subrogation on payment of less than the full amount of a debt or loss, partial payment of a debt or loss may be the basis for subrogation. . . . However, unless a contract specifically provides otherwise,* equitable

> principles apply even when a subrogation right is based on contract. . . . Also, if a contractual right of subrogation is merely the usual equitable right which would have existed in any event in the absence of a contract, equitable principles control subrogation.

(Citations omitted.) (Emphasis supplied.) *Frohlich*, 243 Neb. at 117-18, 498 N.W.2d at 78-79. Applying these general principles in the context of insurance, we concluded that "an insurance policy reaffirms the rights of parties relative to subrogation but, in the absence of an express provision to the contrary, does not alter fundamental principles pertaining to subrogation." *Id.* at 119, 498 N.W.2d at 79. After determining that the policy at issue in *Frohlich* did not define the precise nature or extent of the insurer's subrogation interest and that the record did not disclose whether the insured had been fully compensated by the tort settlement, we reversed a judgment in favor of the insurer and remanded the cause for further proceedings.

In my view, *Frohlich* clearly recognized the right of an insurance company to specifically contract for a conventional subrogation right, regardless of whether its insured has been fully compensated by a tort settlement with a third party. Applying Nebraska law in *McIlheran v. Lincoln Nat. Life Ins. Co.*, 31 F.3d 709 (8th Cir. 1994), the Eighth Circuit Court of Appeals reached the same conclusion. At issue in *McIlheran* was a provision in a group health insurance policy which stated that the insurer's subrogation right against the proceeds of a third party settlement " 'will apply whether or not payment has been made by the third party for all of the Insured Individual's losses.' " (Emphasis omitted.) *Id.* at 711. Rejecting an argument that this provision was contrary to the law and public policy of Nebraska, the *McIlheran* majority relied upon this court's pronouncement in *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993), that " 'if a contract provides for subrogation on payment of less than the full amount of a debt or loss, partial payment of a debt or loss may be the basis for subrogation.' " *McIlheran*, 31 F.3d at 711, quoting *Frohlich, supra*. The *McIlheran* majority reasoned that if the *Frohlich* court had believed that policy language providing for subrogation in the absence of full recovery would violate Nebraska law or policy, it "would have held that in no case may

an insurer subrogate if the insured has not been fully compensated." 31 F.3d at 711.

A further indication that we meant what we said in *Frohlich* is apparent from the structure of our analysis in *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997). In that case, an insurance carrier claimed a right of conventional subrogation with respect to a third-party tort settlement that did not result in full compensation to the injured insured. Citing the rule from *Frohlich* that "in the absence of an express provision to the contrary, an insurance policy reaffirms the rights of parties relative to subrogation but does not alter the fundamental principles pertaining to subrogation," we first examined whether the subrogation provision of the policy described only rights which would have existed under equitable principles of subrogation, noting that if it did, then the subrogation clause could not be fairly characterized as a "distinct contractual undertaking" between the parties which would supersede the equitable "made whole" rule. *Continental Western Ins. Co.*, 253 Neb. at 370, 570 N.W.2d at 711. We concluded that the policy did not create a contractual right that was different from the insurer's equitable right to subrogation and that thus, there was no right of subrogation where the insured had not been fully compensated by her settlement with the tort-feasor. There would have been no reason to engage in this analysis if, as the majority holds today, an express policy provision creating a subrogation right in the absence of full compensation is unenforceable, and statements to the contrary in *Frohlich* are mere dicta.

In the instant case, the district court followed the analytical framework which we outlined in *Continental Western Ins. Co.* and correctly determined that the health insurance policy in question included a distinct contractual undertaking which gave Blue Cross subrogation rights regardless of whether its insured is fully compensated by a third-party tort settlement. The district court then concluded that the provision did not contravene public policy and was enforceable.

In holding to the contrary, the majority adopts the reasoning of Wisconsin courts that a subrogation clause of the type at issue here is unenforceable because "it is inequitable." *Ruckel v. Gassner*, 253 Wis. 2d 280, 295, 646 N.W.2d 11, 19 (2002). See

Rimes v. State Farm Mut. Auto. Ins. Co., 106 Wis. 2d 263, 316 N.W.2d 348 (1982). I disagree with this reasoning because, as another court has succinctly noted: "This is not a case based in equity, but rather on contractual terms." *In re Estate of Scott*, 208 Ill. App. 3d 846, 849, 567 N.E.2d 605, 607, 153 Ill. Dec. 647, 649 (1991).

An insurance policy is a contract. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003); *Hall v. Auto-Owners Ins. Co.*, 265 Neb. 716, 658 N.W.2d 711 (2003). In reviewing an insurance policy, we construe 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. *Auto-Owners Ins. Co. v. Home Pride Cos., ante* p. 528, 684 N.W.2d 571 (2004); *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004). The majority finds no ambiguity in the policy, noting that it "allowed subrogation and a right to recovery regardless of whether the insured was fully compensated for his or her loss." Nevertheless, citing *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993), the majority construes the policy "to confirm, but not expand, the equitable subrogation rights of insurers." By engaging in such construction of unambiguous policy language, the majority has ignored the established principle that when the terms of an insurance contract are clear, no judicial construction is required or permitted. See *Boutilier v. Lincoln Benefit Life Ins. Co., ante* p. 233, 681 N.W.2d 746 (2004). Moreover, I am unaware of any previous case in which this court has invalidated an unambiguous provision of an insurance policy based upon equitable considerations, as the majority has done here. Does this mean that insurance policies and other contracts will now be required to conform to all of the requirements of equity before the law will enforce them?

This court has now joined a minority of jurisdictions which imposes a bright-line rule that an insurance company may not utilize a conventional subrogation clause which expressly applies regardless of whether the injured insured has received full compensation from a tort-feasor. Only two jurisdictions appear to soundly adhere to this rule, as the Wisconsin cases cited above and *Hare v. State*, 733 So. 2d 277 (Miss. 1999), so hold.

The relevant authority in two other jurisdictions is questionable, because both *York v. Sevier County Ambulance Authority*, 8 S.W.3d 616 (Tenn. 1999), and *Davis v. Kaiser Foundation*, 271 Ga. 508, 521 S.E.2d 815 (1999), rely heavily on the reasoning of *Powell v. Blue Cross and Blue Shield of Alabama*, 581 So. 2d 772 (Ala. 1990), *overruled, Ex parte State Farm Fire and Casualty Co.*, 764 So. 2d 543 (Ala. 2000), based upon a determination by the Supreme Court of Alabama that *Powell* was wrongly decided. As the majority notes, Alabama law currently provides that an agreement of the parties may supersede the general rule that a subrogee is not entitled to recover unless the insured has had a full recovery. See *Ex parte Cassidy*, 772 So. 2d 445 (Ala. 2000). Given the subsequent overruling of *Powell*, the opinions from Tennessee and Georgia are not persuasive.

In *Frohlich*, we cited and relied upon *Westendorf by Westendorf v. Stasson*, 330 N.W.2d 699 (Minn. 1983), as well as other cases, for the rule that "unless a contract specifically provides otherwise, equitable principles apply even when a subrogation right is based on contract." *Frohlich*, 243 Neb. at 118, 498 N.W.2d at 79. The actual language used by the Minnesota Supreme Court in *Westendorf by Westendorf* was "absent express contract terms to the contrary, subrogation will not be allowed where the insured's total recovery is less than the insured's actual loss." 330 N.W.2d at 703. In *Hershey v. Physicians Health Plan*, 498 N.W.2d 519 (Minn. App. 1993), the Minnesota Court of Appeals considered the question of whether the phrase "absent express contract terms to the contrary" in *Westendorf by Westendorf* permitted an insurer to contract for subrogation regardless of whether the insured had been fully compensated, and concluded that it did. The court determined that the language in *Westendorf by Westendorf* recognizing a right to override the general equitable rule by contract was not dictum. The court concluded:

> We are mindful that important equity and policy concerns support the full recovery rule and that the adhesive nature of insurance contracts generally compels courts to be vigilant in safeguarding the rights of insureds. Nonetheless, in *Westendorf* the supreme court flatly stated that the full

> recovery rule may be modified by contract; we are obliged to follow that unambiguous statement.

Hershey, 498 N.W.2d at 521.

Other courts have likewise concluded that an insurance policy or other contract may supersede the equitable rule by unambiguously providing for a subrogation right in a tort settlement even where the insured does not receive full compensation. *Fields v. Farmers Ins. Co., Inc.*, 18 F.3d 831 (10th Cir. 1994) (applying Oklahoma law); *Ex parte State Farm Fire and Casualty Co.*, 764 So. 2d 543 (Ala. 2000); *Samura v. Kaiser Foundation Health Plan*, 17 Cal. App. 4th 1284, 22 Cal. Rptr. 2d 20 (1993); *In re Estate of Scott*, 208 Ill. App. 3d 846, 567 N.E.2d 605, 153 Ill. Dec. 647 (1991); *Culver v. Insurance Co. of North America*, 115 N.J. 451, 559 A.2d 400 (1989); *Peterson v. Ins. Co.*, 175 Ohio St. 34, 191 N.E.2d 157 (1963). See *Hill v. State Farm Mut. Auto. Ins. Co.*, 765 P.2d 864 (Utah 1988) (recognizing equitable principles underlying subrogation can be modified by contract, but applying equitable principles because record did not include alleged contractual modification), *disapproved on other grounds, Sharon Steel v. Aetna Cas. and Sur.*, 931 P.2d 127 (Utah 1997).

While I conclude that Nebraska law specifically permits a contractual override of the equitable "made whole" principle of subrogation, I acknowledge that this rule could lead to a harsh result. It is true that a subrogated health insurer having a policy which includes such an override provision could recover 100 percent of its claim from a third-party tort settlement, while the injured insured could recover a much smaller percentage of his or her provable claim from the remaining proceeds. Such a result can, of course, be anticipated and alleviated through negotiation, as was done in this case where Dailey secured an agreement from Union Pacific to satisfy and indemnify him against any subrogation lien which Blue Cross may have, in addition to the payments which Union Pacific has agreed to make directly to Dailey. However, I anticipate that the bright-line rule adopted by the majority, which precludes any recovery by a subrogated insurer unless the insured has been made completely whole by the tort-feasor, will also lead to harsh results. As I understand the reasoning of the majority, if an injured party settles for 99

percent of full compensation, a subrogated health insurance carrier could recover nothing from the settlement and its rights against the tort-feasor would be extinguished. A better solution to this dilemma would be a requirement that where a tort settlement yields less than full compensation, the injured party and the subrogated health insurer would share the proceeds of the settlement on a pro rata basis. The imposition of such a requirement, however, would require legislation. See Neb. Rev. Stat. § 44-3,128.01 (Reissue 1998) (permitting pro rata subrogation under medical payments coverage of automobile liability policies). In the absence of such legislation with respect to health insurance policies, it is my opinion that an insurer is free to include in its policy the type of subrogation clause before us in this case and that the courts are obligated to enforce them. The judgment of the district court was therefore correct in all respects, and I would affirm.

CONNOLLY, J., joins in this dissent.

ROBERT SWEENEY, APPELLANT, V. KERSTENS & LEE, INC., AND ROYAL & SUNALLIANCE INSURANCE COMPANY, APPELLEES.

688 N.W.2d 350

Filed October 22, 2004. No. S-03-525.

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. ____: ____. When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.
3. **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.
4. **Workers' Compensation: Mental Health.** A worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker's injury and results in disability.

5. **Workers' Compensation: Mental Health: Evidence.** Where the evidence is sufficient to permit the trier of fact to find that a psychological injury is directly related to the accident and the employee is unable to work, the employee is entitled to be compensated.
6. **Workers' Compensation: Proof.** In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.
7. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
8. **Negligence: Proximate Cause.** A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and HANNON and CARLSON, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

Dirk V. Block, Jerylyn R. Bridgeford, and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellant.

Mark J. Peterson and Joseph M. Colaiano, of Koley Jessen, P.C., L.L.O., for appellees.

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

GERRARD, J.

NATURE OF CASE

The plaintiff, Robert Sweeney, was injured in an accident that arose out of and was in the course of his employment, and was awarded workers' compensation benefits. Sweeney became clinically depressed, however, after his vocational rehabilitation counselor concluded that Sweeney's loss of earning capacity was only 55 to 60 percent. The question presented in this appeal is whether Sweeney's depression, which resulted from a disappointing vocational rehabilitation report, was proximately caused by Sweeney's original accident.

BACKGROUND

Sweeney was injured in 1997 in an accident that the parties agree arose out of and was in the course of Sweeney's employment with the defendant, Kerstens & Lee, Inc. Sweeney had another accident in 1998, and the Workers' Compensation Court found that this accident also arose out of and was in the course of Sweeney's employment. Sweeney suffered from numbness and pain in his neck and arms as a result of his accidents. In March 2000, the single judge of the Workers' Compensation Court entered an award for temporary total disability benefits, permanent partial disability benefits, and payment of medical expenses. Because Sweeney had not yet reached maximum medical improvement, the single judge reserved ruling on Sweeney's entitlement to vocational rehabilitation.

In December 2000, Kerstens & Lee applied for modification of the award, alleging that Sweeney had reached maximum medical improvement. In response, Sweeney sought continued disability benefits and vocational rehabilitation. However, that motion for modification was dismissed without prejudice, and the parties agreed that Sweeney would be evaluated by Michael Newman, a vocational rehabilitation counselor. Sweeney participated in vocational rehabilitation, with little success. Newman eventually authored a loss of earning capacity report, dated January 20, 2002, that concluded Sweeney's future loss of earning power would "range from 55% to 60%."

Sweeney became severely depressed, and in the spring of 2002, he attempted suicide. Sweeney's neurosurgeon referred him to Dr. William Marcil, a psychiatrist, who diagnosed Sweeney with "Major Depression, single episode and Anxiety disorder, not otherwise specified." Marcil opined that the depression was "due to the significant degree of stress and loss that has evolved since his injury to his neck approximately three years ago." Marcil stated that Sweeney "has become demoralized, angry and threatened that he will not get the financial assistance that he feels is due to him given the residuals of his physical condition." Marcil concluded that "Sweeney is not capable of gainful employment at this time due to his psychiatric problems and his inability to handle any additional stress that may be imposed on him within a work environment." Based on Marcil's opinion, Newman stated that

"my opinion concerning . . . Sweeney's earning capacity would now change to a loss of 100%."

At Kerstens & Lee's request, Sweeney was evaluated by Dr. Bruce Gutnik, another psychiatrist. Gutnik opined that at the time of his evaluation of Sweeney, his diagnosis was "Major Depressive Disorder, single episode, in partial remission." Gutnik stated that "Sweeney's depressive episode was triggered by a court ruling in approximately May 2002 that his disability rating was '58%' and his understanding that this meant his benefits would be time limited." (Although Gutnik's opinion refers to a "court ruling" in "May 2002," it is apparent from the record that Gutnik intended to refer to Newman's January 20 loss of earning capacity report, and the parties have argued on that basis.) Gutnik further opined that Sweeney's "single episode of Major Depressive Disorder was not triggered, in my opinion, with a reasonable degree of medical certainty by pain or disability, but rather, by unhappiness with a court ruling."

Sweeney's case came before the single judge on another application by Kerstens & Lee to modify the award. The single judge found that Sweeney had reached maximum medical improvement and had suffered a total earning power loss of 60 percent, 55 percent of which was attributable to his 1998 accident and injury. The single judge ordered cessation of Sweeney's temporary total disability benefits and awarded permanent partial disability benefits. However, the single judge rejected Sweeney's claim that his depression rendered him totally disabled and disallowed Sweeney's claim for payment of psychiatric care expenses. The single judge reasoned:

> The Court finds the opinion expressed by Dr. Gutnik to be persuasive. Dr. Marcil speaks of how the plaintiff has been progressively concerned over his lack of returning to baseline physically and being unable to resume the work level that he previously enjoyed. Dr. Marcil was of the opinion that the plaintiff's self concept in general has been greatly transformed due to his lack of productivity and his perceived inadequacies compared with how he performed before the injury. However, the Court has noted that in the previous spring, Mr. Newman reported that Mr. Sweeney had been fully cooperative and compliant in working with Mr.

> Newman to develop a vocational plan. Mr. Newman reported that the plaintiff consistently responded in a positive manner and demonstrated a strong commitment for returning to work. This positive attitude which Mr. Newman noted in the plaintiff suggests to me that it was indeed Mr. Newman's opinion and not the losses suffered by the plaintiff as a result of his accident and injury that caused the plaintiff to suffer the depression and anxiety.

The review panel of the Workers' Compensation Court affirmed the decision of the single judge, without comment.

The Nebraska Court of Appeals reversed the judgment of the Workers' Compensation Court review panel. *Sweeney v. Kerstens & Lee, Inc.*, 12 Neb. App. 314, 672 N.W.2d 257 (2003). The Court of Appeals stated, "[E]ven if we assume that Sweeney's depression resulted from Newman's initial opinion, Sweeney's psychiatric injuries are nevertheless still compensable. The Nebraska Supreme Court has stated that when an injury arises out of a person's employment, every natural consequence that flows from the injury likewise arises out of the employment." *Id.* at 319-20, 672 N.W.2d at 262. The court concluded that "without Sweeney's injury, there would have been no loss of earning capacity and thus no depression resulting from that loss." *Id.* at 320, 672 N.W.2d at 262. Consequently, the Court of Appeals concluded that the Workers' Compensation Court had erred in finding that Sweeney's depression and medical bills for treatment of depression were not compensable. *Id.* We granted Kerstens & Lee's petition for further review.

ASSIGNMENTS OF ERROR

Kerstens & Lee assigns that the Court of Appeals erred in (1) finding that the single judge committed clear error in adopting the expert opinion of Gutnik and finding that Sweeney's depressive disorder and the medical bills resulting from the treatment of said disorder were not related to accidents and resulting injuries sustained while Sweeney was employed by Kerstens & Lee and (2) awarding attorney fees.

STANDARD OF REVIEW

[1] 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. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004).

ANALYSIS

[2,3] We note, initially, that the parties have premised their arguments on appeal as if Gutnik's opinion regarding the causation of Sweeney's depression is controlling. When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998). It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004). In this case, the compensation court found Gutnik's opinion to be more credible or persuasive. The Court of Appeals concluded that even assuming Gutnik's opinion was correct, Sweeney's depression was nonetheless compensable. *Sweeney v. Kerstens & Lee, Inc.*, 12 Neb. App. 314, 672 N.W.2d 257 (2003). Because we do not substitute our judgment regarding the credibility of expert witnesses for that of the compensation court, and because the parties have recognized that principle, the issue before us is whether Gutnik's opinion supports the Court of Appeals' determination that Sweeney's depression was proximately caused by his original work-related injury.

[4,5] It is well settled in Nebraska workers' compensation law that a worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker's injury and results in disability. *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991); *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985); *Davis v. Western Electric*, 210 Neb. 771, 317 N.W.2d 68 (1982); *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 144 N.W.2d 154 (1966); *Haskett v. National Biscuit Co.*, 177 Neb. 915, 131 N.W.2d 597 (1964); *Lee v. Lincoln*

Cleaning & Dye Works, 145 Neb. 124, 15 N.W.2d 330 (1944). Where the evidence is sufficient to permit the trier of fact to find that a psychological injury is directly related to the accident and the employee is unable to work, the employee is entitled to be compensated. *Kraft, supra*, citing *Johnston, supra*. See, generally, 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 56.05 (2003).

[6,7] In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998). A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003); *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

[8] In workers' compensation cases, a distinction must be observed between causation rules affecting the primary injury and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. *Rosemann v. County of Sarpy*, 237 Neb. 252, 466 N.W.2d 59 (1991). When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of " ' "direct and natural results." ' " *Id.* at 258, 466 N.W.2d at 63. A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster. *Meyer v. State*, 264 Neb. 545, 650 N.W.2d 459 (2002).

In this case, however, Gutnik's opinion, adopted by the single judge of the compensation court, clearly established that Sweeney's depression was entirely attributable to Newman's loss of earning capacity report, which Sweeney believed would have an unfavorable impact on his compensation litigation. Gutnik

opined that Sweeney's depressive disorder "was not triggered, in my opinion, with a reasonable degree of medical certainty by pain or disability, but rather, by unhappiness with a court ruling." This opinion is clearly distinguishable from that in a case such as *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991), in which this court affirmed an award of workers' compensation benefits to a worker whose traumatic neurosis was attributed, by expert testimony, to both his physical injury and the psychological loss resulting from the worker's immobility and inability to work. Based on that expert opinion, we concluded that the single judge in that case was not clearly wrong in finding that the worker's disabling condition was the proximate result of the work-related accident. *Id.* Here, however, Sweeney's disabling condition was found to result in no part from physical loss, but entirely from an unfavorable loss of earning capacity report.

Under comparable circumstances, it has generally been held that a psychological injury resulting solely from the process of compensation or litigation is not proximately caused by the underlying accident. See, *Ryan v. W.C.A.B. (Community Health Serv.)*, 550 Pa. 550, 707 A.2d 1130 (1998) (psychological injury triggered by lawsuit over work-related accident not product of accident); *Keller Mfg. & Bitum. Cas. v. Hoke*, 215 Va. 525, 211 S.E.2d 82 (1975) (mental condition aggravated by involvement and termination of compensation payments not causally related to covered accident); *Jarosinski v. Indust. Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002) (litigation stress is intervening event, not compensable consequence of industrial injury); *Funaioli v. City of New London*, 61 Conn. App. 131, 763 A.2d 22 (2000) (work-related injury not cause of anxiety over pending workers' compensation claims); *Rodriguez v. W.C.A.B.*, 21 Cal. App. 4th 1747, 27 Cal. Rptr. 2d 93 (1994) (emotional reaction to medical examiner's opinion, and employer's reliance on opinion to terminate benefits, not compensable consequence of original industrial injury); *Motorola, Inc. v. Industrial Com'n*, 125 Ariz. 211, 608 P.2d 788 (Ariz. App. 1980) (psychological reaction to notice of claim status not injury caused by event arising out of employment). But see, *Coleman v. Emily Enterprises, Inc.*, 58 S.W.3d 459 (Ky. 2001) (work-related injury proximate

cause of anxiety over workers' compensation claim); *Detjen v. Workmen's Comp. Appeals Bd.*, 42 Cal. App. 3d 470, 116 Cal. Rptr. 860 (1974) (temporary disability from neurosis precipitated by reopening of workers' compensation claim is compensable), *disagreement recognized, Rodriguez, supra.*

Given Gutnik's opinion in this case, we are persuaded the applicable rule is that Sweeney's litigation stress was an intervening event that broke the causal connection between his depression and the original work-related accident. See, *Jarosinski, supra*; *Rodriguez, supra*; *Motorola, Inc., supra.* Sweeney's depression was not the result of a natural and continuous sequence beginning with an accident arising out of and in the course of his employment.

> "Strictly speaking, all consequences are 'natural' which occur through the operation of forces of nature, without human intervention. But the word, as used, obviously appears not to be intended to mean this at all, but to refer to consequences which are normal, not extraordinary, not surprising in the light of ordinary experience."

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 174, 425 N.W.2d 872, 882 (1988), quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 43 (5th ed. 1984).

While some anxiety over the progress of a workers' compensation claim is to be expected, we cannot say that the single judge erred in concluding that a major depressive episode, triggered solely by an unfavorable report from a vocational rehabilitation counselor, is not a normal or expected consequence of a work-related accident. The Court of Appeals reasoned that in this case, "the evidence shows that without Sweeney's injury, there would have been no loss of earning capacity and thus no depression resulting from that loss." *Sweeney v. Kerstens & Lee, Inc.*, 12 Neb. App. 314, 320, 672 N.W.2d 257, 262 (2003). But as previously noted, the proximate cause of an injury is that cause which in a natural and continuous sequence produces the injury *and* without which the injury would not have occurred. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003). While the Court of Appeals correctly observed that Sweeney's depression would not have occurred without his work-related accident,

the court erred in concluding that Sweeney's depression was a natural, as opposed to extraordinary, result of the accident.

Based on the foregoing analysis, we conclude that the Court of Appeals erred in determining that Sweeney's depression was proximately caused by his work-related injury. The single judge acted within his discretion in crediting Gutnik's opinion and concluding, based upon that opinion and other competent evidence, that Sweeney's depression was not compensable.

Kerstens & Lee also assigns that the Court of Appeals erred in awarding attorney fees, based upon its conclusion that Sweeney's injury was compensable. Obviously, given that the Court of Appeals erred in reversing the judgment of the compensation court review panel, the Court of Appeals also erred in awarding attorney fees.

CONCLUSION

The Court of Appeals erred in reversing the review panel's affirmance of the judgment of the compensation court finding that Sweeney's depression was not proximately caused by an accident arising out of and in the course of his employment. The Court of Appeals consequently erred in awarding attorney fees. The judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to vacate its award of attorney fees and to affirm the judgment of the Workers' Compensation Court review panel.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF JEFFREY B., DECEASED.
JAMES RIGGINS AND TERESA RIGGINS, APPELLEES, V. GEORGE H. SHANER AND CATHERINE SHANER, APPELLANTS.

688 N.W.2d 135

Filed October 29, 2004. No. S-03-1404.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002), are reviewed for error on the record.

2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Rules of Evidence.** In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
4. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
5. **Guardians and Conservators.** Whether appointed by will or by a court, the standard for removal of the guardian of a minor pursuant to Neb. Rev. Stat. § 30-2616 (Reissue 1995) is the same: the best interests of the ward.
6. **Constitutional Law: Parent and Child: Public Policy.** Where a parent's constitutionally protected relationship with a child is not at issue, both public policy and the Nebraska statutes require the case to be determined by reference to the paramount concern in child custody disputes—the best interests of the child.
7. **Trial: Self-Incrimination.** Where a defendant in a civil case refuses to testify on the ground that the evidence may incriminate him or her, the trier of fact may draw an adverse inference from the refusal.
8. **Evidence: Appeal and Error.** In order that assignments of error concerning the admission or rejection of evidence may be considered, an appellate court requires that appropriate references be made to the specific evidence against which an objection is urged.
9. **Appeal and Error.** It is not the function of an appellate court to scour the record looking for unidentified evidentiary errors.
10. **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 evidence admitted.
11. **Evidence: Appeal and Error.** Evidence objected to which is substantially similar to evidence admitted without objection results in no prejudicial error.
12. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.
13. **Appeal and Error.** A party cannot complain of error which that party has invited the court to commit.
14. **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.
15. **Visitation.** The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights.
16. ____. The need for a stable home environment free of unsettling influences is one of the factors to be considered in determining reasonable visitation rights.

Appeal from the County Court for Lancaster County: JACK B. LINDNER, Judge. Affirmed.

Stephanie R. Hupp, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., for appellants.

Terrance A. Poppe and Kelly N. Tollefsen, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellees.

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

GERRARD, J.

NATURE OF CASE

This case involves the guardianship of V.B. and S.B., whose parents died in separate drug-related incidents. In his will, Jeffrey B. (Jeff), the father, appointed George H. Shaner and Catherine Shaner as testamentary guardians, and after Jeff's death, the Shaners accepted that appointment. James Riggins and Teresa Riggins, the children's successor guardians under Jeff's will, filed a motion to remove the Shaners and have themselves appointed as guardians, and the county court granted those requests. The question presented in this appeal is what presumption, if any, must be overcome to remove a minor's testamentary guardian.

FACTUAL BACKGROUND

At the time of the hearing, V.B. was 9 years old and S.B. was 7 years old. George was employed as a computer programmer at the time of the hearing. Catherine was a financial manager at the University of Nebraska. James was the day custodian in charge of Lincoln High School. Teresa was a staff assistant in the football program at the University of Nebraska. Jamie B., V.B. and S.B.'s mother, had died on December 26, 1999, of an asthma attack that was apparently induced by drug use. James was Jamie's father, and Teresa was Jamie's stepmother.

CIRCUMSTANCES OF JEFF'S DEATH

Jeff died in a Lincoln, Nebraska, motel room on February 26, 2001, sometime between 1 and 6:10 a.m. Jeff's cause of death was determined to be acute drug overdose by heroin. Richard Doetker, a criminal investigator for the Lincoln Police Department, testified regarding his investigation into Jeff's death. Doetker testified that in his opinion, based on his training and experience, Jeff's body

had either been cleaned off or moved from where he had died. Doetker found it suspicious that although Jeff died of a drug overdose, no drugs or drug paraphernalia were found in the room.

George went to Jeff's motel at approximately 8 a.m. on February 26, 2001. Doetker testified that George had shown up at the motel after calling the front desk "a couple times" and that George had claimed to be Jeff's brother. When asked how and when he found out about Jeff's death, George refused to answer on the ground that he might incriminate himself.

George refused, also on Fifth Amendment grounds, to testify whether he had made any telephone calls from Jeff's motel on the date of Jeff's death. George similarly refused to answer questions about a series of telephone calls placed to his telephone during the early morning hours of February 26, 2001, by Jennifer Mertlik, Jeff's fiance, who is now known as Jennifer Martin (Martin). Doetker testified that telephone records showed a series of calls from Martin's cellular telephone to George's telephone. George refused to answer questions about meeting with Martin, about discussing with her a story to tell the police, or about whether he went to the motel room to clean up a possible crime scene.

George was arrested, but not charged, for witness tampering with respect to Martin. When asked whether he had cooperated fully with the Lincoln Police Department's investigation of Jeff's death, George again invoked his Fifth Amendment rights. Doetker stated that George was facing "possible charges in this investigation," but could not discuss the matter further because it was a continuing investigation.

George had driven to the motel on February 26, 2001, in Jeff's vehicle, which George drove from Jeff's house after going there to get the keys. George refused to say why he went to the house to get the vehicle, who was at the house at the time, what time he arrived there, how he got there, who called him, or where he had been previously. George invoked his Fifth Amendment rights when asked whether he was aware of a drug transaction in Jeff's motel room on February 26. George admitted that he had used marijuana with Jeff about 2 years before Jeff's death. However, George testified that he had not used illegal drugs since then; George stated that he had been regularly tested for illegal drugs prior to the hearing and that the test results were negative.

Catherine also refused, on the ground of spousal privilege, to answer questions about how she had learned of Jeff's death. She similarly refused to say whether she had spoken with anyone at Jeff's motel. She refused to say whether she had known Jeff to use illegal drugs. Catherine also initially invoked spousal privilege when asked about where George had been on the night of Jeff's death or whether George had received any telephone calls on the night of Jeff's death. However, Catherine later testified that she had not gone to the motel room, that George had left their residence at around 2 a.m. on February 26, 2001, and had returned about 6:30 a.m., and that George had received a telephone call before leaving. However, Catherine still refused, on the ground of spousal privilege, to confirm that the telephone call had been from Martin. Catherine also refused to state whether she had heard George tell Martin to lie about the circumstances of Jeff's death.

Martin refused, on Fifth Amendment grounds, to explain how she learned of Jeff's death or if she had spoken with George in the early morning on February 26, 2001, to discuss Jeff's death. Martin also refused to state whether she had either met with George that morning before going to Jeff's motel or discussed with George what they would tell the police. Martin refused to state whether George told her to lie to police. Martin was charged with providing false information to a police officer, but the charge was dismissed following a diversion program.

SHANERS' GUARDIANSHIP

Jeff's will appointed the Shaners as the guardians of V.B. and S.B., and the Rigginses as successor guardians. On March 8, 2001, the Shaners accepted the testamentary appointment as guardians for V.B. and S.B., and their acceptance was filed with the county court on March 30.

For the first 6 months of the guardianship, V.B. and S.B. stayed with Martin in the house where they had lived with Martin and Jeff. After about 6 months, the children began staying more with the Shaners, but still spent three to four nights a week with Martin. George testified that the Shaners paid Martin $1,000 per month to "babysit"; the money came from V.B.'s and S.B.'s Social Security benefits. However, Martin testified that she was

paid $500 per month. The Shaners also allowed Martin to live rent free with her own children in Jeff's former house, which had been inherited by V.B. and S.B. The Shaners paid Martin's utilities, bought food for the residence, and also helped Martin pay attorney fees. Martin testified that she was provided with the use of a vehicle by the Shaners and that George paid the insurance and fuel expenses for the vehicle.

George had been the personal representative of Jeff's estate, but on May 13, 2002, George resigned as personal representative and First Nebraska Trust Company (First Nebraska) was appointed as successor personal representative. A trust officer for First Nebraska confirmed that Jeff's residence, which belonged to the children as an asset of Jeff's estate, had been lived in rent free and that estate assets were being used to pay the utilities for that residence. The trust officer was also asked about the property that she was managing for the children. She was reluctant to talk about the family trust because of privacy concerns, but the trust officer stated that most of the assets—approximately $243,000—were still in the estate.

Catherine testified that she and George owned a Quonset hut in Lincoln and that they had owned it since "'95, '96." The hut had an upstairs and downstairs. The upstairs had been "off limits to children" from the time it was built until about a year before the hearing. Catherine testified that V.B. and S.B. had visited the Quonset hut with Jeff and that the Shaners, Martin, and a "[f]ew other friends" were often present. Catherine testified that the upstairs was an "adult room," where they "did cigarette smoking and play[ed] Dominoes and had a few beers." Martin also testified that the upstairs was an "adult room," but she refused to explain why, on the ground that it might incriminate her. Martin invoked her Fifth Amendment rights when asked whether George brought drugs to the Quonset, whether George used drugs there, or whether V.B. and S.B. had been present at the Quonset when drugs were used.

RIGGINSES' GUARDIANSHIP

On May 1, 2002, the Rigginses filed an application in the county court for an order appointing them as temporary co-guardians and coconservators of V.B. and S.B. The parties then

stipulated, on June 18, that the Rigginses should be appointed "successor temporary co-guardians and co-conservators" of the children until trial could be had on their motion to remove the Shaners as guardians. The stipulation provided the Shaners with "parenting time" on every other weekend, every Wednesday, and alternate Mondays. The county court entered an order to that effect.

A school social worker for Lincoln Public Schools worked with V.B. and S.B. starting in September 2002. The social worker testified generally that V.B. and S.B. were doing well since they had been living with the Rigginses and had made positive gains since moving. The social worker testified that she would be concerned if the children returned to the Shaners, because "on a couple of different occasions," the children had "mentioned that they're afraid of the Shaners." The social worker did not have any concerns about the Rigginses.

V.B. testified over objection. V.B. stated that she did not like going to visit the Shaners because she did not "think they [were] good people." However, V.B.'s testimony indicated that her opinion was based, at least in part, on things that the Rigginses had told her about the Shaners. James admitted that he had negative opinions about the Shaners and that when the children asked for his opinions, he answered those questions truthfully.

Dr. Lisa Blankenau, a licensed psychologist, also testified over objection. The Shaners objected on the basis that Blankenau had been disclosed as a witness only 2 days before she was called to testify. Specifically, they objected that

> [w]e have not had any opportunity to obtain a rebuttal expert witness. What I would ask is either that this witness be stricken or that in that alternative if the Court is going to allow this witness to testify that when the Shaner's [sic] case is presented that we may have the opportunity to withhold our rest to obtain a rebuttal witness.

The Shaners also filed a motion in limine, stating that they "need[ed] adequate time to obtain rebuttal expert." The court ruled that it would hear the testimony but that the Shaners could withhold their rest "for a reasonable period of time to offer any evidence you wish in — in response thereto." However, the Shaners rested without presenting a witness to rebut Blankenau's

testimony, despite being reminded by the court at the time that they had been granted leave to withhold their rest.

Blankenau testified about her evaluation of V.B. and S.B. Blankenau testified that V.B. had consistently stated that she did not want to go with the Shaners, because she was afraid of them, they were unpredictable, she was confused by them, and they intimidated her and S.B. Blankenau opined that continued visitation with the Shaners was not in V.B.'s or S.B.'s best interests. Blankenau also testified that she did not believe that V.B. and S.B. were being manipulated or coached, because V.B. always provided examples of things that happened when she was with the Shaners that made her feel the way that she did. Blankenau did not make any recommendation regarding the fitness of the Shaners to be guardians.

The Rigginses testified generally regarding their activities with the children, their relationship with the children, and the children's relationship with their half brother, who is also in the Rigginses' care. Similarly, the Shaners testified about their activities with the children and presented testimony from other witnesses regarding the Shaners' relationship with the children and their fitness to be parents.

County Court Findings

At the conclusion of trial, on October 23, 2003, the county court temporarily ordered a halt to the Shaners' visitation, pending a permanent resolution of the case. No objection to that order appears in the record.

On November 24, 2003, the county court entered an order appointing the Rigginses as coguardians of V.B. and S.B. The court stated that "the ultimate standard for the appointment of a guardian is what is in the best interests of the minor children." The court found that "[i]t is without question to this Court that it is in the best interests of [V.B. and S.B.] that James Riggins and Teresa Riggins be appointed their guardians. The evidence is overwhelming . . . ." The court specifically noted the testimony of Blankenau and the school social worker that the children were doing well in the Rigginses' care. The court also stated that

> [t]he refusal by George . . . to answer any questions with respect to his knowledge of the events leading up to and

> subsequent to the death of [Jeff] is very troubling to this Court. Where a defendant in a civil case refuses to testify on the grounds that the evidence may incriminate him a Court may draw an adverse inference from his refusal to do so. . . . The questions raised regarding [Jeff's] death, the evidence presented regarding that death, and [George's] refusal to testify regarding that leave this Court no choice but to reach very disturbing conclusions therewith[.]

(Citation omitted.) The court stated similar concerns regarding Catherine's refusal to answer certain questions. The court found that the children were doing well academically and socially and had a close relationship with the Rigginses and that removing V.B. and S.B. from the Rigginses' care would do irreparable harm to the children. The court found that the Shaners were unfit to serve as guardians for the children and that it was not in the best interests of the children for the Shaners to be granted any parenting time with the children. The court ordered the parties to pay their own attorney fees. The Shaners perfected this appeal.

ASSIGNMENTS OF ERROR

The Shaners assign, consolidated and restated, that the county court erred in (1) appointing the Rigginses as guardians of the children, without giving due weight to the nomination of the Shaners as guardians in Jeff's will; (2) applying a "broad evidentiary standard" to the proceedings, including allowing hearsay evidence; (3) allowing evidence regarding the deaths of Jeff and Jamie; (4) allowing Blankenau's testimony; (5) entering a temporary order at the conclusion of the trial to terminate the Shaners' visitation; (6) terminating the Shaners' visitation; (7) failing to award attorney fees to the Shaners; and (8) overruling the Shaners' motion for directed verdict.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002), are reviewed for error on the record. *In re Guardianship of D.J., ante* p. 239, 682 N.W.2d 238 (2004). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported

by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3,4] In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001).

ANALYSIS

Standard for Removing Testamentary Guardian

The first issue we must address is the burden of proof applicable to a proceeding to remove a guardian who has accepted a testamentary appointment. The Rigginses contend, and the county court determined, that the best interests of the children are controlling. The Shaners argue, however, that a testamentary guardian is entitled to a presumption of fitness and may be removed only if clear and convincing evidence shows the guardian to be unfit.

Our resolution of this issue is controlled by the relevant provisions of the Nebraska Probate Code. The parent of a minor may appoint, by will, a guardian of an unmarried minor. § 30-2606. Section 30-2605 provides that "[a] person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian and minor ward." Subject to the objection of a minor over the age of 14, a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated. § 30-2606. A court may appoint a guardian for a minor if all parental rights of custody have been terminated or suspended by circumstances or court order, but a guardian appointed by will has priority over a guardian who may be appointed by the court. § 30-2608(d).

The priority provision of § 30-2608(d) is intended to address circumstances in which a court-appointed guardian comes into

existence before a parental nomination is discovered or implemented by acceptance, so that the authority of the court-appointed guardian will be terminated in favor of the parental nomination. See Unif. Probate Code § 5-204, comment, 8 U.L.A. 98 (Supp. 2004). However, while a guardian appointed by will has priority over a guardian who may be appointed by a court, the statutes draw no distinction between those methods of appointment once a guardian has, in fact, been appointed. In other words, the means by which a guardian has been appointed ceases to be relevant once the appointment is complete.

Section 30-2616 provides in part as follows:

> (a) Any person interested in the welfare of a ward, or the ward, if fourteen or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.
>
> (b) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

[5] Section 30-2616 does not distinguish between guardians appointed by will or by the court, and we find no other basis in the statutes for such a distinction. While a guardian appointed by will has priority in the process of *appointment*, once appointed, a testamentary guardian is simply a guardian like any other, with the same legal status as a guardian appointed by the court. See Unif. Probate Code § 5-201, comment, 8 U.L.A. 332 (1998). Consequently, whether appointed by will or by the court, the standard for removal of the guardian of a minor pursuant to § 30-2616 is the same: "the best interest of the ward."

In arguing to the contrary, the Shaners cite *Clymer v. La Velle*, 194 Neb. 91, 230 N.W.2d 213 (1975), in which the guardianship of an orphan, Todd Allen La Velle, was contested between Todd's aunt and uncle and Todd's sister. Todd's father left a will that contained a testamentary appointment of Todd's aunt and uncle as his guardians. The Shaners rely, in this case, upon our statement in that opinion that "[t]he testamentary appointment of [Todd's aunt and uncle] as Todd's guardians cannot be ignored.

Todd's father was obviously concerned for his welfare and was in the best position to act in Todd's best interests. He knew intimately both the [aunt and uncle] and [Todd's sister]." *Id.* at 93, 230 N.W.2d at 216.

The Shaners' reliance on *La Velle* is unavailing for two reasons. First, our decision in *La Velle* was based upon law that preceded Nebraska's adoption of the Uniform Probate Code. Thus, the instant case is controlled by statutory provisions that were not in effect when *La Velle* was litigated. Second, the Shaners fail to note our conclusion in *La Velle* that "[i]t is generally held that [a testamentary appointment of a guardian] will be upheld *unless the best interests of the child require otherwise*." (Emphasis supplied.) 194 Neb. at 93, 230 N.W.2d at 216. As explained above, this standard is consistent with that imposed by current Nebraska law.

The Shaners also argue that a testamentary guardian is entitled to the same presumptions given a natural or adoptive parent in proceedings for termination of parental rights, or over more distant relatives or nonrelatives in guardianship proceedings. This contention is meritless. We recently discussed the principle of parental preference, in the context of a guardianship proceeding, in *In re Guardianship of D.J., ante* p. 239, 682 N.W.2d 238 (2004). We stated that the principle of parental preference provides that a court may not properly deprive a biological or adoptive parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. *Id.*

However, we explained that the primary justification for the parental preference principle is based upon constitutional considerations. Parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship—a relationship that in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion. *Id.*, citing *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992). We also noted that in addition to those constitutional considerations, in custody disputes between a parent and nonparent, courts turn to the parental preference principle because the best interests standard, taken to its logical conclusion, would place the

minor children of all but the "worthiest" members of society in jeopardy of a custody challenge. *Id.* We concluded that

> unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child. While the best interests of the child remain the lodestar of child custody disputes, a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child.

In re Guardianship of D.J., ante at 247-48, 682 N.W.2d at 245.

[6] However, the concerns we articulated in *In re Guardianship of D.J.* are limited to disputes in which a natural parent's right to custody is directly implicated. Where a parent's constitutionally protected relationship with a child is not at issue, both public policy and the Nebraska statutes require the case to be determined by reference to the "paramount concern" in child custody disputes—the best interests of the child. See *id.* at 243, 682 N.W.2d at 243.

Appointment of Rigginses as Guardians

Having concluded that the county court acted correctly in applying the standard of the best interests of the children, without affording the Shaners a presumption based upon Jeff's testamentary appointment, resolution of the Shaners' first and most important assignment of error requires us to determine if the court erred in finding that the best interests of the children were served by appointing the Rigginses as guardians. Specifically, we must determine if the court's decision is supported by competent evidence.

[7] In this regard, we note, as did the county court, that where a defendant in a civil case refuses to testify on the ground that the evidence may incriminate him or her, the trier of fact may draw an adverse inference from the refusal. See *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). See, also, *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976). Given the record before us, we conclude that the county court's decision is supported by competent evidence. The record contains substantial evidence showing that the children are thriving in the Rigginses' care,

and this evidence alone would suffice to support the county court's decision. But the record also contains, as the court stated, evidence which raises unsettling questions about the Shaners' fitness to serve as guardians for the children, and this evidence also supports the county court's decision.

Considering the evidence set forth above, the appropriate legal principles, and our standard of review, we conclude that the record contains competent evidence supporting the county court's determination that the best interests of V.B. and S.B. were served by appointing the Rigginses to serve as guardians for the children. The Shaners' first assignment of error is without merit.

Evidentiary Issues

[8,9] The Shaners' next three assignments of error concern evidentiary rulings made by the county court. First, the Shaners argue that the county court erred by applying a "broad evidentiary standard" to the proceedings, including the admission of hearsay. The Shaners claim that "[i]t is clear from reviewing the entire record in this case that hearsay evidence abounded." Brief for appellants at 28. However, in support of this argument, the Shaners identify only two instances in the record that they contend were hearsay. Consequently, we will consider the Shaners' objections in only those two instances. In order that assignments of error concerning the admission or rejection of evidence may be considered, an appellate court requires that appropriate references be made to the specific evidence against which an objection is urged. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). It is not the function of an appellate court to scour the record looking for unidentified evidentiary errors. See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

The first identified instance of hearsay is contained in the following colloquy, from the direct examination of the school social worker:

> [Rigginses' counsel:] Does [V.B.] appear to you to be happy?
>
> [School social worker:] She appears to me to be torn.
>
> Q Okay. And what do you mean by that?
>
> A Well, I think given the situation and the custody issues that are going on, I think she feels like there are a lot of

feelings that she can't express. I think she's got a lot of fears. I think she likes living with her grandparents. I know she does. She tells me that so —

[Shaners' counsel]: Objection. Hearsay.

THE COURT: Well, the rules are broad in this kind of a suit. Overruled. I'll receive the answer.

Q Does [V.B.] appear to you to be healthy?

A Healthy, yes.

[10] Plainly, the Shaners were not prejudiced by the overruling of their objection. To constitute reversible error in a civil case, the wrongful admission of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted. *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999). Here, while the Shaners' objection was overruled, the social worker never finished the statement to which the Shaners were objecting. Consequently, the testimony to which the objection was directed is not in evidence, despite the unfavorable ruling from the court.

The other instance identified by the Shaners occurred during the direct examination of Doetker, who was discussing his investigation into Jeff's death upon Doetker's arrival at the motel.

[Rigginses' counsel:] What did you do after arriving there?

[Doetker:] Basically I was briefed on what occurred there. The receptionist had told me that —

[Shaners' counsel]: Objection. Hearsay.

THE COURT: Well, I'm gonna overrule the objection. Rules of Evidence are very broad in this kind of a case. It's overruled. You may answer.

[Doetker:] The investigation showed that [an individual] checked into Room Number 203 approximately 3 p.m. on February 25th, 2001. And that a gentleman by the name of Jeff [B.] then came to that hotel at approximately 10 p.m. that evening.

[11] This colloquy again fails to demonstrate any prejudice to the Shaners. The only potentially prejudicial information contained in Doetker's statement was that Jeff arrived at the motel—a fact which was established continuously throughout the record. Evidence objected to which is substantially similar to evidence

admitted without objection results in no prejudicial error. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). Because neither of the hearsay objections identified by the Shaners resulted in prejudice to them, we reject their second assignment of error.

Next, the Shaners assign that the county court erred in admitting evidence regarding the deaths of Jeff and Jamie, which evidence the Shaners argue was irrelevant. However, the record contains very little evidence regarding Jamie's death and reveals nothing that would be prejudicial to the Shaners. The Shaners' argument on appeal is based on the evidence of Jeff's death and George's possible involvement in Jeff's death and its aftermath.

We simply reject the Shaners' argument that evidence of Jeff's death was irrelevant to the issues to be decided in these proceedings. The county court inferred "very disturbing conclusions" from George's repeated reliance on the Fifth Amendment. Those inferences were within the court's discretion and reflected on George's fitness to serve as guardian. It is difficult to conclude that evidence directly bearing on a guardian's general obedience to the law, and specific involvement in the death of his wards' father, is not relevant to his fitness to continue in the role of guardian. It was certainly not an abuse of discretion for the county court to conclude that such evidence was relevant. The Shaners' third assignment of error is without merit.

[12] Finally, the Shaners argue that the county court erred in allowing Blankenau to testify because she was belatedly disclosed as a witness. Generally, the control of discovery is a matter for judicial discretion. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002). Here, the court exercised its discretion by granting the Shaners' request to withhold their rest until they could obtain rebuttal testimony. This was, as reflected above, specifically requested by the Shaners in their objection and motion in limine.

[13] A party cannot complain of error which that party has invited the court to commit. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). In this case, the Shaners asked the court to exclude Blankenau's testimony or, in the alternative, allow them time to obtain a rebuttal witness. The court chose the latter, but the Shaners did not present a witness to rebut Blankenau's

testimony. In short, the court gave the Shaners what they requested in their objection and motion, and the Shaners cannot complain about that ruling on appeal.

VISITATION

[14] The Shaners' fifth and sixth assignments of error are directed at the county court's termination of the Shaners' visitation. Their fifth assignment of error, however, is moot. 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. *State on behalf of Pathammavong v. Pathammavong, ante* p. 1, 679 N.W.2d 749 (2004). The Shaners complain that the temporary termination of their visitation at the conclusion of trial was ordered without notice to the parties and violated their right to due process. However, the issue of whether the temporary order was issued in error was relevant only from the time that it was ordered until it was replaced by the county court's permanent order. Therefore, any issue relating to the temporary order is moot and need not be addressed in order to resolve this appeal. See *id.*

[15,16] The Shaners also argue that the court erred in permanently terminating their visitation. However, we conclude that the court's order is supported by competent evidence. The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights. *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001). The Shaners are not related to V.B. and S.B. and have no legal right to visitation. Cf. *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999). The record suggests that the children did not like visiting with the Shaners and were fearful of them, and that the instability associated with visitation was negatively affecting them. The need for a stable home environment free of unsettling influences is one of the factors to be considered in determining reasonable visitation rights. *Fine, supra.* The record also demonstrates hostility between the parties and disagreements over visitation prior to trial which required the court's intervention to resolve. Given these facts, we cannot say that the county court erred in concluding that the best interests of the children would not be served by continuing the Shaners' visitation schedule with the children.

REMAINING ASSIGNMENTS OF ERROR

We have considered the Shaners' two remaining assignments of error regarding the court's overruling of their motion for directed verdict and the potential award of attorney fees, and find each assignment of error to be without merit.

CONCLUSION

The county court correctly concluded that in proceedings to remove a testamentary guardian of a minor, the appropriate standard is the best interests of the minor. The court's finding that the best interests of V.B. and S.B. were served by appointing the Rigginses to serve as guardians is supported by competent evidence, and the court did not commit reversible error in its evidentiary rulings or in terminating the Shaners' visitation. The county court's judgment is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD WISINSKI, APPELLANT.

688 N.W.2d 586

Filed November 5, 2004. No. S-03-467.

1. **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.
2. **Rules of Evidence: Other Acts.** The admissibility of evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), must be determined upon the facts of each case and is within the discretion of the trial court.
3. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
4. **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.
5. ____: ____: ____. 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.

6. **Rules of Evidence: Other Acts.** Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
7. **Indictments and Informations: Aiding and Abetting: Jury Instructions.** An aiding and abetting instruction is proper where warranted by the evidence, notwithstanding the fact that the information charging the defendant does not contain specific aiding and abetting language.

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 Sarpy County, GEORGE A. THOMPSON, Judge. Judgment of Court of Appeals affirmed.

Patrick J. Boylan, Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Clifford Wisinski was convicted in the district court for Sarpy County of burglary and of theft by unlawful taking of more than $1,500. Wisinski appealed to the Nebraska Court of Appeals and assigned errors regarding evidentiary rulings, sufficiency of the evidence, and jury instructions. The Court of Appeals affirmed Wisinski's convictions and sentences. *State v. Wisinski*, 12 Neb. App. 549, 680 N.W.2d 205 (2004). We granted Wisinski's petition for further review. We affirm the Court of Appeals' decision.

STATEMENT OF FACTS

The facts of the underlying case were described in the Court of Appeals' opinion as follows:

> On January 31, 2002, Thomas Szynskie and Jana Szynskie went on vacation to Oklahoma. Jana left a key at the home of her friend, Wendy Womochil, with instructions for Womochil to care for Jana's pets while the Szynskies

were away. Womochil was not present at her home when Jana left her key, but Womochil's friend, Debra Holub, was present.

Holub contacted a friend, Clesson Wright, and told him about the key Jana had left at Womochil's home. Wright then contacted his friend, Wisinski. According to the testimony of Wright, Wisinski came over to Womochil's home and Wright, Wisinski, and Holub discussed using Jana's key in order to "look for some stuff to take out." Wright testified that he did not have a vehicle and that he had contacted Wisinski because Wisinski did have a vehicle.

The following morning, Wright went over to the Szynskies' home and entered using the key Jana had left at Womochil's house. Wright testified that upon arriving, he removed his boots by the door so as not to track snow or slush into the house and proceeded to feed the Szynskies' cats. Wisinski then arrived and knocked on the door; Wright let Wisinski in. The two men then proceeded to take numerous items from the home, loading them first into the garage so that the items could be loaded into Wisinski's vehicle all at once.

While Wright and Wisinski were looking through the house and loading items into the garage, the telephone rang several times. Wright answered the telephone each time, told the callers that Thomas was out of town, and wrote down their telephone numbers. At trial, Wright stated that he answered the telephone at Wisinski's instructions, "You better answer that. It might be one of the neighbors." Wright also testified that Wisinski took a snowblower and removed the snow from in front of the house and from the driveway. Wisinski told Wright that he did so "[t]o make it look like we're supposed to be there, a strange car in the driveway."

Wright testified that he and Wisinski then loaded all of the items from the garage into the back of Wisinski's vehicle and took them to a friend's home in North Omaha. After unloading the items, they went to a bank. Wright testified that Wisinski had taken a checkbook from the Szynskies' home and that he and Wisinski unsuccessfully attempted to cash a check from that checkbook which they had written to

"Melvin Roach." (Wisinski was later found using an identification card with the name "Melvin Roach" on it.) Wright and Wisinski then returned to the Szynskies' home and took some additional items, which they took to Wisinski's home.

The Szynskies returned home early from vacation upon the news that their house had been broken into. An investigation ensued. On February 13, 2002, Wisinski was apprehended in a red truck by police. Located in that truck were some of the items identified as stolen by the Szynskies, including a printer containing some business stationery imprinted with the name of Thomas' business.

At trial, Wisinski was found guilty of burglary and theft by unlawful taking, more than $1,500. Wisinski moved for a new trial. The trial court sentenced Wisinski to 3 to 10 years' imprisonment on each count, to be served concurrently. The trial court also denied Wisinski's motion for new trial.

State v. Wisinski, 12 Neb. App. 549, 553-54, 680 N.W.2d 205, 212 (2004).

Wisinski appealed to the Court of Appeals and asserted that the district court erred in (1) granting the State's request for a hearing pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), when the State had not articulated a proper purpose for which it offered evidence regarding the circumstances of Wisinski's apprehension; (2) admitting evidence of value of property over various objections; (3) failing to grant Wisinski's motion to dismiss because of allegedly insufficient evidence; (4) failing to give certain jury instructions; (5) giving an aiding and abetting instruction when the information charging Wisinski did not include aiding and abetting language; and (6) hearing Wisinski's motion for new trial after, rather than before, sentencing.

The Court of Appeals rejected each of Wisinski's assignments of error and concluded that (1) regarding the rule 404 assignment of error, the district court had properly determined that the evidence at issue was evidence of events inextricably intertwined with the charged crime and was not rule 404 evidence of other crimes; (2) Wisinski failed to argue his assignment of error regarding admission of evidence of value of property; (3) there was sufficient evidence to support the convictions; (4) the district court did not err in refusing the jury instructions urged by Wisinski; (5) the

evidence supported the aiding and abetting instruction, and Wisinski need not have been charged with aiding and abetting in order for the jury to receive an aiding and abetting jury instruction; and (6) Wisinski suffered no prejudice from the timing of the court's ruling on his motion for new trial. The Court of Appeals affirmed Wisinski's convictions and sentences. We granted Wisinski's petition for further review.

ASSIGNMENTS OF ERROR

On further review, Wisinski asserts that the Court of Appeals erred in (1) affirming the district court's determination that the evidence regarding the circumstances surrounding his apprehension was not rule 404 evidence of other crimes and affirming the district court's refusal to give a limiting instruction with respect to such evidence; (2) affirming the district court's giving of an aiding and abetting instruction when the information did not contain aiding and abetting language; and (3) affirming the district court's refusal to give Wisinski's requested jury instructions regarding voluntariness of statements, determination of value of property taken, and accomplice testimony.

STANDARDS OF REVIEW

[1,2] 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. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). 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. *Id.* The admissibility of evidence under rule 404(2), § 27-404(2), must be determined upon the facts of each case and is within the discretion of the trial court. *Id.*

[3-5] Whether jury instructions given by a trial court are correct is a question of law. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003). 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. *Id.* To establish reversible error from a court's refusal to give a requested instruction, an appellant

has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Id.*

ANALYSIS

Alleged Rule 404 Evidence.

Wisinski asserts that the Court of Appeals erred in affirming the district court's determination that certain evidence was not evidence of other crimes subject to rule 404. Wisinski claims that because of such determination, the district court erred when it did not require the State to articulate a proper purpose for admitting the evidence under rule 404 and did not give the jury a limiting instruction with respect to the evidence. We conclude that the district court did not err in determining that the evidence at issue was not rule 404 evidence and that the Court of Appeals did not err in affirming such determination.

Rule 404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior to trial, the State filed a motion to admit evidence under rule 404. The State sought admission of evidence it described as

> [e]vidence that on or about February 12, 2002, approximately ten days after the reported burglary, [Wisinski] was apprehended by Omaha police in a vehicle. After the owner of the vehicle recovered it, he noticed in it meat in coolers and a computer printer with paper bearing the name Guaranteed Roofing. Meat and a printer were reported taken in the burglary, and Guaranteed Roofing is the name of victim's business.

The State asserted that the evidence was admissible to show proof of motive, intent, plan, and identity.

At the rule 404 hearing, the court expressed doubt whether the evidence was rule 404 evidence and asked the State whether it was "just circumstantial evidence of a crime that was committed." The State replied that the evidence could be viewed as the

court suggested but that it had filed the rule 404 motion "in an abundance of caution." At the hearing, the State presented the testimony of witnesses, including three police officers who were involved in apprehending Wisinski. They generally testified regarding the circumstances under which they apprehended Wisinski, including descriptions of the truck he was driving and its contents; however, they did not testify regarding the reason they stopped the truck nor did they say they stopped the truck because it was stolen.

The State also presented the testimony of Leland Marsh, the owner of the truck in which Wisinski was apprehended. Marsh testified that the truck had been reported stolen and that the truck had been recovered by the Omaha Police Department. He further testified that when the truck was returned to him, it was filled with various items, including meat in coolers and a computer printer with paper bearing the name "Guaranteed Roofing." Marsh testified that these items did not belong to him.

The record in the present case does not appear to contain an explicit ruling on the rule 404 motion. However, the officers and Marsh gave substantially the same testimony at trial, and the court overruled Wisinski's relevance objections to such testimony. The court also refused to give Wisinski's proposed limiting instruction regarding such evidence. The Court of Appeals stated in its opinion that the trial court appeared by its statements and actions to have determined that the evidence was not rule 404 evidence, and it reviewed the court's rulings on this basis. *State v. Wisinski*, 12 Neb. App. 549, 680 N.W.2d 205 (2004). We agree with the Court of Appeals' assessment of the record.

[6] The Court of Appeals concluded that the evidence at issue was not rule 404 evidence and that the district court thus did not err in refusing to treat the evidence as such. We agree with the Court of Appeals' conclusion. The Court of Appeals cited our decision in *State v. Aguilar*, 264 Neb. 899, 909, 652 N.W.2d 894, 903 (2002), in which we stated, "Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of rule 404(2) coverage." (Citing *U.S. v. Heidebur*, 122 F.3d 577 (8th Cir. 1997).) The Court of Appeals also cited its decision in *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001), *disapproved on other grounds, State v. Smith*,

267 Neb. 917, 678 N.W.2d 733 (2004). In *Powers*, the Court of Appeals stated:

> Prior conduct which is inextricably intertwined with the charged crime is not considered extrinsic evidence of other crimes or bad acts and rule 404 does not apply. See, *U.S. v. O'Dell*[, 204 F.3d 829 (8th Cir. 2000)]; *U.S. v. Luna*[, 94 F.3d 1156 (8th Cir. 1996)]; *U.S. v. Tate*[, 821 F.2d 1328 (8th Cir. 1987)]. The Eighth Circuit has held: "'[W]here evidence of other crimes is "so blended or connected, with the one[s] on trial as that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged," it is admissible as an integral part of the immediate context of the crime charged. When the other crimes evidence is so integrated, it is not extrinsic and therefore not governed by Rule 404(b).'" *U.S. v. Phelps*, 168 F.3d [1048,] 1057-58 [(8th Cir. 1999)], quoting *U.S. v. Swinton*, 75 F.3d 374 (8th Cir. 1996). See, also, *U.S. v. Luna, supra*; [additional citations omitted]. As such, prior conduct that forms the factual setting of the crime is not rendered inadmissible by rule 404. *U.S. v. Phelps, supra*; [additional citations omitted]. The State is entitled to present a coherent picture of the facts of the crime charged, and evidence of prior conduct that forms an integral part of the crime charged is not rendered inadmissible under rule 404 merely because the acts are criminal in their own right, but have not been charged. *U.S. v. Williams*[, 95 F.3d 723 (8th Cir. 1996)]. A court does not err in finding rule 404 inapplicable and in accepting prior conduct evidence where the prior conduct evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime. See *U.S. v. Forcelle*[, 86 F.3d 838 (8th Cir. 1996)].

10 Neb. App. at 262, 634 N.W.2d at 7-8.

Evaluating the evidence at issue in this case under these standards, the Court of Appeals noted that the police officers' testimony was foundational for establishing that Wisinski was in possession of the property he was charged with having stolen and

that Marsh's testimony that his truck had been stolen and that he did not own the items found in it when it was recovered helped establish that the property was stolen. The Court of Appeals concluded that such information was integral to the State's case and that therefore, it was not rule 404 evidence. The Court of Appeals noted that the State presented no direct evidence that Wisinski had stolen the truck and that therefore, no bad act evidence subject to rule 404 was presented. The Court of Appeals further stated that to the extent such evidence could have been construed as rule 404 evidence, its admission was harmless.

We agree with the authority cited by the Court of Appeals and with its conclusions with respect to the district court's rulings on this issue. Rule 404 was inapplicable to the evidence to which Wisinski objects. We therefore find no merit to Wisinski's assignments of error with respect to rule 404 evidence.

Aiding and Abetting Instruction.

Wisinski also asserts that the Court of Appeals erred in affirming the district court's decision to give an aiding and abetting instruction. Wisinski argues that the instruction was not appropriate because the information charging him with the crimes of which he was convicted did not contain aiding and abetting language and because the evidence did not support the instruction. We reject Wisinski's argument.

[7] As the Court of Appeals correctly noted, the common-law distinction between principal and aider or abettor has been abolished. Referring to the aiding and abetting statute, Neb. Rev. Stat. § 28-206 (Reissue 1995), and our prior case law, we recently held that "notwithstanding the fact that the information charging the defendant does not contain specific aiding and abetting language, an aiding and abetting instruction is proper where warranted by the evidence." *State v. Contreras, post* p. 797, 803, 688 N.W.2d 580, 585 (2004). In the present case, we determine that the district court and thus the Court of Appeals did not err in concluding that the evidence warranted an aiding and abetting instruction. Based on our reasoning in *Contreras*, the district court did not err in giving the instruction despite the fact that the information did not contain aiding and abetting language, and the Court of Appeals did not err in affirming the giving of the instruction.

Other Assigned Errors.

Wisinski generally asserts on further review that the Court of Appeals erred in affirming the district court's refusal to give requested jury instructions. Wisinski argued to the Court of Appeals that the district court erred in refusing to give his proposed instructions regarding (1) a specific finding as to the value of the property stolen, (2) accomplice testimony, and (3) the voluntariness of his statements to police. Wisinski provides no additional argument with respect to these issues on further review, and we find no error in the Court of Appeals' disposition of these issues.

CONCLUSION

We conclude that the Court of Appeals did not err in affirming the district court's determination that certain evidence was not rule 404 evidence, the district court's giving of an aiding and abetting instruction, and the district court's refusal to give other requested instructions. We therefore affirm the Court of Appeals' decision affirming Wisinski's convictions and sentences.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAVID R. WACKER, APPELLANT.

688 N.W.2d 357

Filed November 5, 2004. No. S-03-1196.

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. **Plea Bargains.** Pure plea agreements involve a suspect who has been apprehended for allegedly committing a crime and, rather than face the prospects of an extended trial and a punishment of undetermined severity if convicted, decides to plead guilty to charges mutually acceptable to him or her and the prosecutor.
3. **Criminal Law: Words and Phrases.** A cooperation agreement arises when the State agrees to limit the prosecution in some manner in consideration for the defendant's cooperation.
4. **Constitutional Law: Due Process.** The principle for enforcing a cooperation agreement arises under the Due Process Clause of the 14th Amendment.
5. **Criminal Law: Equity.** Cooperation agreements are enforceable on equitable grounds if (1) the agreement was made; (2) the defendant has performed whatever

the defendant promised to perform; and (3) in performing, the defendant acted to his or her detriment or prejudice.

6. **Self-Incrimination.** Providing self-incriminating information can constitute detrimental reliance.
7. **Due Process: Police Officers and Sheriffs: Confessions.** When a promise is made by police to an individual, in exchange for a confession, the standards of substantive due process prohibit the State from reneging on the bargain.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Conviction and sentence vacated, and cause remanded for a new trial.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., 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.

David R. Wacker appeals his conviction and sentence for manslaughter resulting from a motor vehicle accident. A police officer told Wacker that the county attorney would charge him with motor vehicle homicide instead of manslaughter if he admitted to driving the vehicle. He admitted to driving the vehicle, but the State reneged on the agreement. Wacker moved to compel the State to amend the charge to motor vehicle homicide in accordance with the agreement. The district court denied the motion to amend. We conclude that the officer, after speaking to the county attorney, entered into a cooperation agreement and that the State is bound by the agreement. Accordingly, we vacate Wacker's conviction and sentence and remand the cause for a new trial on the charge of motor vehicle homicide.

BACKGROUND

On September 13, 2001, Wacker drank three or four beers while driving around with Nathan Curtis and another friend. Wacker, who was 19 at the time, was driving a pickup truck registered to him, and Curtis was in the passenger seat. Wacker later dropped the other friend off.

Later that night, Wacker called the 911 emergency dispatch center and stated that there had been a wreck and that he could not find Curtis. A member of the Hemingford Volunteer Fire Department responded to the emergency call, and he found Wacker lying on the porch at a trailer house and discovered Curtis dead in a ditch 20 feet east of Wacker's pickup truck.

Gordon Downing, a State Patrol officer, assisted in the accident investigation and testified that it became "apparent" and "obvious" that alcohol was involved and that Curtis had been thrown out of the passenger side of the truck. Two days later, Downing interviewed Wacker at the police department. Wacker admitted that he and Curtis had been drinking the night of the accident but denied that he was driving.

Almost 17 months later, on February 11, 2003, Downing obtained an arrest warrant for Wacker. In an interview on that date, Downing spoke to Wacker about the possible charges that could be filed. Downing's taped conversation with Wacker reveals that when he discussed the charges with Wacker, he immediately stressed that Wacker was initially charged with manslaughter instead of motor vehicle homicide. Downing then described the differences between manslaughter and motor vehicle homicide. He stressed that each was a different class of felony and that manslaughter required a minimum of 1 year in the state penitentiary, while motor vehicle homicide did not carry a minimum penalty. He stated that under motor vehicle homicide, "you get probation, you usually get 3 days in jail . . . whatever the judge decides." He stated that the county attorney chose to charge Wacker with manslaughter because it meant he would spend a year in "the pen."

Downing then told Wacker that according to the county attorney, "right now she's told me the ball's in your court." He also told Wacker that "she's willing to charge you with motor vehicle homicide, but you haven't been honest with us." He then repeated that "it's up to you, the ball's in your court [as to] what you're charged with." Downing then repeated the penalties for manslaughter and motor vehicle homicide. After some discussion about bond and whether Wacker wanted to talk to an attorney, the discussion returned to the difference in penalties and the ease of proving either manslaughter or motor vehicle homicide, with the emphasis

on how easy it would be to prove. Downing stated, "[M]anslaughter is going to be a slam dunk for us." Downing then stated:

> I'm just telling you what you're looking at. I feel like that's about the fairest thing I can do, [be]cause I wouldn't want to be in your shoes, and if I was, I would want to know what I was looking at. [Be]cause certainly the county attorney could just charge you with manslaughter and say tough crap, [Wacker] can just deal with it, he gets a year in the pen—too bad, you know? But that's a year east, you know, even if you get sentenced to time for motor vehicle homicide, it's gonna probably going to be less than a year. If it's less than a year, you're gonna be in a lock [remainder of word unintelligible] in Box Butte County jail, and I certainly would rather be in Box Butte County jail than in the state pen for something like this. Because at least you're close to family; you can have visitors. If you're in Lincoln, uh, it's a long drive.

Downing then asked if Wacker wanted to talk, and Wacker stated that he would. Wacker admitted that he had been driving and stated that he had lied earlier because he was "scared shitless." He provided some details about the accident and how he was driving, and he addressed some of Downing's theories about how he had lost control of the vehicle. He also admitted that he had consumed three or four beers and confirmed that Curtis had not driven the vehicle the night of the accident. At the end of the conversation, Downing asked Wacker to repeat again that Wacker was the driver, and Downing said that he would call the county attorney and tell her that Wacker was the driver. At that point, after getting Wacker's confession, Downing started hedging his comments; he told Wacker that he did not want to pressure him because it was the county attorney's decision what to charge him with. Wacker repeated that he was the driver, and Downing then told him that he would tell the county attorney that Wacker had told the truth. Downing then stated that he did not know what the county attorney was going to do, but that he would tell her, and that she "told me she would go with a motor vehicle homicide charge." During the interview, Downing also discussed the previous county attorney, but the tape-recorded statement makes it clear that the earlier discussion about charges for motor vehicle

homicide was in reference to a discussion with the current county attorney. The words "plead guilty" were never brought up in the conversation between Downing and Wacker.

The information filed on March 7, 2003, charged Wacker with manslaughter instead of motor vehicle homicide. Before trial, he moved to compel the State to amend the charge, alleging that he entered into a cooperation agreement with the State under which he would be charged with motor vehicle homicide if he told the truth and that the State failed to honor the agreement. At a pretrial hearing on the motion to compel amendment to the charge, Downing testified that before obtaining the warrant, he discussed possible charges with the county attorney, who stated that if Wacker admitted everything, was honest, and pleaded guilty, she would offer felony motor vehicle homicide. But Downing did not correctly communicate that offer to Wacker.

The district court found that the State had offered a plea agreement and that Wacker had not pleaded to anything. Citing to *State v. Howe*, 2 Neb. App. 766, 514 N.W.2d 356 (1994), the court found that the State's offer was purely for a plea to a lesser charge. The court found, however, that Wacker's confession was made as the result of a plea offer and suppressed the statements. The jury found Wacker guilty, and the court sentenced him to an indeterminate term of 24 to 36 months. Wacker appeals.

ASSIGNMENTS OF ERROR

Wacker assigns that the district court erred by (1) failing to require the State to amend the charge to motor vehicle homicide or dismiss the manslaughter charge; (2) overruling a motion to suppress seizure of his blood sample; (3) admitting expert testimony in the absence of a pretrial hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); (4) allowing Downing to give opinions about the cause of the accident, the vehicle's speed, and the driver's identity; (5) finding there was sufficient evidence to convict; (6) using his constitutional right to remain silent to enhance the sentence; and (7) imposing an excessive sentence.

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. Thomas, ante* p. 570, 685 N.W.2d 69 (2004).

ANALYSIS

Wacker argues that he did not agree to a plea agreement. He contends that he entered into a cooperation agreement when Downing told him that the county attorney agreed—if Wacker told the truth—to charge him with motor vehicle homicide instead of manslaughter. He argues that a cooperation agreement differs from a plea agreement and that the State was bound by the terms. The State contends that there was no agreement and that even if there was, it was a plea agreement that Wacker breached because he never pleaded guilty.

In discussing plea and cooperation agreements, we have previously stated that we will " 'meticulously keep separate and apart the subjects of (1) the conferral of immunity, (2) a plea bargain, and (3) some other bargain involving something other than a plea to a criminal charge.' " *State v. Copple*, 224 Neb. 672, 687, 401 N.W.2d 141, 153 (1987), *abrogated on other grounds, State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). We have also stressed that " '[t]he legal incidents are different. The procedural rules are different. Other than the very general notion of some "*quid pro quo*," the three phenomena are distinct. We only do the law a disservice when we heedlessly blur those distinctions.' " *Id.*

[2] Pure plea agreements " 'involve a suspect who has been apprehended for allegedly committing a crime and, rather than face the prospects of an extended trial and a punishment of undetermined severity if convicted, decides to plead guilty to charges mutually acceptable to him and the prosecutor.' " *State v. Howe*, 2 Neb. App. 766, 772, 514 N.W.2d 356, 361 (1994), quoting *United States v. Minnesota Min. & Mfg. Co.*, 551 F.2d 1106 (8th Cir. 1977). This differs from formal immunity, which is a creation of statute. See *id.*

[3,4] But a cooperation agreement is neither a plea agreement nor a grant of immunity. Instead, a cooperation agreement arises when the State agrees to limit the prosecution in some manner in consideration for the defendant's cooperation. See *State v. Howe, supra*. The principle for enforcing a cooperation agreement arises under the Due Process Clause of the 14th Amendment. *State v.*

Sturgill, 121 N.C. App. 629, 469 S.E.2d 557 (1996). "Generally, 'fundamental fairness requires that promises made during plea-bargaining and analogous contexts be respected.' " (Emphasis omitted.) *Id.* at 635, 469 S.E.2d at 561.

In discussing fundamental fairness regarding enforcement of nonstatutory immunity, we have stated:

> "We believe that, as a matter of fair conduct, the government ought to be required to honor such an agreement when it appears from the record that: (1) an agreement was made; (2) the defendant has performed on his side; and (3) the subsequent prosecution is directly related to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government."

State v. Copple, 224 Neb. at 688, 401 N.W.2d at 153, quoting *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982). We then stated:

> "[T]he courts have developed a concept of 'nonstatutory' immunity whereby the courts will enforce informal or procedurally flawed grants of immunity on equitable grounds. . . . These cases indicate that where the government has entered into an agreement with a prospective defendant and the defendant has acted to his detriment or prejudice in reliance upon the agreement, 'as a matter of fair conduct, the government ought to be required to honor such an agreement.' "

Id., quoting *United States v. Carpenter*, 611 F. Supp. 768 (N.D. Ga. 1985). We believe these principles also apply to cooperation agreements.

[5] Applying these principles, the Nebraska Court of Appeals determined that "cooperation agreements are enforceable on equitable grounds if (1) the agreement was made; (2) the defendant has performed whatever the defendant promised to perform; and (3) in performing, the defendant acted to his or her detriment or prejudice." *State v. Howe*, 2 Neb. App. at 774, 514 N.W.2d at 362. We agree.

Was Agreement Made?

The State argues that either there was no agreement or if there was an agreement, it was a plea agreement. We disagree.

First, we determine that there was an agreement. In its brief, the State characterizes the tape as including only the following:

"Downing told Wacker that he was going to call the county attorney and tell her that he had finally been honest, and had admitted that he was driving, and that Downing couldn't say what she would do, because she was in charge of this thing." Brief for appellee at 19. The State then contends that "[a]t no time was there ever a promise made to Wacker that he would only be charged with motor vehicle homicide." *Id.* The State argues that Wacker's argument "has no basis in reality as reflected by [the taped confession]." *Id.* The State also indicates that Downing's statements referred to things said by the previous county attorney over a year in the past.

The State's description of the tape ignores the events leading up to Wacker's confession and mischaracterizes the taped confession. After discussing the differences between manslaughter and motor vehicle homicide, Downing told Wacker that according to the county attorney, "right now she's told me the ball's in your court." He told Wacker that "she's willing to charge you with motor vehicle homicide, but you haven't been honest with us." He then repeated that "it's up to you, the ball's in your court [as to] what you're charged with." The only reasonable construction of these statements is that Wacker controlled whether he would be charged with manslaughter or motor vehicle homicide. If he confessed, the charge would be motor vehicle homicide; if not, then the charge would be manslaughter.

Furthermore, the discussion was not about a plea. Although the record indicates that the county attorney intended Downing to offer a plea agreement; a plea is not what Downing offered. The words "plea or plead" are not mentioned in the tape. At no time did Downing tell Wacker that he would be required to plead guilty in exchange for his information. Instead, Downing stated that Wacker would be charged with motor vehicle homicide and talked about how the State could go about proving the crime at trial.

Having spoken with the county attorney, Downing had authority to enter into an agreement with Wacker. See *Butler v. State*, 55 Md. App. 409, 462 A.2d 1230 (1983). Further, courts have enforced cooperation agreements of nonprosecution or other concessions made by investigative agents without evidence that a U.S. Attorney or the Attorney General had delegated to them the authority to make such a promise. *State v. Sturgill*, 121 N.C. App.

629, 469 S.E.2d 557 (1996), citing *United States v. Carillo*, 709 F.2d 35 (9th Cir. 1983), and *United States v. Rodman*, 519 F.2d 1058 (1st Cir. 1975). See, also, *People v Gallego*, 143 Mich. App. 639, 372 N.W.2d 640 (1985). The preeminent consideration is not whether the police have the authority to make the promise, but whether the promise was in fact made. *State v. Sturgill, supra.*

We conclude that Downing entered into a cooperation agreement with Wacker and that Wacker performed by confessing that he had been driving the vehicle and by providing information about the accident, including information confirming that he had been drinking.

Did Wacker Act to His Detriment or Prejudice and What is Remedy?

The State does not address whether Wacker acted to his detriment or prejudice when performing the agreement. The confession, however, was not used against Wacker at trial. Thus, the argument could be made that Wacker was not prejudiced by his statements or that suppression is the appropriate remedy for the State's breach. We disagree.

[6] The test is whether "in performing, the defendant acted to his or her detriment or prejudice." *State v. Howe*, 2 Neb. App. 766, 774, 514 N.W.2d 356, 362 (1994). Providing self-incriminating information can constitute detrimental reliance. *Id.* See *State ex rel. Fortner v. Urbom*, 211 Neb. 309, 318 N.W.2d 286 (1982). Some courts have recognized suppression as a remedy or a manner in which to return the defendant to the status quo. See, *People v Gallego, supra*; *State v. Sturgill, supra*; *Com. v. Stipetich*, 539 Pa. 428, 652 A.2d 1294 (1995). Here, suppression would be an insufficient remedy for the State's breach.

[7] Had Wacker known that the State's promise would not have been kept, it is unlikely he would have given up his constitutional right against self-incrimination. "When a promise is made by police to an individual, in exchange for a confession, the standards of substantive due process prohibit the State from 'welshing' on the bargain." *State v. Sturgill*, 121 N.C. App. at 645-46, 469 S.E.2d at 567. See, also, *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982). In the context of a plea agreement, it has been said that a defendant is entitled to specific performance when " 'no other

remedy is appropriate to effectuate the accused's legitimate expectation engendered by the governmental promise.' " *People v. Macrander*, 756 P.2d 356, 361 (Colo. 1988).

Here, Wacker reasonably expected that by providing information about the accident—particularly by admitting that he was driving the vehicle—that he would not be charged with manslaughter and instead would be charged with only motor vehicle homicide. In anticipating a motor vehicle homicide charge, Wacker detrimentally relied upon the promise by providing incriminating information. Suppression of the confession could not place Wacker back in a position that achieves his legitimate expectation.

Additionally, a confession affects whether a defendant will testify. Although Wacker's statement was suppressed, had he chosen to testify, he could have possibly been impeached with his confession. Thus, the confession, made in reliance on Downing's promise of a lesser charge, posed a risk for Wacker if he chose to testify at trial. Thus, the statement's suppression cannot put Wacker back in the status quo. Although we recognize that in some circumstances suppression might cure the effects of a broken cooperation agreement, here, we determine that it was insufficient.

We determine that suppression was not sufficient to negate Wacker's detrimental reliance on the State's promise and is not the appropriate remedy. The State made an agreement with Wacker promising that he would be charged with motor vehicle homicide in exchange for his confession. Wacker agreed and performed in reliance on the promise, and the State breached the agreement. Thus, the district court erred when it denied Wacker's motion to dismiss or to compel the State to amend the charge. To meet Wacker's expectation interest based on his reliance on the State's promise, we vacate the manslaughter conviction and sentence and remand the cause for a new trial at which Wacker cannot be charged again with manslaughter, but may be charged with motor vehicle homicide or a lesser offense. Because we remand the cause for a new trial, we do not address Wacker's remaining assignments of error.

CONVICTION AND SENTENCE VACATED, AND CAUSE REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLANT, V. DAVID CONTRERAS, APPELLEE.

688 N.W.2d 580

Filed November 5, 2004. No. S-04-273.

1. **Appeal and Error.** The purpose of appellate review in error proceedings is to provide an authoritative exposition of the law to serve as precedent in future cases.
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. **Aiding and Abetting.** The common-law distinction between principal and aider and abettor has been abolished; a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.
4. **Aiding and Abetting: Indictments and Informations: Notice.** Given the provisions of Neb. Rev. Stat. § 28-206 (Reissue 1995), an information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified.
5. **Aiding and Abetting: Indictments and Informations: Jury Instructions.** An aiding and abetting instruction is proper where warranted by the evidence, notwithstanding the fact that the information charging the defendant does not contain specific aiding and abetting language.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Exceptions sustained.

Kay E. Tracy, Deputy Hall County Attorney, for appellant.

Jay B. Judds, of Milner, Neuhaus & Judds, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this error proceeding brought by the State pursuant to Neb. Rev. Stat. § 29-2315.01 (Supp. 2003), we are primarily asked to provide an answer to the question whether it is proper for the trial court to include an aiding and abetting instruction in its charge to the jury where the charging document does not specifically recite aiding and abetting language. We conclude that it is proper to give an aiding and abetting instruction where warranted by the evidence, notwithstanding the fact that the document charging the defendant does not include aiding and abetting language. In the

instant case, the trial court refused to so instruct the jury and the State takes exception thereto. We sustain the State's exceptions.

STATEMENT OF FACTS

On the evening of February 28, 2003, David Contreras and Ricardo Orozco were drinking beer and driving around Grand Island in a black Ford Explorer. According to certain witnesses, there was an unidentified third person in the Explorer. Contreras and Orozco came upon a group of people in the parking lot of a gas and convenience store. The occupants of the Explorer became involved in a verbal altercation with the group in the parking lot, and beer bottles were thrown between the two groups. Contreras and Orozco left the parking lot, and witnesses testified that as they left, Contreras shouted that they were going to come back.

Orozco refused to testify at Contreras' trial, but a Grand Island police officer testified regarding statements Orozco made after his arrest. Orozco told police that after he and Contreras left the convenience store, they went to Orozco's brother-in-law's house to get a gun. They then drove to a residence where they believed there would be people who had been involved in the earlier incident. They saw no one at that residence, but continued driving and saw some people in front of a nearby residence who they thought were part of the rival group. This group included Joseph Reha, the victim. Orozco told police that they thought that individuals in this group had "flashed a gun" and that at that point, Contreras fired two or three rounds out the Explorer's window. The gun then jammed, so they drove around the block, and when they returned there was no one outside. They continued driving back to the convenience store and, seeing no one there, drove to an automobile repair shop. Orozco told police that they saw a man from the rival group at the repair shop, that the man pointed a rifle at them, and that Contreras rolled down the window and fired three rounds. They drove off and disposed of the gun. They then were stopped by police while driving toward Orozco's home. The police officer who made the stop testified that only two people emerged from the Explorer and that Contreras came out of the passenger side. An empty, fired casing was found in the back seat of the Explorer.

In addition to the police officer's testimony recounting Orozco's statements, several witnesses to the incidents testified at trial. The

witnesses were generally able to identify Contreras as having been located in the back seat of the Explorer during the incident at the convenience store. The witnesses also generally testified that shots were fired from the Explorer during the later incidents at the residence and at the automobile repair shop. Certain witnesses specified that the shots were fired from the back seat. However, none of the witnesses were able to identify Contreras as the person who actually fired the shots from the Explorer.

In its opening statement, the State told the jury that one who aids and abets another to commit a crime may be found guilty as a principal and that "if you find that someone in that vehicle fired a gun with the appropriate intent and that the other people knew and aided in some way, then you can find them all guilty of the crime." At the jury instruction conference, Contreras objected to the State's proposed instruction regarding aiding and abetting on the ground that Contreras had been charged in the information as a principal and the information did not contain aiding and abetting language. The State's proposed instruction quoted Neb. Rev. Stat. § 28-206 (Reissue 1995) as follows: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." Contreras also moved for an order in limine to prevent the State from referring to aiding and abetting in its closing argument.

The district court refused the State's proposed instruction on aiding and abetting and granted Contreras' motion in limine with regard to the State's closing argument. According to the State's application for leave to docket an appeal, which appeal was approved by the district court pursuant to § 29-2315.01, the district court had refused the State's proposed instruction and granted Contreras' motion in limine for the reason that the information did not give Contreras adequate notice that the State planned to proceed under an aiding and abetting theory.

The jury found Contreras guilty of (1) attempted first degree assault (of Reha), (2) use of a weapon during the commission of an attempted felony assault, (3) one count of unlawful discharge of a firearm at an occupied building (the automobile repair shop), and (4) one count of use of a weapon to commit unlawful discharge. The jury found Contreras not guilty of (1) a second count of unlawful discharge of a firearm at an occupied building (the

residence), (2) a second count of use of a weapon to commit unlawful discharge, and (3) tampering with physical evidence. The district court entered judgment based on the jury's verdict, and on December 12, 2003, the court sentenced Contreras on the four convictions. On December 30, the State sought leave to docket an error proceeding under § 29-2315.01. The Nebraska Court of Appeals granted leave, and the error proceeding was thereafter moved to the docket of the Nebraska Supreme Court.

ASSIGNMENTS OF ERROR

The State asserts that the district court erred in (1) refusing to give the State's proposed instruction on aiding and abetting and (2) granting Contreras' motion in limine and ordering the State to refrain from referring to aiding and abetting in its closing argument.

SCOPE AND PURPOSE OF REVIEW IN ERROR PROCEEDINGS

The instant appeal is before this court as an error proceeding filed by the prosecuting attorney pursuant to § 29-2315.01, which states:

> The prosecuting attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made. . . . The prosecuting attorney shall then present such application to the appellate court within thirty days from the date of the final order.

[1] The scope and purpose of appellate review in error proceedings are defined in Neb. Rev. Stat. § 29-2316 (Supp. 2003). The purpose of the review is to provide an authoritative exposition of the law to serve as precedent in future cases. *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000).

STANDARD OF REVIEW

[2] 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. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

ANALYSIS

Relying on statute and case law, the State takes exception to the rulings of the district court in which it refused to give the State's proposed instruction on aiding and abetting and in which it ordered the State to refrain from referring to aiding and abetting in its closing argument. Noting that § 28-206 abrogates the common-law distinction between the prosecution of a defendant as an aider or abettor as distinguished from a principal offender, the State argues that no additional language is required in the information to prosecute a defendant for aiding and abetting than is required to charge and prosecute a defendant as the principal.

In response, Contreras argues that where the information charging the defendant does not explicitly contain aiding and abetting language, a defendant is not put on notice that he or she may be tried as an aider or abettor rather than the principal and that an instruction and therefore a conviction on aiding and abetting deny the defendant due process. Because the position taken by Contreras ignores the aiding and abetting statute, § 28-206, and the import of our prior case law, we reject the argument advanced by Contreras. We agree with the State that no additional aiding and abetting language was required in the information and that because the evidence supported an instruction, the district court erred in refusing to instruct on aiding and abetting and additionally in ordering the State to refrain from referring to aiding and abetting in its closing argument. The State's exceptions are therefore sustained.

The aiding and abetting statute, § 28-206, provides that "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." The State refers us to *Scharman v. State*, 115 Neb. 109, 111, 211 N.W. 613 (1926), in which this court considered a predecessor statute which provided that " '[w]hoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.' " This court explained in *Scharman* that the intention of the Legislature in the enactment of the predecessor statute was

> to abrogate all distinction heretofore existing between such aider, abettor, or procurer and the one committing the act, and to provide that each should be prosecuted and punished

> as principals; that is, that the words "prosecuted and punished," as used in such section, mean that the same rule as to the information, conduct of the case, as well as the punishment, heretofore applicable to principals, should thereafter govern such aiders, abettors, or procurers, and that no additional facts need be alleged in an information against an accessory before the fact than are required against his principal.

115 Neb. at 112, 211 N.W. at 614.

[3] Subsequent to enactment of the current version of § 28-206, we recognized that "[t]he common-law distinction between principal and aider and abettor has been abolished; a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he [or she] were the principal offender." *State v. Jackson*, 258 Neb. 24, 34, 601 N.W.2d 741, 750 (1999). We have also recently recognized that "[a]n information charging an aider and abettor of a crime need not include any additional facts than those necessary to charge the principal of the crime." *State v. Leonor*, 263 Neb. 86, 96, 638 N.W.2d 798, 807 (2002). We have also held that an aiding and abetting instruction "is usually proper where two or more parties are charged with commission of the offense" and that an aiding and abetting instruction is proper when warranted by the evidence. *State v. Marco*, 230 Neb. 355, 361, 432 N.W.2d 1, 6 (1988).

This court is aware of the difficulties that were engendered by the common-law distinction between principals and accessories in felony cases. See 2 Wayne R. LaFave, Substantive Criminal Law § 13.1(d) (2d ed. 2003) (listing difficulties such as historical necessity that principal must be convicted as prerequisite to conviction of accessory). However, the abrogation of the distinction between principal and aider or abettor eliminates such difficulties and, simply put, means that a person is legally accountable for the conduct of another when he or she participates in the commission of the crime. *Id.*, § 13.1(e). In this connection, we have stated that an individual is guilty as an aider or abettor where the evidence shows that the individual participated in the underlying crime through word, act, or deed. *State v. Marco, supra.*

[4] Section 28-206 does not define a separate crime of aiding and abetting. By its terms, § 28-206 provides that a person who

aids or abets may be prosecuted and punished as if he or she were the principal offender. Given the provisions of § 28-206 and our previous constructions of this statute, an information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified. See *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000) (stating that due process notice requirement requires that language of statute and previous constructions of statute in existence at time of crime provide reasonable notice to person of ordinary intelligence of scope of criminal behavior reached by statute). The information in the present case charged Contreras with numerous crimes, including attempted assault in the first degree and associated use of a weapon, as well as unlawful discharge of a firearm at an occupied building and associated use of a weapon. The information coupled with the terms of § 28-206 and prior case law gave Contreras adequate notice that he could be prosecuted for aiding and abetting the commission of such crimes.

[5] Given § 28-206 and our prior decisions that the information charging an aider and abettor of a crime need not include any additional facts other than those necessary to charge the principal of the crime and that an aiding and abetting instruction is proper where warranted by the evidence, we hold that notwithstanding the fact that the information charging the defendant does not contain specific aiding and abetting language, an aiding and abetting instruction is proper where warranted by the evidence.

Turning to the instant case, it is clear that the evidence presented warranted an aiding and abetting instruction. The testimony of various witnesses placed Contreras inside the vehicle from which the shots were fired, and various witnesses testified that Contreras was involved in the altercations that preceded the shootings. However, aside from the police officer's testimony regarding the content of Orozco's statements, no witness was able to identify Contreras as the specific person who fired the shots from the vehicle. Therefore, if the jury did not find that Contreras had actually fired the shots, the jury could nevertheless

have found that, through word, act, or deed, Contreras aided and abetted the person who actually fired the shots.

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. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Because the evidence in this case supported an aiding and abetting instruction, the district court erred by refusing such instruction and by ordering the State to refrain from referring to aiding and abetting in its closing argument.

EFFECT OF RULING

For the reasons above, we find merit in the State's exceptions to the district court's rulings. Disposition of the case is therefore governed by § 29-2316, which provides:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the prosecuting attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and the provisions of article I, § 12, of the Nebraska Constitution protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001). Under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt or innocence of the defendant. *Id.* In a case tried to a jury, jeopardy attaches when the jury is empaneled and sworn. *Id.*

Because jeopardy attached with respect to the counts of which Contreras was acquitted, our decision will not affect the judgment of the district court with respect to those counts. However, we note that with respect to the counts of which Contreras was convicted, this court reversed, without opinion, such convictions in Contreras' direct appeal, see case No. S-03-1454, and those counts were remanded for a new trial. The decision herein determines the law to govern in such new trial and in any similar case which may be pending at the time this decision is rendered or which may thereafter arise in the state.

CONCLUSION

We conclude that the district court erred by refusing to give an aiding and abetting instruction and by ordering the State to refrain from referring to aiding and abetting in its closing argument. We therefore sustain the State's exceptions.

EXCEPTIONS SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V.
MARK A. BANES, APPELLANT.

688 N.W.2d 594

Filed November 12, 2004. No. S-03-297.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Sentences.** An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
3. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Criminal Law: Statutes.** Penal statutes are to be strictly construed against the government.
5. ____: ____. Penal statutes are to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
6. ____: ____. With regard to penal statutes, it is not within the province of the courts to read a meaning into a statute that is not there.
7. **Sentences.** Pursuant to Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999), a court must give credit for time served on a charge when a prison sentence is imposed for that charge.

8. ____. The import of Neb. Rev. Stat. § 83-1,106(4) (Reissue 1999) is that all credit available due to presentence incarceration shall be applied, but only once.
9. ____. When concurrent sentences are imposed, the credit is applied once, and the credit applied once, in effect, is applied against each concurrent sentence, because the longest sentence determines the offender's actual length of time in prison.

Petition for further review from the Nebraska Court of Appeals, INBODY, CARLSON, and CASSEL, Judges, on appeal thereto from the District Court for York County, ALAN G. GLESS, Judge. Judgment of Court of Appeals affirmed.

Kevin V. Schlender for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

We granted the State's petition for further review in this case to consider the proper method of calculating credit for time served in presentence confinement where a defendant receives concurrent sentences of differing terms in contemporaneous but unrelated criminal prosecutions. Although for different reasons than those articulated by the Nebraska Court of Appeals in its decision in *State v. Banes*, No. A-03-297, 2004 WL 503100 (Neb. App. Mar. 16, 2004) (not designated for permanent publication), we affirm.

STATEMENT OF FACTS

On March 22, 2002, Mark A. Banes was arrested on two counts of first degree sexual assault (the felony case). Banes was incarcerated on these charges from March 22 until April 19, when his mother posted bond and Banes was released. Banes remained free from April 19 until June 11. On June 11, Banes was arrested on new and unrelated charges of one count of first degree sexual assault and one count of third degree sexual assault (the misdemeanor case). The misdemeanor case involved a different victim. Banes did not post bond.

On June 17, 2002, Banes' mother filed a request seeking a refund of the bond money she had posted to gain Banes' release in the felony case. The district court granted her request the same day.

On September 25, 2002, Banes entered a guilty plea in the felony case to an amended information charging him with attempted sexual assault in the second degree, a Class IIIA felony. Also on September 25, Banes entered a guilty plea in the misdemeanor case to an amended information charging him with contributing to the delinquency of a minor, a Class I misdemeanor.

On February 18, 2003, Banes was sentenced in each case. In imposing sentence in the felony case, the district court sentenced Banes to incarceration for a period of 20 months to 4 years. The judgment in the felony case granted Banes "credit for all jail time already served solely attributable to this case." In the misdemeanor case, the district court sentenced Banes to incarceration for a period of not less than 1 year and not more than 1 year. The judgment in the misdemeanor case provided that the sentence therein "be served concurrently with the sentence" in the felony case. The judgment further provided for "jail credit beginning with [Banes'] arrest on June 11, 2002."

On February 26, 2003, Banes filed a motion in the felony case captioned "Motion to Determine Credit for Time Served." In this motion, Banes requested the district court "to determine the amount of credit for time served" in the felony case. Specifically, Banes requested that the court grant him "credit for time served from March 22, 2002 to April 19, 2002 . . . and June 17, 2002 to February 18, 2003." On March 4, 2003, the court entered an order in this felony case in which it granted Banes credit for time served from March 22 through April 19, 2002, a period of 29 days, but did not grant credit for time served on or after June 17 until sentencing on February 18, 2003.

On March 19, 2003, Banes appealed his sentence in the felony case to the Court of Appeals. Banes assigned as error the district court's failure to grant him credit for the time he served while he was incarcerated after his bond was refunded on June 17, 2002, through sentencing. Banes did not file an appeal in the misdemeanor case, and that case is not before us.

In an unpublished opinion filed March 16, 2004, the Court of Appeals reversed the sentencing order in the felony case. *State v. Banes*, No. A-03-297, 2004 WL 503100 (Neb. App. Mar. 16, 2004) (not designated for permanent publication). Referring to Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999), the Court of Appeals concluded that the district court had abused its discretion in granting Banes credit for only 29 days in the felony case. The Court of Appeals reasoned that when concurrent sentences are imposed, under the language of the statute, Banes should "have been allowed a credit for the time he served from June 17, 2002, until February 18, 2003, in both" the felony case and the misdemeanor case. *State v. Banes*, 2004 WL 503100 at *2. The Court of Appeals reversed the district court's sentencing order and remanded the cause with directions to grant Banes credit in the felony case for the additional time he served from June 17, 2002, the date his bond was released, until February 18, 2003, the date of his sentencing, a period of 246 days.

The State filed a petition for further review on April 13, 2004, challenging the Court of Appeals' decision that reversed the district court's ruling with regard to the presentence incarceration credit Banes was entitled to receive in the felony case. We granted the State's petition for further review.

ASSIGNMENT OF ERROR

In its petition for further review, the State assigns one error. The State claims, restated, that the Court of Appeals erred in determining that Banes was entitled to credit against his sentence in the felony case for the time he served from June 17, 2002, until February 18, 2003.

STANDARDS OF REVIEW

[1,2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Losinger, ante* p. 660, 686 N.W.2d 582 (2004). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

[3] Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent

conclusion irrespective of the decision made by the court below. *State v. Aguilar, ante* p. 411, 683 N.W.2d 349 (2004).

ANALYSIS

In the instant case, the district court sentenced Banes to 20 months' to 4 years' imprisonment in the felony case. The district court thereafter sentenced Banes to no less than 1 year and no greater than 1 year in prison in the misdemeanor case. The sentence in the misdemeanor case was ordered to be served concurrent with the sentence imposed in the felony case. On appeal, the issue presented in the felony case is what credit should have been given to Banes for the presentence incarceration that resulted from the charge for which his felony sentence was actually imposed. Resolution of this issue involves construction of § 83-1,106.

[4-6] We have stated that penal statutes are to be strictly construed against the government. See, *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002); *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). Additionally, penal statutes are to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Aguilar, supra.* Finally, we have recognized that with regard to penal statutes, it is not within the province of the courts to read a meaning into a statute that is not there. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

The outcome of this case is controlled by § 83-1,106. Section 83-1,106(1) provides:

> Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services, the county board of corrections, or, in counties which do not have a county board of corrections, the county sheriff.

[7] Section 83-1,106 was amended in 1988. Prior to its amendment, § 83-1,106 provided that credit for time served "may be given." Neb. Rev. Stat. § 83-1,106(1) (Reissue 1987). Under the prior version of § 83-1,106(1), the courts had discretion in awarding credit for time served, except where the statutory maximums were exceeded. *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989). In 1988, the statute was amended, changing "may be given" to "shall be given." The overriding effect of the 1988 amendment is that a court must give credit for time served on a charge when a prison sentence is imposed for that charge. See *State v. Sanchez*, 2 Neb. App. 1008, 1011, 520 N.W.2d 33, 35 (1994) (stating that as amended, § 83-1,106(1) "requires the sentencing court to grant credit for time served against a defendant's sentence"). Contrariwise, if an offender serves time in jail on a charge for which there is no conviction or sentence, no credit is given for that time served. See *State v. Heckman*, 239 Neb. 25, 473 N.W.2d 416 (1991).

Because § 83-1,106(1) mandates that credit for time served must be given for time spent in custody on a charge when a prison sentence is imposed for such charge, we examine Banes' presentence incarceration to determine how to effectuate the objective of § 83-1,106(1). Banes' presentence incarceration can be divided into three time periods. The first time period concerns Banes' incarceration in the felony case from March 22 to April 19, 2002. This period consists of 29 days. Banes' incarceration during the first time period was solely as a result of the charges in the felony case. In sentencing Banes in the felony case, the district court gave Banes credit for this 29-day period of presentence incarceration, and the State does not dispute this ruling.

The second time period began on June 11, 2002, and extended to June 17, during which period Banes was incarcerated due to the misdemeanor case. This period consists of 6 days. Banes' incarceration during this second time period is solely attributable to the charges in the misdemeanor case. Given the State's assignment of error on further review, we understand that the State does not object to credit from June 11 to 17 being given solely to the misdemeanor case.

The third time period began on June 17, 2002, with the refund to Banes' mother of the bond she posted in the felony case, and

extended to February 18, 2003, the date of sentencing in each case. With respect to this period of presentence incarceration, the Court of Appeals reasoned that Banes should have been allowed credit in "both" cases for this third period, and thus, the Court of Appeals decided that the district court had abused its discretion in failing to give Banes credit in the felony case for his incarceration from June 17, 2002, to February 18, 2003. It is this third time period of presentence incarceration that is the focus of our analysis.

On further review, the State urges us to rely on § 83-1,106(4) and to reverse the Court of Appeals' decision. We note, as has the State, that subsection (4) anticipates the circumstance involving allocation of credit for a period of presentence incarceration while more than one case is proceeding. Section 83-1,106(4) provides as follows:

> If the offender is arrested on one charge and prosecuted on another charge growing out of conduct which occurred prior to his or her arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge which has not been credited against another sentence.

[8] Noting that § 83-1,106(1) requires the sentencing court to grant credit when a sentence is imposed, we read § 83-1,106(4) as requiring that such credit shall be given which has not otherwise been applied, and the import of this subsection is that all credit available due to presentence incarceration shall be applied, but only once. Looking at the text of § 83-1,106(4), and given our case involving two arrests in two matters, we observe that the scenario outlined in the language of the subsection does not literally provide for our set of facts relative to the third time period, and it is not within the province of the courts to read a meaning into a penal statute that is not there. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). We must nevertheless give § 83-1,106(4) a sensible application in the context of the objective sought to be accomplished and the purpose sought to be served by the statute. *State v. Aguilar, ante* p. 411, 683 N.W.2d 349 (2004).

[9] Under our statutes, an offender shall be given credit for time served as a result of the charges that led to the sentences;

however, presentence credit is applied only once. § 83-1,106(1) and (4). In *State v. Sanchez*, 2 Neb. App. 1008, 1014, 520 N.W.2d 33, 37 (1994), albeit in a case involving one matter, the Court of Appeals recognized that when credit is calculated for concurrent sentences, the longest sentence determines the offender's actual length of time in prison, and credit is "in effect" given to each sentence. Thus, when concurrent sentences are imposed, the credit is applied once, and the credit applied once, in effect, is applied against each concurrent sentence. This approach is commonly followed under statutes the purposes of which are similar to those in Nebraska. See, e.g., *Valle v. Com'r of Correction*, 45 Conn. App. 566, 696 A.2d 1280 (1997), *reversed on other grounds* 244 Conn. 634, 711 A.2d 722 (1998) (involving two matters and concurrent sentences in which credit was given to longest sentence). In this regard, the Supreme Court of Colorado has stated:

> If . . . multiple counts or cases are concurrently filed against a defendant in the same jurisdiction, and the defendant remains confined in that jurisdiction on all charges due to his inability to post bail, each charge would appropriately be considered a cause of the defendant's presentence confinement. . . . In the case of concurrent sentences, the period of presentence confinement should be credited against each sentence. This is so because concurrent sentences obviously commence at the same time and in a functional effect result in one term of imprisonment represented by the longest of the concurrent sentences imposed.

(Citation omitted.) *Schubert v. People*, 698 P.2d 788, 795 (Colo. 1985). See, similarly, *Johnson v. State*, 89 P.3d 669, 671 (Nev. 2004) (stating that "overwhelming majority of states," when apportioning credit for time served in presentence confinement arising from one matter, adhere to principle that credit is given once, but when concurrent sentences are imposed, credit is effectively applied against each concurrent sentence, because longest term of concurrent sentence determines time in jail). See, also, *State v. Tauiliili*, 96 Haw. 195, 29 P.3d 914 (2001).

Applying the foregoing principles to the facts in our case, it is apparent the Court of Appeals erred in its reasoning when it stated that Banes should have been "allowed a credit for the time

he served from June 17, 2002, until February 18, 2003, in both [cases]." *State v. Banes*, No. A-03-297, 2004 WL 503100 at *2 (Neb. App. Mar. 16, 2004) (not designated for permanent publication). Credit is to be given to only one sentence in one case, although we recognize that when an offender has received concurrent sentences, the "effect" is that credit is applied against each sentence. See *State v. Sanchez, supra*.

When analyzing the periods of time served by Banes in presentence incarceration, § 83-1,106 requires the following outcome: Banes' first time period of presentence incarceration, from March 22 to April 19, 2002, is credited against his sentence in the felony case. Banes' second time period of presentence incarceration, from June 11 to 17, 2002, is credited against his sentence in the misdemeanor case. Banes' third time period of presentence incarceration, from June 17, 2002, until sentencing on February 18, 2003, is credited to his sentence in the felony case.

As the Court of Appeals correctly noted, the district court abused its discretion in failing to give Banes full credit against his felony sentence for the presentence time he served in custody as a result of the charges that led to that sentence. Although the reasoning of the Court of Appeals was incorrect in part, the Court of Appeals' decision reversing the district court's sentence in the felony case and remanding the cause with directions that Banes should be given credit in the felony case for time served from June 17, 2002, until February 18, 2003, was correct.

CONCLUSION

Banes was entitled to credit for presentence detention from June 17, 2002, to February 18, 2003, against only his felony sentence and not against the sentence in the misdemeanor case, and we therefore disagree with the Court of Appeals' statement that Banes was entitled to credit in "both" the felony and misdemeanor cases for this time period. However, we agree with the Court of Appeals' decision that the district court abused its discretion in failing to give Banes credit in the felony case for presentence time served from June 17, 2002, to February 18, 2003. Thus, for reasons other than those articulated by the Court of Appeals, we affirm the decision of the Court of Appeals, which reversed the district court's decision and remanded the cause with

directions to grant Banes credit in the felony case for additional time served.

AFFIRMED.

WRIGHT, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V.
ROGER VAN, APPELLANT.

688 N.W.2d 600

Filed November 12, 2004. No. S-03-1106.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Statutes: Proof.** The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional.
4. **Constitutional Law: Statutes: Waiver.** A facial challenge to a statute is waived if a party fails to file a timely motion to quash in the district court.
5. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.
6. **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.
7. **Indictments and Informations.** The function of an information is twofold: With reasonable certainty, an information must inform the accused of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.
8. **Criminal Law: Indictments and Informations.** Generally, to charge a defendant with the commission of a criminal offense, the information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime, or in language equivalent to the statutory terms defining the crime charged.
9. **Indictments and Informations: Due Process.** 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. However, when the charging of a crime in the language of the statute leaves the information insufficient to reasonably inform the defendant as to the nature of the crime charged, additional averments must be included to meet the requirements of due process.

10. **Indictments and Informations.** An information is deemed sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
11. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
12. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
13. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
14. **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.
15. **Sentences.** 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.
16. **Sentences: Appeal and Error.** Where a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed.
17. ____: ____. 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.
18. **Sentences: Evidence: Appeal and Error.** The mere fact that a defendant's sentence differs from that imposed on a coperpetrator does not in and of itself make the defendant's sentence an abuse of discretion, as the court must consider each defendant's life, character, and previous conduct in imposing sentence.
19. **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.
20. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence

admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

21. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
22. **Due Process: Evidence: Prosecuting Attorneys.** The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
23. **Constitutional Law: Evidence.** Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.
24. **Pretrial Procedure: Prosecuting Attorneys: Evidence.** Whether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.
25. **Jury Misconduct: New Trial.** In order for jury misconduct to become the basis for a new trial, it must be prejudicial.
26. **Jury Misconduct: Proof.** Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct.
27. **Motions for New Trial: Evidence: Proof.** One moving for new trial on the basis of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence.

Appeal from the District Court for Wayne County: ROBERT B. ENSZ, Judge. Affirmed.

Melissa A. Wentling, of Wentling Law Office, for appellant.

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

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

STEPHAN, J.

Roger Van was charged in a five-count information with sexual assault in the first degree, assault in the first degree, assault in the second degree, first degree false imprisonment, and terroristic threats. All of the charged offenses were alleged to have been perpetrated upon J.G.C. in Wayne County, Nebraska, from December 8 to 17, 2001. Following a jury trial in the district

court for Wayne County, Van was convicted and sentenced on each of the five counts. He perfected this timely direct appeal.

I. BACKGROUND

This case arises from what began as a consensual homosexual relationship involving bondage, discipline, and sadomasochism (BDSM). The record reflects that in such relationships, one person is a "master" who exerts control over the life of another, who is referred to as a "submissive" or "slave." Generally, persons entering into such a relationship negotiate its limits and decide on a safe word or signal that can be used to stop the master when the submissive becomes too uncomfortable. The record further reflects that rarely do people enter a BDSM relationship without limits, in which no safe word is used and the submissive yields completely to the control of the master.

In the summer of 2001, J.G.C. resided in Houston, Texas, with F.B. The two men were involved in what they characterized as a "master/slave" relationship. F.B. acted as J.G.C.'s partner, friend, companion, and "master," generally dictating all aspects of J.G.C.'s personal life, but not his professional life. For example, F.B. required J.G.C. to perform most household chores and dictated what clothes J.G.C. would wear outside of work. In addition, J.G.C. wore a collar around his neck and was required to walk behind and slightly to the right of F.B. J.G.C. was not allowed to remove the collar without permission from F.B.

F.B. testified at trial that he and J.G.C. focused on a "master/slave" relationship and did not generally engage in sadomasochistic activities. They did, however, engage in some bondage and discipline activities, including floggings and the use of restraints and gags. F.B. and J.G.C. had a safe word that J.G.C. could invoke if the physical discipline became too intense, but J.G.C. did not invoke the safe word at any time during the relationship.

J.G.C. testified that prior to his relationship with F.B., he had been involved in other BDSM relationships, including a relationship that was initiated over the Internet. In the summer of 2001, he felt that he was not getting enough structure, pain, and discipline from F.B., and he therefore began searching the Internet for a new partner who could give him, in his words, "the treatment that I thought that I deserved for fundamentally being a bad person."

J.G.C. stated he was looking for a "very physically and mentally abusive punishment relationship." J.G.C. conducted this search using a computer at his workplace.

In September 2001, J.G.C. responded to an Internet advertisement posted by Van. After that initial contact, the two exchanged approximately 300 e-mail messages. J.G.C. estimated that he spent approximately 125 hours from September until early December either reading e-mail messages from Van or responding to them. At the beginning of this correspondence, J.G.C. informed Van that he wanted to become a total slave. Over the course of the correspondence, this relationship was defined and understood by both parties to be without limits, to have no safe word, and to be permanent. J.G.C. testified at trial that a submissive cannot end a "no limits" relationship and that he expected to be tortured, humiliated, and to eventually die as a result of his relationship with Van.

Specific punishments were discussed in the e-mail correspondence. J.G.C. stated in one message that he needed to be afraid of Van. In another, J.G.C. mentioned the possibility of being branded by Van and suggested where a brand could be applied to his body. He mentioned his fantasies about being restrained and raped. During their e-mail correspondence, J.G.C. specifically told Van that he may try to escape, but that Van should never allow him to do so and should keep him restrained. In various e-mail messages which he transmitted to Van during this period, J.G.C. indicated that he wanted to be flogged, whipped, beaten, restrained, gagged, shaved, tattooed, pierced, blindfolded, injected with saline, and locked in a cell. He also asked that hot wax be dripped on him, that clothespins be placed on his body and ripped off, and that electronic stimulation be used on him. J.G.C. wrote to Van: "The 'rules' shouldn't apply to true Masters; they should be allowed to do whatever they want whenever they want . . . ." He expressed his anger that "our society today doesn't recognize those rights." In another message, J.G.C. listed "affirmations" that he identified as being important to him with respect to the anticipated relationship with Van, which "affirmations" included the following: "[t]o know that You are the kind of man who will get special pleasure out of flaunting the law; a man who believes that You have the right, and OUGHT to have the right, to do whatever You want without being punished for it."

On December 5, 2001, J.G.C. staged his own abduction by driving his car to New Orleans, Louisiana, leaving it at a restaurant, and taking a bus to Omaha, Nebraska. Prior to "disappearing," J.G.C. deleted all e-mail correspondence with Van from his workplace computer. Jerry Marshall met J.G.C. at the bus station in Omaha on Friday, December 7. Marshall was employed by Van as a delivery driver and maintenance person, and he was also the submissive in a BDSM relationship with Van. When Marshall and J.G.C. arrived in Wayne, J.G.C. was taken through a back entrance into the lower level of Van's floral shop located in that city. After J.G.C. disrobed, he was restrained, blindfolded, and led through several rooms. He was eventually placed face up on a specially designed table and secured by his hands and ankles. He and Van then discussed the context of their relationship, and J.G.C. understood it was to include the punishment, humiliation, and torture they had discussed in their e-mail correspondence. Van then beat J.G.C. lightly and shaved parts of his body. J.G.C. was then taken to a 4- by 6-foot cell, where he was restrained on the floor until the next morning.

Marshall woke J.G.C. on the morning of Saturday, December 8, 2001, and took him to a small basement apartment to use the bathroom, shower, and shave. Marshall then returned J.G.C. to what was referred to as the "dungeon room" and secured him to the aforementioned table located there. Van entered the room, gave J.G.C. a notebook and pen, and instructed him to write down everything he had done wrong in his life. J.G.C. understood that what he wrote was to be the basis of his future punishments. J.G.C. testified that as he worked on this writing assignment, he began to realize that he was not a bad person, as he had previously believed, and did not need to be punished. He described this as a "huge catharsis" which caused him to decide that he wanted to return to his life in Houston. J.G.C. testified that at this point, he decided to end the relationship with Van, and he therefore told Marshall that he needed to speak with Van.

When Van came into the dungeon room approximately 20 minutes later, J.G.C. informed him that he had made a mistake and no longer wished to continue their relationship. J.G.C. described Van's demeanor at this time as "very calm" and testified that Van mentioned their prior e-mail correspondence in which J.G.C. had

directed Van not to allow him to escape if he attempted to do so. At the end of the conversation, Van said he was not sure what to do and returned to his floral shop upstairs. Marshall testified that at that point, Van told Marshall that J.G.C. "had had a moment or a slip." The two then reviewed the e-mail correspondence between Van and J.G.C. to confirm that J.G.C. had instructed Van not to allow J.G.C. to leave, even if he requested to leave.

J.G.C. testified that after about 20 minutes, Marshall came into the dungeon room and dragged J.G.C. back to the cell, indicating that if J.G.C. "screwed up" again, he would be killed and buried in the cell. Marshall then took J.G.C. to another room and beat him with a belt. Van then returned, and he and Marshall took J.G.C. to the dungeon room where they strapped him to the table. At that time, Van informed him that he would be severely punished for trying to escape. Van and Marshall then gagged and blindfolded J.G.C., beat him, ripped clothespins off his body, stuck him with pins, and flogged and whipped him. After approximately an hour, he was returned to the cell.

On the morning of Sunday, December 9, 2001, after permitting J.G.C. to shower and shave, Marshall returned him to the dungeon room and locked him down on the table. Some time later, Van entered the room and told J.G.C. that he hoped he had learned his lesson and would never try to escape again. J.G.C. replied that he was sorry he had disappointed Van. Van then forced J.G.C. to listen to an audiotape of Van's voice repeatedly telling J.G.C. that he was a bad person and needed to be punished. J.G.C. had suggested such an audiotape in one of his e-mail messages. Van also informed J.G.C. that a video camera in the room enabled Van to watch J.G.C. at all times and that if he continued to be disobedient, Van would kill him. After listening to the audiotape for most of the day, J.G.C. was returned to the cell and shackled.

On the morning of Monday, December 10, 2001, J.G.C. was strapped to the table in the dungeon room and required to listen to the audiotape. Several times during that day and evening, Van administered what J.G.C. considered "light" spankings and beatings.

On the following day, J.G.C. was again required to listen to the audiotape. That evening, Van strapped J.G.C. to the table, gagged him, and administered six or seven injections of saline solution into his scrotum. After the injections, Van subjected J.G.C. to a

"light beating" for approximately 30 minutes. J.G.C. was then returned to the cell for the night.

On the morning of Wednesday, December 12, 2001, Marshall told J.G.C. that Van had some plans for him. Marshall later took J.G.C. to a small room where a computer was located and taught him to enter information related to Van's business into a software program. While working at the computer, J.G.C. drafted a message to a friend in Houston stating that he was being held against his will by Van in Wayne, Nebraska. J.G.C. testified that he intended to transmit this message by e-mail when Marshall was not looking. Before J.G.C. could attempt an Internet connection, however, Marshall returned and discovered the message. At that point, Marshall returned J.G.C. to the cell and told him that Van needed to be informed of the message.

Marshall testified that after he reported this incident, Van had a private conversation with J.G.C. for approximately 30 minutes. Afterward, Van reported to Marshall that J.G.C. was unhappy because his previous BDSM sessions had not been sufficiently intense. At that point, Marshall and Van returned J.G.C. to the dungeon room where they locked him on the table. After blindfolding and gagging J.G.C., Van and Marshall beat him severely using a whip, a flogger, pins, hot wax, and clothespins. Marshall and Van then removed J.G.C. from the table, secured his hands to an overhead beam so that he hung by his wrists, and beat him for 10 to 15 minutes. After the beating, Van informed J.G.C. that every time he made a mistake, the punishment would be more severe until Van became tired of it and decided to kill him.

On several evenings, J.G.C. was required to give Van a massage. J.G.C. testified that after one of these sessions, on the evening of either December 10 or 11, 2001, Van anally penetrated him. J.G.C. testified that he did not consent to this act, but did not resist either verbally or physically because of the threats which Van had made previously. J.G.C. further testified that Van anally penetrated him again on or after December 12.

J.G.C. testified that on either December 14 or 15, 2001, Van placed him on the table in a prone position, blindfolded and gagged him, and then said that he intended to brand him as his property. J.G.C. testified that a few minutes later a brand was applied to his right thigh, causing intense pain.

On the morning of Sunday, December 16, 2001, Marshall approached J.G.C. and asked if he was being held against his will. Marshall testified that he had difficulty making it clear to J.G.C. that his inquiry was "out of the game." Eventually, J.G.C. told Marshall that he did want to leave, and the two devised an escape plan. When Van left later in the day, J.G.C. and Marshall made it appear that J.G.C. had forced his way out of the basement. This plan was meant to protect Marshall from possible retribution by Van. Marshall then took J.G.C. to the home of a friend who loaned J.G.C. money for a bus ticket to Houston.

At that point, Marshall telephoned F.B. and informed him that he had J.G.C. with him and that they would be calling again. Marshall then drove J.G.C. to Omaha. While they were waiting for the next bus to Houston, Marshall telephoned F.B. again, and this time J.G.C. spoke to F.B. During this conversation, J.G.C. informed F.B. that he had left Houston of his own accord but wanted to come home. After J.G.C. boarded the bus, Marshall called F.B. a third time to advise him that J.G.C. was en route.

F.B. notified J.G.C.'s father that J.G.C. was returning to Texas. When he arrived in Dallas, Texas, on Monday, December 17, 2001, J.G.C. was met by F.B., his father, and another man, who drove him to Houston. En route, J.G.C. told F.B. and his father about some of the events which had occurred in Wayne but did not go into detail out of embarrassment and a desire to protect Marshall. Upon arriving in Houston, J.G.C. gave a statement to police in which he did not identify Van or Marshall by name. He left with the understanding that without additional information, Houston police would be unable to conduct any further investigation.

The next day, at the urging of his father, J.G.C. gave a taped statement to Houston police identifying Van and Marshall, who were subsequently arrested. Marshall was originally charged with one count of second degree assault, one count of third degree assault, one count of terroristic threats, and one count of false imprisonment. He pled guilty to one charge of third degree assault in exchange for his testimony against Van.

Additional facts relevant to our analysis of Van's assignments of error will be set forth therein.

II. ANALYSIS

1. Constitutionality of Statutes

(a) Assignments of Error

In his first assignment of error, Van assigns, restated, that Neb. Rev. Stat. §§ 28-319(1)(a), 28-308, 28-309, 28-314, and 28-311.01 (Reissue 1995 & Cum. Supp. 2002), which define the offenses of sexual assault in the first degree, assault in the first degree, assault in the second degree, false imprisonment in the first degree, and terroristic threats, respectively, are unconstitutional as applied to him because they violate his right to privacy guaranteed by the Due Process Clauses of both the Nebraska and U.S. Constitutions, and because the statutes were arbitrarily, capriciously, and discriminatorily applied to him.

In his second assignment of error, Van assigns, restated, that Nebraska's rape shield law, Neb. Rev. Stat. § 28-321 (Reissue 1995), is unconstitutional as applied to him.

(b) Standard of Review

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003); *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002).

[2,3] A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004); *State v. Spady, supra.* The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional. *State v. Spady, supra.*

(c) Disposition

(i) Charging Statutes

Van contends that the statutes defining the criminal offenses of which he was convicted are unconstitutional as applied to him because the "Nebraska legislature did not intend these statutes to apply to conduct that occurs during a private, consensual relationship involving BDSM activities." Brief for appellant at 20. Van argues that the events that occurred in his basement "are almost identical to the BDSM relationship discussed and negotiated in the

emails" in which J.G.C. "appeared to be a willing participant." *Id.* at 18. He argues that he and J.G.C. were "two adults who, with complete and mutual consent, engaged in sexual practices common to their homosexual, BDSM lifestyle." *Id.* at 22.

Van rests his legal argument on *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), which was decided after Van's trial but prior to his sentencing. In *Lawrence*, the U.S. Supreme Court considered the validity of a Texas criminal statute prohibiting two persons of the same sex from engaging in certain intimate sexual conduct. The two adult men convicted under the statute had engaged in consensual sexual activity in a private residence. Overruling *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), the Court recognized that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" and held that the Texas statute furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Texas*, 539 U.S. at 572, 578. The Court noted that as a "general rule," government should not attempt to define the meaning or set the boundaries of a personal relationship "absent injury to a person or abuse of an institution the law protects." 539 U.S. at 567.

In *Lawrence*, the consensual nature of the sexual activity was undisputed. In the instant case, consent was very much at issue. The offenses with which Van was charged were alleged to have been committed from December 8 to 17, 2001, after J.G.C. claimed to have withdrawn his initial consent to the relationship with Van and expressed his desire to return to Texas. In order to obtain a conviction on the charge of sexual assault in the first degree, the State was required to prove beyond a reasonable doubt that sexual penetration occurred without J.G.C.'s consent. See § 28-319(1)(a). We find nothing in *Lawrence* to even remotely suggest that nonconsensual sexual conduct is constitutionally protected under any circumstances or that consent, once given, can never be withdrawn.

Our statutes defining first and second degree assault include no reference to consent. Van was charged with assault in the first degree, defined by § 28-308(1), which provides: "A person commits the offense of assault in the first degree if he intentionally or

knowingly causes serious bodily injury to another person." He was also charged with violating § 28-309, which defines assault in the second degree as "[i]ntentionally or knowingly" causing "bodily injury to another person with a dangerous instrument." This court has held that "all attempts to do physical violence which amount to a statutory assault are unlawful and a breach of the peace, and a person cannot consent to an unlawful assault." *State v. Hatfield*, 218 Neb. 470, 474, 356 N.W.2d 872, 876 (1984). Although we have not previously had occasion to determine the applicability of this principle to a BDSM relationship, other courts have done so. For example, in *People v. Jovanovic*, 263 A.D.2d 182, 198 n.5, 700 N.Y.S.2d 156, 168 n.5 (1999), a case involving alleged conduct which occurred after e-mail correspondence in which the complainant had indicated an interest in participating in sadomasochism, the court noted that under New York law, consent was not a defense to the crime of assault because "as a matter of public policy, a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of serious harm, even if the victim asked for or consented to the act."

In *State v. Collier*, 372 N.W.2d 303, 305 (Iowa App. 1985), the Iowa Court of Appeals held that BDSM activity did not fall within an exception to the Iowa assault statute as conduct by voluntary participants in a "sport, social or other activity" which did not create an "unreasonable risk of serious injury or breach of the peace." (Emphasis omitted.) The court in *Collier* held:

> Whatever rights the defendant may enjoy regarding private sexual activity, when such activity results in the whipping or beating of another resulting in bodily injury, such rights are outweighed by the State's interest in protecting its citizens' health, safety, and moral welfare. . . . A state unquestionably has the power to protect its vital interest in the preservation of public peace and tranquility, and may prohibit such conduct when it poses a threat thereto.

(Citations omitted.) 372 N.W.2d at 307.

The Supreme Judicial Court of Massachusetts used similar reasoning in rejecting the defendant's argument that he was not guilty of assault and battery because he and the victim were engaged in a sadomasochistic relationship in which beatings administered with a riding crop were for sexual gratification.

Commonwealth v. Appleby, 380 Mass. 296, 402 N.E.2d 1051 (1980). The court held that any right to sexual privacy held by a citizen "would be outweighed in the constitutional balancing scheme by the State's interest in preventing violence by the use of dangerous weapons upon its citizens under the claimed cloak of privacy in sexual relations." *Id.* at 310, 402 N.E.2d at 1060. See, also, *People v. Samuels*, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (1967) (holding consent not defense to aggravated assault charge arising from filmed sadomasochistic beating).

Although *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), was decided subsequent to these cases, it does not undermine their reasoning. The *Lawrence* Court did not extend constitutional protection to *any* conduct which occurs in the context of a consensual sexual relationship. Rather, the Court indicated that State regulation of such conduct was inappropriate "absent injury to a person or abuse of an institution the law protects." 539 U.S. at 567. In addition, it specifically noted that the case it was deciding did not involve "persons who might be injured." 539 U.S. at 578. We therefore conclude that §§ 28-308 and 28-309 are not unconstitutional as applied to Van.

[4] We note that Van also argues that the assault statutes are arbitrarily applied, in that their literal application would criminalize such things as surgeries, tattoos, and body piercing. We regard this argument as a facial challenge to the constitutionality of the assault statutes. See *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996) (challenge that statute vests unbridled discretion in county attorney is facial). Van did not, however, file a motion to quash in district court. A facial challenge to a statute is waived if a party fails to file a timely motion to quash in the district court. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). We therefore do not reach the issue of arbitrary application.

Van was also convicted of committing terroristic threats and first degree false imprisonment. "A person commits terroristic threats if he or she threatens to commit any crime of violence . . . [w]ith the intent to terrorize another." § 28-311.01(1)(a). A person commits false imprisonment under § 28-314(1) if he or she "knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury; or (b) with intent to hold

him in a condition of involuntary servitude." Like the assault statutes, the object of these criminal statutes is to protect citizens from injury and to maintain public order, institutions which the law does and should protect. We do not interpret *Lawrence* as restricting the ability of the State to regulate such conduct through its criminal laws and, accordingly, conclude that neither statute is unconstitutional as applied to Van.

(ii) Rape Shield Law

Nebraska's rape shield law, codified at § 28-321, provides in relevant part that evidence of a victim's past sexual behavior is not admissible except as follows:

> Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence [or] evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

Prior to trial, the State filed a motion to exclude evidence of J.G.C.'s past sexual behavior pursuant to § 28-321, on grounds that there was no sexual activity between J.G.C. and Van prior to December 7, 2001, and that J.G.C.'s sexual behavior prior to that date was irrelevant. Following an evidentiary hearing on the motion, the district court entered an order determining that the details of J.G.C.'s prior sexual activity, including events, dates, and partners, were inadmissible under the rape shield law. However, relying upon *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999), and *State v. Johnson*, 9 Neb. App. 140, 609 N.W.2d 48 (2000), the court concluded that under the Confrontation Clause of the Fifth Amendment, Van had the right to inquire generally at trial whether J.G.C. had previously engaged in BDSM activities with persons other than Van.

Van contends that the limitations which the district court imposed upon his right to cross-examine J.G.C. cause the rape

shield law to be unconstitutional as applied to him, arguing that if he "had been allowed to fully cross examine [J.G.C.], a reasonable jury would have a 'significantly different impression of [J.G.C.'s] credibility.' " Brief for appellant at 27, quoting *State v. Johnson, supra.* He contends that "the rejected evidence of [J.G.C.'s] prior consensual BDSM behavior was so relevant and probative that it triggered Van's constitutional right to present such evidence." Brief for appellant at 27.

[5] However, the substance of this "rejected evidence" is not apparent from the record. At trial, Van cross-examined J.G.C. extensively about his prior BDSM activities, including specific information about his relationship with F.B. He made no offer of proof with respect to any additional facts he sought to elicit from J.G.C. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. Neb. Evid. R. 103(1), Neb. Rev. Stat. § 27-103(1) (Reissue 1995); *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). Van has not preserved an issue with respect to exclusion of specific evidence pertaining to J.G.C.'s prior sexual history, and thus we do not reach his claim that the rape shield law is unconstitutional as applied to him.

2. Sufficiency of Information

(a) Assignment of Error

In his third assignment of error, Van assigns, restated, that the district court erred in finding no error of law or irregularities at trial with regard to the State's use of a "blanket" information which did not specify particular facts as applied to each charged offense.

(b) Standard of Review

[6] 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. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004); *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003).

(c) Disposition

The information filed in this case alleged that Van committed the charged offenses in Wayne County "on or about December 8, 2001 to December 17, 2001." Each charged offense was described in the information using the language of the statute by which it was defined. At trial, Van did not specifically object to the form of the information, but did object to all the evidence being presented without specifying which evidence related to which count. During the hearing on his motion for new trial, Van argued, inter alia, that the information violated his double jeopardy rights. Generally, on appeal, he now argues that the information was deficient because it failed to specify the particular facts that supported each of the two assault charges. Relying upon *State v. Bachelor*, 6 Neb. App. 426, 575 N.W.2d 625 (1998), Van contends that there is no way of knowing what evidence the jury used to support its guilty verdict with respect to the charges of first and second degree assault.

Bachelor did not involve a challenge to the sufficiency of an information, but, rather, a contention that third degree assault was a lesser-included offense of second degree assault, such that conviction of both offenses arising out of the same conduct would constitute double jeopardy. Van was charged with and convicted of first and second degree assault, which we have held are separate offenses for double jeopardy purposes. See *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981). *Bachelor* does not support Van's argument that an information alleging multiple counts must allege specific evidentiary facts relevant to each count.

[7-10] The function of an information is twofold: With reasonable certainty, an information must inform the accused of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense. *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001). Generally, to charge a defendant with the commission of a criminal offense, the information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime, or in language equivalent to the statutory terms defining the crime charged. *Id.* 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. *Id.* However, when the charging of a crime in the language of the statute leaves the information insufficient to reasonably inform the defendant as to the nature of the crime charged, additional averments must be included to meet the requirements of due process. *Id.* Nonetheless, an information is deemed 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.*

Here, the information charges that five crimes were committed in Wayne County during a 10-day timeframe and describes the statutorily essential elements of each crime in the words of the statute that defines each charged offense, or language equivalent thereto. We conclude that the information was legally sufficient to accomplish its dual purpose as articulated in *State v. Brunzo, supra.*

3. Motion for Mistrial

(a) Assignment of Error

In his fourth assignment of error, Van assigns, restated, that the district court erred in denying his motion for a mistrial following certain testimony by Marshall which the court ordered stricken.

(b) Standard of Review

[11] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003); *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

(c) Disposition

During trial, the district court conducted a hearing out of the presence of the jury to determine whether evidence relating to Van's prior sexual conduct with Marshall and others was admissible under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995). The court concluded that evidence relating to Van's relationship with Marshall was not subject to rule 404, as it occurred during the time of the conduct involving J.G.C. and Marshall was essentially a codefendant. The court specifically found, however, that evidence of Van's conduct with other individuals was inadmissible under rule 404.

During direct examination by the State, Marshall testified about a conversation he had had with Van about J.G.C. on Thursday, December 13, 2001. Marshall testified that they discussed the events of the previous day and J.G.C.'s progress as a "slave." Marshall testified that during this conversation, Van stated that if J.G.C. did not work out, they would have to kill him. Marshall testified that Van appeared to be disappointed when he made this statement. When the State asked Marshall the reason for Van's apparent disappointment, he responded, "[Van] had told me that what his goal was is to eventually get seven slaves and it was—." At that point, Van's counsel immediately objected and moved for a mistrial on the basis that Marshall had testified regarding Van's behavior with others in violation of the court's finding at the rule 404 hearing. The district court denied the motion but instructed the jury to disregard Marshall's response.

[12] On appeal, Van contends that Marshall's statement was so prejudicial that it could not be cured by the instruction to disregard and that the district court therefore erred in not granting a mistrial. A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *State v. Shipps, supra*; *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999). Marshall's brief remark did not include specifics about Van's prior sexual conduct with other individuals, and we conclude that it does not rise to the level of prejudice that would require a mistrial. The instruction to disregard was sufficient to minimize any prejudice caused by the remark, and the district court did not err in denying Van's motion for mistrial.

4. Assistance of Counsel

(a) Assignment of Error

In his fifth assignment of error, Van assigns, restated, that his trial counsel was ineffective, thereby depriving him of his Sixth Amendment right to assistance of counsel.

(b) Standard of Review

[13,14] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052,

80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003); *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003). 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. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). 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. *Id.*

(c) Disposition

Van alleges that his trial counsel was ineffective in agreeing to redact specific details in the e-mail messages received in evidence at trial, in failing to file a bill of particulars or a motion to quash the assault charges in the information, in failing to request a change of venue, and in failing to challenge discrimination in the selection of the jury. Van concedes in his brief that these claimed deficiencies are "not apparent on the record." Brief for appellant at 30.

Based upon our determination, discussed above, that the information was legally sufficient, we conclude that there is no merit to Van's claim that his trial counsel was ineffective in failing to file a bill of particulars or motion to quash. We agree that the present record provides an insufficient basis for resolution of Van's other claims regarding the assistance provided by his trial counsel. Accordingly, we do not reach those issues in this direct appeal.

5. SENTENCING

(a) Assignment of Error

In his sixth assignment of error, Van assigns that the district court erred "in failing to impose concurrent sentences . . . and imposing an excessive sentence, which constituted an abuse of its discretion."

(b) Standard of Review

[15-17] 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. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Where a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed. *Id.* 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.*

(c) Disposition

All of Van's sentences were within statutory limits. First degree sexual assault is a Class II felony, which carries a minimum prison sentence of 1 year and a maximum of 50 years. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002) and § 28-319(2). Van was sentenced to 7 to 10 years in prison on this charge. First degree assault is a Class III felony and carries a minimum prison sentence of 1 year and a maximum of 20 years. §§ 28-105 and 28-308(2). Van was sentenced to 5 to 8 years in prison for first degree assault. Second degree assault and false imprisonment are Class IIIA felonies which carry no minimum sentence and a maximum prison sentence of 5 years. §§ 28-105, 28-309, and 28-314. Van received prison sentences of 2 to 5 years for second degree assault and 1 to 3 years for false imprisonment. Terroristic threats is a Class IV felony which carries no minimum sentence and a maximum sentence of 5 years in prison. §§ 28-105 and 28-311.01(2). Van received a prison sentence of 1 to 3 years for terroristic threats. The sentences were ordered to be served consecutively.

[18] In arguing that these sentences were excessive, Van contends that all of the charged offenses arose from a single "transaction" which he describes as a "consensual and prearranged BDSM relationship" initiated by J.G.C. Brief for appellant at 31. This argument ignores J.G.C.'s sworn testimony that at the time of the charged offenses, he had withdrawn any consent previously communicated to Van. Nor do we find merit in Van's argument

that his sentences are excessive when compared to the sentence received by Marshall. The mere fact that a defendant's sentence differs from that imposed on a coperpetrator does not in and of itself make the defendant's sentence an abuse of discretion, as the court must consider each defendant's life, character, and previous conduct in imposing sentence. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

Based upon our review of the record, including the presentence investigation report reflecting Van's prior history of sexual offenses, we conclude that the district court did not abuse its discretion in sentencing Van to consecutive terms of imprisonment as noted above.

6. Denial of Motion for New Trial

(a) Assignments of Error

Van's remaining assignments of error pertain to the denial of his motion for new trial. In his seventh assignment of error, Van asserts that the district court erred in failing to find that the verdict was not supported by sufficient evidence or was contrary to law. In his eighth assignment of error, Van alleges prosecutorial misconduct for not disclosing certain evidence prior to trial. In his ninth assignment of error, Van asserts that the trial court erred in refusing a juror affidavit offered in support of his motion for new trial and further erred in not remanding for a new trial or at least for an evidentiary hearing on this issue. In his 10th assignment of error, Van assigns that the district court erred in denying him a new trial based upon newly discovered evidence.

(b) Standard of Review

[19,20] 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. *State v. Hudson, ante* p. 151, 680 N.W.2d 603 (2004). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

(c) Disposition

(i) Sufficiency of Evidence

a. Terroristic Threats

With respect to the terroristic threats charge, Van argues that J.G.C. stated in the e-mail correspondence and admitted on cross-examination that he needed to be afraid of Van. Van argues that his conduct cannot be a terroristic threat "when [J.G.C.], the victim, is asking Van to threaten him, to make him afraid of Van." Brief for appellant at 32. We view this as a restatement of Van's contention that because J.G.C. originally consented to the BDSM relationship, Van cannot be convicted of terroristic threats. We find no merit in this argument.

"A person commits terroristic threats if he or she threatens to commit any crime of violence . . . [w]ith the intent to terrorize another." § 28-311.01(1)(a). In *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990), we held that the terroristic threats statute required neither an actual intent to execute the threats made nor that the recipient of the threat actually be terrorized. Because the State was not required to prove J.G.C. was actually terrorized, the only issue for the jury was whether Van possessed the intent to terrorize him. There was evidence that Van threatened J.G.C.'s life, which is sufficient to support the conviction for terroristic threats.

b. False Imprisonment

Van argues that because J.G.C. admitted the possibility that Van did not understand that J.G.C. really wanted to go home, there was insufficient evidence for the jury to find Van guilty of false imprisonment. Under Nebraska law, a person commits false imprisonment in the first degree "if he or she knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury; or (b) with intent to hold him or her in a condition of involuntary servitude." § 28-314(1). The statute contains no express "lack of consent" element, but it does require an

inquiry into whether the restraint was "knowingly" done. Subsection (1)(b) would require a further inquiry into Van's intent. Regardless of J.G.C.'s belief, the issue of Van's knowledge and intent was for the jury to decide. Because J.G.C. testified that he told Van that he wished to go home, there was sufficient evidence upon which the jury could conclude that Van acted with the requisite knowledge and intent.

c. Sexual Assault

As noted, consent is clearly a defense to the sexual assault charge. In this respect, Van argues that the only evidence in the record is that J.G.C. neither physically nor verbally resisted the assault and that thus, he consented to it. However, under Neb. Rev. Stat. § 28-318(8) (Reissue 1995), the phrase "without consent" within the context of § 28-321 can mean compulsion to submit "due to the use of force or threat of force." In addition, "[a] victim need not resist verbally or physically where it would be useless or futile to do so." § 28-318(8). The jury was instructed on these definitions. Thus, the mere fact that J.G.C. did not verbally or physically resist is not determinative of whether he consented to the acts. The record includes evidence that J.G.C. was subject to beatings for disobeying Van and that he revoked his consent to the BDSM relationship prior to the acts of sexual penetration. Thus, the evidence was sufficient to support Van's conviction on this charge.

d. First and Second Degree Assault

[21] Although Van makes a general assignment that the jury's verdict was not supported by sufficient evidence, he makes no specific argument in this regard with respect to the assault convictions. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Perry, ante* p. 179, 681 N.W.2d 729 (2004); *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

(ii) Alleged Prosecutorial Misconduct

[22-24] The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland,*

373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* Whether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal. *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995). Van argues that the State failed to disclose three categories of evidence prior to his trial.

a. Polygraph Examination Notes

Van filed a pretrial motion to disclose the results of a polygraph test administered to J.G.C. This motion was sustained on June 21, 2002. Van concedes in this brief that he received polygraph information from the State prior to trial. Van contends, however, that the information provided to him was incomplete. Specifically, he contends that one section of this information, captioned "PRE-TEST ADMISSIONS," states "See notes" and that he was never provided with any notes. Brief for appellant at 34. He argues that the failure of the State to provide the notes unfairly limited his ability to cross-examine J.G.C. concerning prior inconsistent statements.

At the hearing on the motion for new trial, the State offered an affidavit from an officer of the Wayne Police Department averring that all of the materials related to the polygraph report were provided to Van. Van offered no evidence to the contrary. The State could not have failed to disclose information which did not exist. Accordingly, Van's argument in this regard is without merit.

b. Statements of J.G.C. and Marshall

Van filed a pretrial motion to disclose exculpatory and mitigating evidence, which was sustained by the trial court prior to trial. In his brief, Van contends that at trial, both Marshall and J.G.C. testified that they had previously lied to law enforcement officers and that the State failed to provide him with this information prior

to trial, thus prejudicing his ability to cross-examine the witnesses. The State argues that Van has presented no evidence in support of his contention that it failed to provide him with information regarding J.G.C.'s and Marshall's statements prior to trial. Moreover, it is clear from the record that Van was provided the information he now complains about while the trial was progressing, when both J.G.C. and Marshall testified about their prior lies. Because Van possessed the information during trial, any delay in receiving the information could not have impaired his ability to cross-examine the witnesses. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (holding no *Brady* violation exists when material evidence is disclosed prior to end of trial).

c. Evidence Pertaining to Anita Reeves

During his cross-examination on July 10, 2002, J.G.C. denied that he knew a person named "Anita Reeves" and denied that he had ever told anyone at a Houston church that he intended to go to New Orleans. During redirect on July 11, the State did not question J.G.C. regarding these statements.

On July 12, 2002, while the trial was still in progress, a Wayne police officer conducted a telephone interview with Reeves. During this interview, it was discovered that Reeves had contacted the Houston police in December 2001 to report that she had had contact with J.G.C. at a church in Houston and that J.G.C. stated he was going to New Orleans. The State immediately provided this information to Van. Van now contends that the State knowingly permitted J.G.C. to falsely testify because it knew the contents of the police interview contradicted J.G.C.'s testimony.

The record reflects that the State did not acquire the information regarding Reeves until after J.G.C.'s trial testimony. Prosecutors therefore could not have knowingly allowed J.G.C. to testify falsely with respect to Reeves. In addition, the interview was based only on Reeves' unsworn statements and thus cannot be said to have rendered J.G.C.'s contradictory, sworn statement false. In any event, the disputed contact between J.G.C. and Reeves is a collateral matter which could not be a basis for impeachment. See *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). For these reasons, we conclude that the State did not engage in misconduct by permitting J.G.C. to testify that he did not have contact with Reeves.

(iii) Alleged Juror Misconduct

In support of his motion for new trial, Van offered an affidavit of one of the jurors regarding statements he had made to other jurors during deliberation. The statements pertained to the juror's belief that sodomy was unlawful in Nebraska. The Nebraska Criminal Code, by which criminal offenses are defined in this state, does not include an offense designated as "sodomy." The district court sustained a relevancy objection to the affidavit, reasoning that while it made reference to "thoughts or comments made in the jury room," there was no evidence that the jury received any extraneous information from an external source during its deliberations. Van argues that the exclusion of the affidavit was reversible error and that the affidavit reflects juror misconduct which warrants a new trial.

[25,26] In order for jury misconduct to become the basis for a new trial, it must be prejudicial. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986). Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *State v. Thomas, supra*; *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988).

In support of his argument that the excluded affidavit reflects juror misconduct, Van relies on *In re Stankewitz*, 40 Cal. 3d 391, 220 Cal. Rptr. 382, 708 P.2d 1260 (1985). In that case, a juror advised other jurors during guilt phase deliberations in a felony murder trial that he had been a police officer for 20 years and that robbery occurs as soon as a person forcibly takes personal property from another, regardless of intent to keep the property. This statement of the law was contrary to a jury instruction given by the court. The applicable California statute provided: " 'Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly.' " (Emphasis omitted.) 40 Cal. 3d at 397, 220 Cal. Rptr. at 384, 708 P.2d at 1262. The court reasoned that when a statement of law not given to the jury in the instructions entered the jury room, the defendant was denied his constitutional right to a fair trial unless the State could prove no actual prejudice

occurred. It thus reversed the conviction and remanded the cause for a new trial.

In the instant case, the district court relied upon the controlling statute in Nebraska, Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), which provides:

> 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.

(Emphasis supplied.) In concluding that the statements which the juror claims to have made to other jurors during deliberations did not constitute "extraneous prejudicial information" within the meaning of this statute, the district court also relied upon our holding in *State v. Thomas*, 262 Neb. at 999, 637 N.W.2d at 650, that the word "extraneous" as used in this statute means " ' "existing or originating outside or beyond: external in origin: coming from the outside . . . brought in, introduced, or added from an external source or point of origin." ' " Applying this definition, we determined in *Thomas* that a juror's statement made during deliberations concerning his knowledge of another case was not extraneous because it was "provided by a member of the jury, not by an external source." 262 Neb. at 999, 637 N.W.2d at 650. We noted that "[n]one of the jurors brought extraneous information to the jury or obtained extra information about the facts of the case." *Id.* at 1000, 637 N.W.2d at 650.

We have applied the same reasoning to legal knowledge possessed by a juror. In *Leavitt v. Magid*, 257 Neb. 440, 443, 598 N.W.2d 722, 725 (1999), the unsuccessful plaintiff in a medical malpractice action alleged jury misconduct, based upon affidavits indicating that a juror, who was an attorney, "intimidated the other

jury members into using a definition of proximate cause that conflicted with the jury instructions." We concluded that the legal knowledge possessed by the attorney-juror was not extraneous prejudicial information within the meaning of § 27-602(2), because it was general knowledge not specific to the factual circumstances presented in the case. Because the juror affidavits were therefore inadmissible, we concluded that the court did not err in denying an evidentiary hearing or in denying the motion for new trial. Similarly, in *State v. Meyer*, 236 Neb. 253, 460 N.W.2d 656 (1990), we held that a juror affidavit may not be used to show a jury's misunderstanding of the law as such misunderstanding inheres in the verdict.

In this case, nothing in the excluded affidavit establishes that matters outside the personal knowledge or belief of the juror were introduced during deliberations and therefore no "extraneous" information was introduced that could be admissible under § 27-606(2). The district court did not err in excluding the affidavit, and Van did not meet his burden of proving prejudicial juror misconduct which would entitle him to a new trial.

(iv) Newly Discovered Evidence

[27] Van argues that the district court erred in denying his motion for new trial on grounds of newly discovered evidence. A new trial can be granted on various grounds materially affecting the substantial rights of the defendant, including "newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial." Neb. Rev. Stat. § 29-2101(5) (Cum. Supp. 2002). One moving for new trial on the basis of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

In support of his claim that he was entitled to a new trial on the basis of newly discovered evidence, Van submitted two affidavits. The first was from a private investigator who averred that he "exhausted all the available resources" he had in an attempt to locate an individual referred to as "W.B." prior to trial but was

unable to do so. The second affidavit was from W.B., who averred that in 1996, he met J.G.C. on an Internet site and that the two corresponded for 6 months. The second affidavit further states that in this correspondence, J.G.C. had expressed a desire to disappear and wanted W.B. as his master and to have complete control over him. The affidavit states that J.G.C. resided with W.B. from April 1997 until 1999. W.B. averred that J.G.C. was a "good liar" and that J.G.C. expected W.B. to provide him financial support. J.G.C. also indicated to W.B. that he wished to receive more punishment during their BDSM sessions. When the relationship ended, W.B. informed F.B. that J.G.C. was motivated only by financial gain. W.B. averred that he showed F.B. e-mail messages which J.G.C. had sent to various individuals reflecting his intention to stage his own abduction, adopt a new identity, and enter a permanent no-limits BDSM relationship. W.B. further averred that he was unaware of Van's case until after the verdict and that when he became aware of it, he contacted Van's attorney. In his affidavit, W.B. opined that J.G.C. was dishonest and motivated by his own financial interests.

When announcing its decision on the motion for new trial on the record, the district court found that the issues addressed in W.B.'s affidavit pertaining to lies by J.G.C. had been raised at trial and admitted by J.G.C. It reasoned that the defense had the opportunity to and did strongly rely on J.G.C.'s lies as a defense at trial and that the additional information provided by W.B. would have gone solely to J.G.C.'s credibility and did not therefore constitute a permissible basis for granting a new trial. See *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). The court did not make an express finding whether the "newly discovered" evidence was such that it could not have been discovered prior to trial.

We assume without deciding that Van has demonstrated that the evidence claimed as "newly discovered" was not available at trial and could not have been discovered with reasonable diligence. See *State v. Jackson, supra*. However, he was also required to demonstrate that the evidence materially affected his substantial rights. See *id.* Nothing in W.B.'s affidavit would directly affect any of J.G.C.'s testimony about what occurred between Van and him. W.B.'s testimony that J.G.C. had previously sought a no-limits BDSM relationship and that J.G.C. was capable of deception

was information that had already been presented to the jury and thus was entirely cumulative. At most, the evidence provided by W.B.'s affidavit would collaterally affect J.G.C.'s general credibility and thus was not material to Van's defense. The district court did not abuse its discretion in finding that newly discovered evidence did not support a new trial.

III. CONCLUSION

For the reasons discussed, we find no merit in any of the assignments of error and, therefore, affirm the judgment of the district court.

AFFIRMED.

JOHN MCGINN, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.

689 N.W.2d 802

Filed November 19, 2004. No. S-03-597.

1. **Demurrer: Pleadings: Appeal and Error.** 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.
2. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled.
3. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the trial court.
4. **Insurance: Contracts.** An insurance policy is a contract.
5. **Insurance: Breach of Contract.** In asserting a claim for breach of an insurance contract, it is ordinarily necessary to assert a breach.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Christopher D. Jerram, of Kelley & Lehan, P.C., and Thomas B. Cowart, of Law Offices of Windle Turley, P.C., for appellant.

Joseph K. Meusey, Marck C. Laughlin, and Jeremy B. Morris, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Mary Lyn Lynch and Thomas Lynch initiated this case in the district court for Douglas County as a class action suit against State Farm Mutual Automobile Insurance Company (State Farm), their automobile insurance carrier. In their first "cause of action," based on contract, the Lynches challenged the administration of the "medical payments coverage" provided to them in their State Farm automobile insurance policy. The Lynches generally alleged throughout all their six "causes of action" that members of the purported class paid premiums for indemnity coverage but that State Farm instead delivered managed care coverage of lesser value. At the time this appeal was filed, the Lynches' case was proceeding but no class had been certified.

On August 26, 2002, the Lynches filed their ninth amended petition in which appellant, John McGinn, was added as a putative class representative. The ninth amended petition (sometimes referred to hereinafter as "petition") is the operative petition for purposes of this appeal. Because Nebraska's new rules of pleading apply to "civil actions filed on or after January 1, 2003," and this action was filed prior to that date, State Farm's challenge to the adequacy of the petition was in the form of a demurrer. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2003); *Kubik v. Kubik, ante* p. 337, 683 N.W.2d 330 (2004).

In its demurrer to the ninth amended petition, State Farm claimed that the petition did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer as to McGinn's claims, dismissed those claims without leave to replead, and struck McGinn as a party to the lawsuit. McGinn was permitted to appeal pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002). McGinn challenges the district court's order sustaining State Farm's demurrer. We affirm.

STATEMENT OF FACTS

The facts as alleged in the petition are as follows: On August 18, 1995, Mary Lynch was involved in an automobile accident in Omaha, Nebraska, when her car was struck from behind by

another vehicle. As a result of the collision, Mary Lynch allegedly sustained personal injuries necessitating medical treatment. Mary Lynch submitted a claim to State Farm pursuant to her medical payments coverage, seeking payment for the medical treatment she had received as a result of the August 18 automobile accident. The record reflects that at the time of her accident, Mary Lynch's medical payments coverage provision provided as follows:

> We [State Farm] will pay reasonable medical expenses incurred, for *bodily injury* caused by accident, for services furnished within three years of the date of the accident. These expenses are for necessary medical, surgical, X-ray, dental, ambulance, hospital, professional nursing and funeral services, eyeglasses, hearing aids and prosthetic devices. . . .
>
> . . . .
>
> We have the right to make or obtain a utilization review of the medical expenses and services to determine if they are reasonable and necessary for the *bodily injury* sustained.

(Emphasis in original.)

State Farm denied Mary Lynch's claim. Thereafter, the Lynches filed the instant class action on behalf of themselves and "all others similarly situated," claiming, in summary, that State Farm engaged in a "scheme" in which it sold them and the members of the class automobile insurance policies and "billed the class members for traditional indemnity medical payments coverage, while actually delivering to them a medical cost containment/managed care program," allegedly a lesser type of coverage. In their petition, the Lynches asserted six separate "causes of action," to wit: breach of contract; breach of the covenant of good faith and fair dealing; violation of the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 et seq. (Reissue 1999); fraud; unjust enrichment; and violation of the Consumer Protection Act, Neb. Rev. Stat. § 59-1601 et seq. (Reissue 1998). Each "cause of action" refers to and is dependent on the existence of the insurance policy contract at issue. Among their various prayers for relief, the Lynches sought damages and a partial refund of the premiums paid for the insurance.

On August 26, 2002, the district court granted the Lynches leave to file a ninth amended petition, adding McGinn as an additional plaintiff and class representative. McGinn purportedly represented

himself and other policyholders who have medical payments coverage in their State Farm automobile insurance policies, but who have not filed a claim under that coverage, and thus, have not had a claim denied.

On September 13, 2002, State Farm filed a demurrer to the ninth amended petition, asserting, inter alia, that the allegations of the petition failed to state facts sufficient to constitute a cause of action. In an order filed January 23, 2003, the district court sustained the demurrer, dismissed McGinn's claims without leave to replead, and struck McGinn as a plaintiff.

In its January 23, 2003, order, the district court reviewed the petition and in connection with McGinn's breach of contract claim reasoned that McGinn's allegations under the ninth amended petition failed to state a cause of action, because "McGinn ha[d] not filed a claim with State Farm and as a result there ha[d] been no denial of a McGinn claim." The district court dismissed all of McGinn's remaining claims under the same reasoning.

On May 9, 2003, the district court entered an order under § 25-1315, concluding that there was "no just reason" for delay and entering judgment in State Farm's favor as to McGinn's claims in the ninth amended petition. Thereafter, McGinn filed the instant appeal. According to the parties, the Lynches' claims against State Farm, encompassing policyholders who have filed a claim and been denied, have been proceeding in the district court during the pendency of the instant appeal.

ASSIGNMENTS OF ERROR

On appeal, McGinn assigns two errors. McGinn claims, restated, that the district court erred (1) in sustaining State Farm's demurrer and dismissing McGinn and the class members he represented from the suit and (2) in sustaining State Farm's demurrer, because a demurrer is not the proper method by which to challenge class status.

STANDARDS OF REVIEW

[1-3] 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. *Kubik v. Kubik, ante* p. 337, 683 N.W.2d 330 (2004);

Rodehorst v. Gartner, 266 Neb. 842, 669 N.W.2d 679 (2003). In determining whether a cause of action has been stated, a petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled. *Id.* Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the trial court. *Id.*

ANALYSIS

Failure to State Cause of Action

In the petition, the following "causes of action" were asserted: breach of contract; breach of the covenant of good faith and fair dealing; violation of the Uniform Deceptive Trade Practices Act, § 87-301 et seq.; fraud; unjust enrichment; and violation of the Consumer Protection Act, § 59-1601 et seq. In sustaining State Farm's demurrer as to each of McGinn's claims under the ninth amended petition, the district court noted that McGinn had not filed a claim under the medical payments coverage provision of his policy and, therefore, had not had a claim denied by State Farm. The district court, in sustaining State Farm's demurrer, initially assessed these facts relative to McGinn's contract allegations and, thereafter, as to all of the "causes of action" as they pertained to McGinn.

In reviewing the district court's decision sustaining State Farm's demurrer, we 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. In considering McGinn's facts as pled to determine whether those facts state a cause of action, we construe the petition liberally.

In the petition, McGinn alleges that he is a policyholder under a State Farm automobile insurance policy that contains a provision for medical payments coverage which is subject to a utilization review as to reasonableness and necessity. Unlike the Lynches, McGinn admits in paragraph 9 of the petition that he has not made a medical payments claim. McGinn nevertheless asserts that he has a justiciable legal issue, because he claims to have purchased a type of medical payments coverage which will not be delivered if he makes a claim.

In support of his assertion that he has stated a cause of action, McGinn relies on cases such as *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wash. App. 245, 63 P.3d 198 (2003), and urges us to reverse the district court's order sustaining State Farm's demurrer. We find the cases upon which McGinn relies, which are not repeated here, unpersuasive or inapposite.

For example, although *Sitton* was certified as a class action and the allegations in *Sitton* are similar to those in the petition, the opinion makes clear that unlike McGinn's circumstance as alleged in the instant case, each of the class representatives who brought the class action against their automobile insurance carrier in *Sitton* had filed claims with the insurance company, which claims were denied, at least in part. We review McGinn's claims and determine whether, despite McGinn's failure to have filed a claim under his medical payments coverage provision, he nevertheless has stated a cause of action against State Farm. We conclude as a matter of law that he has not.

[4,5] Initially, we note that an insurance policy is a contract. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003); *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 659 N.W.2d 823 (2003). In assessing claims for damages in insurance contract actions, it has been recognized that it is ordinarily necessary to assert a breach. 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 232:42 (2000) (stating that allegation of breach is element of claim in action for failure to provide insurance benefits as called for under policy). In the absence of a breach, a cause of action has not ordinarily been stated. See *id.* See, also, *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 627, 611 N.W.2d 409, 415 (2000) (stating cause of action for breach of insurance contract accrues "at the time of the breach or failure to do the thing agreed to").

In connection with the breach of contract "cause of action," McGinn has admittedly not filed a claim under his medical payments coverage and has not had a claim denied. As such, McGinn cannot allege, as the Lynches have, that State Farm "billed [him] for traditional indemnity medical payments coverage, while actually delivering . . . a medical cost containment/managed care program." McGinn has not been subject to the administration of the policy, and specifically, he has not actually had the coverage

at issue "delivered" to him. If McGinn would submit a claim, we do not know if he would be afforded coverage, denied coverage, or denied coverage in part. Referring to the facts alleged in his contract "cause of action," it cannot yet be said that State Farm has breached the contract of insurance or failed to do the thing agreed to. See *Snyder, supra.*

McGinn has not asserted a case involving a breach of contract, and therefore he has not stated a cause of action for breach of contract, as the district court found. We agree with the district court's reasoning relative to McGinn's claim based in contract.

The district court extended its reasoning to McGinn's remaining claims. This was not error. Each of the other "causes of action" incorporates the existence of the contract for insurance and each is dependent on the viability of McGinn's breach of contract claim. Because McGinn has not alleged a case involving breach of contract, as a matter of law, the remaining "causes of action" likewise fail to state a cause of action. The district court did not err in granting the demurrer.

Remaining Assignment of Error

In view of our resolution of the preceding assignment of error, it is not necessary for us to reach the remaining assignment of error. See *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

CONCLUSION

Referring to his State Farm automobile policy, McGinn alleges that he has not filed a claim under his medical payments coverage provision and has not had a claim denied. Accepting as true the facts pled by McGinn, McGinn has not alleged a breach of his contract of insurance, and this "cause of action" as well as the remaining dependent "causes of action" are not suitable for judicial resolution. We conclude that the district court did not err in sustaining State Farm's demurrer and dismissing the petition as to McGinn, for the reason that McGinn has not stated a cause of action. Accordingly, we affirm the district court's order sustaining State Farm's demurrer without leave to replead, dismissing McGinn's claims, and ordering him stricken as a party plaintiff.

AFFIRMED.

HENDRY, C.J., and McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLANT, V. JEREMIAH L. FIELDS, APPELLEE.

688 N.W.2d 878

Filed November 19, 2004. No. S-03-1184.

1. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
2. **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.
3. **Sentences.** A sentencing court is not limited in its discretion to any mathematically applied set of factors.
4. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life, but there also must be some reasonable factual basis for imposing a particular sentence.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Sentences vacated, and cause remanded for resentencing.

Jon Bruning, Attorney General, and Marie Colleen Clarke, and Stuart J. Dornan, Douglas County Attorney, and Sandra L. Denton, for appellant.

Michael J. Decker for appellee.

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

CONNOLLY, J.

The State of Nebraska appeals Jeremiah L. Fields' sentences. It contends the sentences were excessively lenient. A jury convicted Fields of count I, first degree false imprisonment; count II, first degree sexual assault; count III, robbery; count IV, use of a deadly weapon to commit a felony; and count V, possession of a deadly weapon by a felon. The district court sentenced him to 5 to 5 years' imprisonment for counts I and IV and 5 to 10 years' imprisonment for each remaining count, with the sentences on counts I, II, III, and V running concurrently and count IV running consecutively with credit for time already served. The effect of

the sentences was a total time of 10 to 15 years' imprisonment, making Fields eligible for parole in 4 years from the date of sentencing and for release on good time credits in 6½ years. Because of the severity of the crimes and the likelihood that Fields will reoffend, we determine that the sentences were excessively lenient. We vacate Fields' sentences and remand the cause with instructions for a different judge to impose greater sentences.

I. BACKGROUND

Because the facts are pivotal to whether the sentences were excessively lenient, we set them out in detail. On October 15 or 16, 2002, Fields sexually assaulted J.H., a 43-year-old female who lived alone. She had attended special education classes through the first semester of the ninth grade. J.H. has one son, who was raised by her sister. She receives disability and cannot manage her own finances.

On October 15, 2002, J.H. fell asleep and later awoke to find Fields, a stranger, entering the room with a gun. He uttered, "Bitch, wake up." He then forced J.H. to the living room, pointed the gun at her, and demanded that she remove her clothes; terrified, she complied.

Pointing a gun, Fields next demanded J.H. to perform oral sex on him. During this sexual assault, Fields struck her with the gun multiple times on the back of the head. He then ordered her into the bedroom, instructed her to lie down, placed a pillow over her face, and sexually penetrated her vagina with the gun. She pleaded with him to stop because of the pain, and he refused. He then penetrated her vagina with his penis.

Fields next forced J.H. to the basement at gunpoint and ordered her to get on a mattress. He then gagged and bound her with cords and beat her with a leather belt. He then left.

While Fields was gone, J.H. attempted to get loose, but was unsuccessful. Fields returned, untied her, and forced her to help him load a television and other items into his car. He pointed a gun at J.H. and threatened that if she called the police, he would come back and kill her or have one of his "homeboys" kill her.

After Fields left, J.H. called her sister, who called the police, and J.H. was then taken to the hospital. The record contains photographs showing numerous bruises and scratches and swelling

on J.H.'s face, neck, back, arms, wrists, legs, ankles, and torso. J.H. told police that Fields had tattoos and described his vehicle. The vehicle was later recovered after it had been reported as being stolen. J.H. later identified Fields in a photographic lineup and at trial.

Before trial, a hearing was held pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), concerning evidence that Fields attempted to hire someone to murder J.H. The record contains a transcript of a recorded telephone conversation that Fields made while in jail pending trial. During the conversation, Fields attempted to arrange J.H.'s murder, offering $4,000 to $5,000 to a friend if he would "take her out before trial." Fields made it clear during the conversation that he wanted J.H. to "be dead." The record also contains a newspaper article stating that Fields was charged with conspiracy to commit first degree murder for the murder-for-hire attempt. The court determined that the evidence could be introduced at trial, although the State ultimately did not do so. The parties stipulated that DNA recovered from the rape kit was consistent with Fields' DNA profile.

Fields did not introduce evidence, and the jury convicted him of all charges. Evidence at sentencing showed that Fields was 23 years old and has an eighth grade education. He has two children, but no support orders have been entered. The presentence report showed that Fields used and distributed illegal drugs, and he admitted that he has had women perform sexual favors to obtain drugs from him. He stated to the probation officer that he was under the influence of methamphetamine and "crack" during the assault.

The report also showed that Fields has had over 60 charges or arrests, including arrests for crimes involving aggression or violence such as the use of a weapon to commit a felony, assault and battery, robbery, and multiple counts of third degree assault and disorderly conduct.

The probation officer who prepared the presentence investigation report noted:

> Fields['] record reflects a history of illegal and anti-social behavior. The record indicates previous ass[au]ltive behavior. He was incarcerated for a period of six-months for assault 3rd degree in 2002. There were several charges of assault

> and/or domestic related charges that were declined. Which is . . . an indicator that his temper and his emotions are not under control and he may re-offend at any given time.

The officer recommended incarceration without recommending a specific amount of time. Neither J.H. nor members of her family attended the sentencing hearing.

Fields was sentenced to 5 to 5 years' imprisonment for counts I and IV and 5 to 10 years' imprisonment for each remaining count, with the sentences on counts I, II, III, and V running concurrently and count IV running consecutively. When entering the sentence, the court stated, "According to my mathematics, that means a term of imprisonment of not less than 10, no[r] more than 20 years imprisonment."

II. ASSIGNMENTS OF ERROR

The State assigns, consolidated and rephrased, that the court imposed an excessively lenient sentence.

III. STANDARD OF REVIEW

[1,2] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). 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. *Id.*

IV. ANALYSIS

The State contends that the court abused its discretion when it sentenced Fields. The State points out factors such as Fields' history of violence, the severity of the assault on J.H., his likelihood to reoffend, and his need for a long-term, structured program of rehabilitation. The State also notes that while the trial judge stated that Fields would serve 10 to 20 years' imprisonment, the prison term is actually 10 to 15 years, and that Fields will be eligible for parole in 4 years from the date of sentencing and could be released on good time credits in 2½ years after that time.

1. STATUTORY PROVISIONS

The provisions under the applicable statutes are as follows:

(1) First degree sexual assault, robbery, and use of a weapon to commit a felony are Class II felonies, each punishable by 1 to 50 years' imprisonment. Neb. Rev. Stat. §§ 28-319(2), 28-324(2), and 28-1205(2)(b) (Reissue 1995), and 28-105(1) (Cum. Supp. 2002). The sentence for use of a weapon to commit a felony must be served consecutively to any other sentence imposed. § 28-1205(3).

(2) First degree false imprisonment is a Class IIIA felony punishable by 0 to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. §§ 28-314(2) (Cum. Supp. 2002) and 28-105.

(3) A felon in possession of a weapon is a Class III felony punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. Neb. Rev. Stat. §§ 28-1206(3)(b) (Reissue 1995) and 28-105.

When the State challenges a sentence as excessively lenient, the appellate court should consider:

> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and
>
> (4) Any other matters appearing in the record which the appellate court deems pertinent.

Neb. Rev. Stat. § 29-2322 (Reissue 1995).

[3,4] We have stated, however, that a sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). But there also must be some

reasonable factual basis for imposing a particular sentence. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

For example, we refused to find a sentence excessively lenient in a motor vehicle homicide case when the defendant expressed deep remorse for her conduct and promised to maintain sobriety, there were letters from the community attesting to the defendant's rehabilitation efforts, and the record contained letters from the victim's family expressing their opinion that the defendant's remorse and rehabilitation were genuine. In addition, the defendant was unlikely to commit another crime, she would respond favorably to probation, and imprisonment would place a hardship on her children. *State v. Harrison, supra.*

In contrast, we held that a sentence was excessively lenient in a case involving sexual assault of a child. *State v. Hamik, supra.* In *Hamik*, the defendant was sentenced to probation for sexual assault to be served consecutively to a sentence of incarceration imposed in another case. We noted that unlike *Harrison*, the defendant did not address the court at his sentencing hearing, did not acknowledge his criminal conduct, and did not express remorse. The trial court was unable to discern in the defendant's attitude any appreciation of a need to make changes in his life. In addition, the presentence investigation report indicated a history of aggressive and violent conduct.

Likewise, the Nebraska Court of Appeals has held that consecutive sentences of 8 to 15 years' imprisonment for attempted second degree murder and 2 to 5 years' imprisonment for the use of a firearm in the commission of a felony were excessively lenient. *State v. Silva*, 7 Neb. App. 480, 584 N.W.2d 665 (1998). The Court of Appeals noted that the crime was particularly unsettling because the defendant drove in front of his wife's car and, using a firearm, opened fire, striking the windshield and other portions of the car. He had a history of violent behavior and was likely to reoffend. The Court of Appeals resentenced him to consecutive prison sentences of 20 to 40 years and 5 to 10 years.

2. Application of Statutory Factors

(a) Nature and Circumstances of Crime

It would unnecessarily lengthen this opinion to repeat the nature and circumstances involving these crimes. In brief, the

cruel acts inflicted on J.H. would make the Marquis de Sade flinch.

(b) History and Characteristics of Fields and Need for Sentences Imposed

The record shows that Fields has a long history of aggressive and violent behavior. The presentence investigation report reveals a person who is routinely involved with law enforcement, has problems with illegal drugs, and is highly likely to reoffend. Fields has not acknowledged his criminal conduct, nor has he expressed remorse for his crimes. Obviously, Fields needs a longer period of structure and rehabilitation. We determine that the sentences imposed do not provide adequate deterrence to criminal conduct.

(c) Other Matters Appearing in Record Deemed Pertinent

The court did not make factual findings to explain the sentences imposed. The court also did not address the nature and circumstances of the crime or Fields' criminal history. Instead, the court stated, albeit mistakenly, that by its calculations, Fields would serve 10 to 20 years' imprisonment. However, as the State points out, because most sentences were below the maximum term and were concurrent, the sentences were equivalent to 10 to 15 years' imprisonment. Under the good time credit statutes, Fields would be eligible for parole in about 4 years from the date of sentencing, with a mandatory release date 2½ years later. See Neb. Rev. Stat. §§ 83-1,107 to 83-1,110 (Supp. 2003). The only consecutive sentence imposed was the sentence for the use of a firearm, which sentence is required to be consecutive by law. See § 28-1205(3).

V. CONCLUSION

We determine that the court imposed excessively lenient sentences. Under Neb. Rev. Stat. § 29-2323 (Reissue 1995), when an appellate court determines that a sentence imposed is excessively lenient, it shall either (1) remand the cause for imposition of a greater sentence, (2) remand the cause for further sentencing proceedings, or (3) impose a greater sentence. Under § 29-2323(1), we vacate the sentences and remand the cause to the district court

with instructions to impose greater sentences. The sentences should be imposed by a different district court judge than the original sentencing judge.

SENTENCES VACATED, AND CAUSE REMANDED FOR RESENTENCING.

LAWRENCE A. SEMLER, APPELLANT AND CROSS-APPELLEE, v. SEARS, ROEBUCK AND COMPANY, APPELLEE AND CROSS-APPELLEE, AND THE WALDINGER CORPORATION, APPELLEE AND CROSS-APPELLANT.

689 N.W.2d 327

Filed December 3, 2004. No. S-03-995.

1. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
2. **Statutes.** Statutory interpretation presents a question of law.
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 trial court.
4. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: 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.
6. **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.
7. **Negligence.** Not every negligence action involving an injury suffered on land is properly considered a premises liability case.
8. ____. Under a premises liability theory, a court is generally concerned with either a condition on the land or the use of the land by a possessor.
9. **Negligence: Employer and Employee: Legislature: Intent.** The Legislature intended to limit the application of Neb. Rev. Stat. § 48-425 (Reissue 2004) to the employer-employee relationship.
10. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.
11. **Employer and Employee: Words and Phrases.** The simple-tool doctrine operates to relieve an employer of certain duties in the course of providing tools to its employees.

12. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

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

Kenneth Cobb, of Law Office of Kenneth Cobb, P.C., for appellant.

Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee The Waldinger Corporation.

Brian S. Kruse and Glen Th. Parks, of Rembolt, Ludtke & Berger, L.L.P., for appellee Sears, Roebuck and Company.

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

HENDRY, C.J.

INTRODUCTION

Lawrence A. Semler brought this action against Sears, Roebuck and Company (Sears) and The Waldinger Corporation (Waldinger) for injuries he sustained in a fall while using a ladder. In particular, Semler's petition alleged that Sears was negligent in providing an unsafe ladder for his use, specifically alleging that the ladder failed to have "rubber shoes." Waldinger was named a defendant due to its claimed subrogated interest in Semler's workers' compensation benefits. See Neb. Rev. Stat. § 48-118 (Reissue 2004). The district court for Lancaster County granted Sears' motion for summary judgment and dismissed Semler's action. Semler appeals, and Waldinger cross-appeals. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

At all times relevant to this action, Semler was employed as a heating and air-conditioning service technician for Waldinger. Semler classified his work for Waldinger as light commercial, involving the repair of heating and air-conditioning units for retail establishments.

On December 22, 1997, during the course of his employment, Waldinger dispatched Semler to the Sears store in Lincoln, Nebraska, to repair the heating unit in its product service center. Upon his arrival at the center, Semler testified that he noticed a ladder leaning against a heating unit suspended from the ceiling. After asking a Sears employee, "Is this the furnace that's not working," and receiving the response, "Yeah, it's cold as hell in here," Semler climbed the ladder to determine the nature of the problem. Semler testified that he "[m]ost likely" adjusted the ladder before climbing, but that he did not notice until after the accident whether the "shoes" on the ladder had rubber on them. According to Semler, a ladder shoe is "basically a triangulated swivel that allows a ladder to be put in several different positions."

After analyzing the problem, Semler descended the ladder and returned to his truck to obtain an electrical meter. Upon returning with the meter, Semler climbed the ladder a second time. It was on this occasion that, according to Semler, "[t]he bottom of [the ladder] slipped out," causing Semler to fall to the ground. Semler testified it was his opinion that the ladder's lack of rubber shoes caused the ladder to "slip out" on the concrete floor.

Semler also testified that as of the date of the accident, he had received specific safety training with respect to setting up and climbing ladders and that about 90 percent of the calls to which he was dispatched involved the use of a ladder. Semler further testified that Waldinger provided all the tools he needed for his job. These tools included an extension ladder with rubber shoes. Semler stated that such a ladder was on the Waldinger truck he drove to Sears, but he chose not to use it.

ASSIGNMENTS OF ERROR

On appeal, Semler sets out nine assignments of error that can be consolidated, restated, and renumbered as three. Semler argues that the district court erred in (1) determining that Sears owed no duty to Semler "because [Semler] was an employee of an independent contractor"; (2) finding that no material issue of fact existed as to whether Sears breached its duty to Semler; and (3) finding that even assuming Sears supplied the ladder to Semler, the simple-tool doctrine discharged any duty Sears owed. Waldinger cross-appealed. Since Waldinger's assignments of error are substantially similar to Semler's, they will be considered collectively.

STANDARD OF REVIEW

[1] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Swanson v. Ptak, ante* p. 265, 682 N.W.2d 225 (2004).

[2,3] Statutory interpretation presents a question of law. *Holm v. Holm*, 267 Neb. 867, 678 N.W.2d 499 (2004). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *Id.*

[4,5] 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. *Demerath v. Knights of Columbus, ante* p. 132, 680 N.W.2d 200 (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.*

ANALYSIS

Before addressing Semler's and Waldinger's assignments of error, we note that the record includes the deposition testimony of Neal Simley (Neal), who was a Sears employee on the date of Semler's fall. In that deposition, Neal testified in part as follows: "[Sears' counsel:] Did you select a ladder for [Semler] to use? [Neal:] Yeah. I probably — most likely probably said, Well, here's one you can use if you want, you know." The record also includes Neal's statement that "[a]t the time, there was a 20 foot extension ladder that belonged to [the Sears] service department and I [Neal] said he [Semler] could use it if he wished and retrieved it from its storage space in the next room." Semler, however, testified that no one at Sears retrieved a ladder for his use, but, rather, that the ladder he used was leaning against the heating unit upon his arrival.

Neal's deposition testimony and statement could be viewed as creating an issue of fact with respect to whether, upon Semler's arrival at Sears, the ladder was retrieved by Neal or was merely leaning against the heating unit. In concluding that Neal did not retrieve the ladder for Semler's use, the district court found:

Semler emphatically disagrees with Neal's account. While Semler does not remember Neal being present at the product service center, he specifically denies asking Neal for a ladder. In fact, Semler reiterates throughout his testimony that a ladder was present in the product service center when he arrived, leaning against the heater unit. To say that Semler is entrenched in his position is an understatement. Neal, on the other hand, is less sure of his position.

Virtually all of Neal's testimony concerning a ladder is prefaced with the word "probably." For example, Neal testified that he "probably" selected a ladder for Semler; that he "probably" helped Semler find a ladder; and that he "probably" propped a ladder up against the wall. When he was not speculating about what happened concerning a ladder, Neal testified that he could not recall. Finally, Neal qualified all of his testimony by concluding that "I can't say for 100 percent certain that I got him [Semler] a ladder."

So, even though an argument could be made that a fact issue exists concerning whether a ladder was leaning against the heater unit when Semler arrived in the product service center or was later provided by Neal, the court finds that all of the credible evidence supports the former. That is, there was a ladder leaning against the heater unit when Semler arrived in the product service center. Neal's qualified testimony about "probably" providing a ladder, in light of Semler's unqualified testimony, does not create a genuine issue of fact.

[6] Neither Semler nor Waldinger specifically assigns or argues in their briefs that Neal's deposition or his statement creates an issue of fact as to whether Neal retrieved the ladder for Semler's use. 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. *Scurlocke v. Hansen, ante* p. 548, 684 N.W.2d 565 (2004). As a result, we view the evidence to show that the ladder was leaning against the heating unit upon Semler's arrival at Sears.

Duty to Provide Safe Place to Work

In its determination that Sears owed no duty to provide Semler a safe place to work, the district court relied in part upon

Ray v. Argos Corp., 259 Neb. 799, 612 N.W.2d 246 (2000). In *Ray*, we held:

> Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. There are two recognized exceptions to the general rule. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.

259 Neb. at 803, 612 N.W.2d at 249.

Finding, inter alia, that "[t]here is no evidence Sears retained control over Semler's work" and further that no rule of law imposed a nondelegable duty upon Sears, the district court determined that "no legal duty existed for Sears to protect Semler from injury."

Semler contends that the district court erred as a matter of law in applying the rule set forth in *Ray*. Semler argues that the rule articulated in *Ray* applies to the issue of an employer's vicarious liability for the acts of an independent contractor resulting in injury to third persons, and not to the direct negligence of Sears in providing a defective ladder to Semler, which direct negligence was the issue presented by the pleadings.

We concur that *Ray* does not apply in this circumstance. The pleadings in this case show that Semler is not contending that Sears is vicariously liable to him due to the acts of an independent contractor hired by Sears, over whom Sears retained control. Rather, the pleadings allege that Sears is liable to Semler for its direct negligence in providing a defective ladder for his use. As such, control of another is not the dispositive issue.

Semler cites to *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993), asserting that *Parrish* provides the proper legal analysis. We disagree. In *Parrish*, the issue presented was once again vicarious liability. Specifically, the issue was whether the landowner, the Omaha Public Power District, retained sufficient control over the construction site to impose liability on the district for the alleged negligent acts of a subcontractor. It was in that context that we noted, as Semler argues,

that an owner in control and possession of his property owes a duty to provide a safe workplace to the employee of an independent contractor.

Sears responds by arguing that even if the district court's reliance on *Ray* was misplaced, the district court nevertheless reached the correct result. In support of its argument, Sears relies upon *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

In *Anderson*, the landowner, Nashua Corporation, hired Mike Anderson's employer, an independent contractor, to paint the interior of several underground storage tanks on Nashua's property. While painting an underground tank, the tank burst into flames, severely burning Anderson. In addressing Nashua's duty under the subheading "DIRECT NEGLIGENCE," we observed that in a landowner-independent contractor context, a landowner's duty to maintain the premises in a reasonably safe condition for business invitees had been modified and that in such context, such duty was limited to latent defects that the independent contractor or his employees did not have knowledge of. 246 Neb. at 431, 246 N.W.2d at 283. From this, Sears argues that the absence of rubber shoes was not latent and that, therefore, Sears breached no duty to Semler. Given the pleadings and evidence admitted at the summary judgment hearing, we conclude that *Anderson* is also inapplicable.

[7] Nashua's direct negligence in *Anderson* was considered, inter alia, in the context of premises liability. However, not every negligence action involving an injury suffered on someone's land is properly considered a premises liability case. See, *Whalen v. U S West Communications*, 253 Neb. 334, 346, 570 N.W.2d 531, 540 (1997) (case is not one of premises liability but instead "involves injury caused by misuse of defective equipment"); *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983) (case not one of premises liability, but instead involved active negligence of defendant).

[8] Under a premises liability theory, a court is generally concerned with either a condition on the land, see, e.g., *John v. 00 (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990); *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982); Restatement (Second) of Torts § 343 (1965), or the use of

the land by a possessor, see, e.g., *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999); *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999); Restatement, *supra*, §§ 341 A and 344.

Nowhere in Semler's petition is it alleged that his injuries were due to Sears' failure to protect him from a condition or activity existing upon Sears' land. Rather, Semler's petition alleges that Sears furnished a ladder for Semler and that Sears' negligence was based upon this act. As Semler argues in his brief, he "is suing Defendant Sears for its direct negligence in supplying a defective ladder for his use on its premises." Brief for appellant at 12. Semler's petition and the evidence received by the district court do not implicate *Anderson*'s premises liability analysis. Having concluded that neither *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000); *Anderson, supra*; nor *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993), provides the appropriate legal analysis for determining Sears' duty, we turn to one of Semler's and Waldinger's theories raised by the pleadings and considered by the district court, namely Semler's contention that Sears breached a duty to Semler in supplying an unsafe ladder.

RESTATEMENT (SECOND) OF TORTS § 392: SUPPLIER OF CHATTEL

Semler and Waldinger rely on the Restatement, *supra*, § 392 in support of their argument that a material issue of fact exists as to whether Sears owed Semler a duty in supplying the ladder. In addressing Semler's and Waldinger's argument, the district court found that there was no genuine issue of material fact to support the contention that Sears supplied the ladder and that as such, § 392 did not create a duty on Sears' behalf.

The Restatement, *supra*, § 392 at 319, provides:

> One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by persons for whose use the chattel is supplied

> (a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or
>
> (b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to inform those whom he should expect to use it.

The Restatement, *supra*, comment *e*. at 321-22, discusses the definition of supplying a chattel for one's business purposes:

> One who employs another to erect a structure or to do other work, and agrees for that purpose to supply the necessary tools and temporary structures, supplies them to the employees of such other for a business purpose. This is true irrespective of whether the structure or work when finished is to be used for business or residential and social purposes. On the other hand, if it is understood that the person who is to do the work is to supply his own instrumentalities, but the person for whom the work is to be done permits his own tools or appliances to be used as a favor to the person doing the work, the tools and appliances are supplied as a gratuity and not for use for the supplier's business purposes.

Semler and Waldinger contend that the presence of the ladder leaning against the heating unit upon Semler's arrival, together with the fact that no Sears employee attempted to stop Semler from using the ladder, creates a genuine issue of fact as to whether Sears supplied the ladder. In his deposition, Semler testified in relevant part as follows:

> [Sears' counsel:] Back in December of '97, what equipment did Waldinger provide you?
>
> [Semler:] I have — Waldinger buys every tool I need. I have no tool expense. I have a — my van is full of tools, hand tools, torches, saws, and on the top of my van there is a step ladder and an extension ladder.
>
> Q Does Waldinger provide you the truck as well?
>
> A Yes.
>
> . . . .
>
> Q [On December 22 of 1997, when you went to Sears, d]id you have your extension ladder with you?
>
> A Yes.
>
> . . . .
>
> Q Does that ladder have rubber soles on it?

A Yes.

. . . .

Q Does Waldinger have any policies, to your knowledge, about using Waldinger equipment only?

. . . .

A I'm not sure if there was a strict policy as to using other people's tools. We shouldn't have to, and we don't normally. But whether there was a strict policy on paper, I don't know.

Q Did they ever discuss that in any of the safety training that you had?

. . . .

A Yeah.

Q Okay. What would they say about that?

A Well, you know, a company the size of Waldinger shouldn't borrow that stuff. So we don't borrow tools.

. . . .

Q Back in 1997, was it common for you [Semler] to use equipment other than Waldinger equipment?

A No.

. . . .

Q That day you choose not to use the ladder you had brought; is that correct?

A That's right.

Q Why did you choose that?

A Because there was already a ladder on it — on the unit.

Q But you certainly had an opportunity to have used your own ladder; isn't that right?

A I could have taken theirs down and put mine up, yes.

The record contains no evidence of any contract setting forth which party was to provide tools for Semler's repair work. However, as Semler's testimony shows, Semler arrived at Sears the day of the accident with a plethora of tools, including an extension ladder. Indeed, Semler testified that it was not Waldinger's policy to borrow tools and, further, that he could have used his ladder to perform the necessary repair work but chose not to. As the district court appropriately observed in finding that Sears did not provide the ladder for Semler's use, "[t]he ladder was present when Semler arrived and he elected to use the

ladder . . . notwithstanding that a ladder provided by Waldinger was available to him and that the use of Sears' ladder was in contravention of Waldinger's policy."

Viewing the evidence in a light most favorable to Semler, and giving to him the benefit of all reasonable inferences, we determine that the district court did not err in concluding that there is no genuine issue as to whether Sears supplied the ladder for Semler's use. At most, the presence of the ladder leaning against the heating unit could be viewed as a "favor to the person [Semler] doing the work." See Restatement (Second) of Torts § 392, comment *e*. at 322 (1965). In such instance, its availability would be nothing more than a mere "gratuity," the Restatement would not apply, and no duty would be owed by Sears to Semler. Having determined that there is no genuine issue of material fact that Sears supplied the ladder to Semler, we find the district court did not err in concluding that the Restatement was not applicable.

STATUTORY DUTY

Semler and Waldinger next argue that in connection with Semler's use of Sears' ladder, Sears owed a nondelegable duty to Semler. Their argument is premised primarily upon Neb. Rev. Stat. § 48-425 (Reissue 2004). The district court found that § 48-425 "is not applicable to the facts of this case." Although Waldinger's brief contains a passing reference to the ladder creating an " 'abnormally dangerous condition,' " brief for cross-appellant Waldinger at 9, there is no specific argument in either Semler's or Waldinger's briefs claiming that Semler's work involved special risks or dangers. We will therefore limit our discussion to the issues specifically argued. See *Scurlocke v. Hansen, ante* p. 548, 684 N.W.2d 565 (2004).

A consideration of whether § 48-425 imposes a nondelegable duty upon Sears involves statutory interpretation. Statutory interpretation is a question of law in connection with which an appellate court has an obligation to reach a conclusion independent of the determination reached by the trial court. *Holm v. Holm*, 267 Neb. 867, 678 N.W.2d 499 (2004).

[9] Section 48-425 provides in relevant part that "[a]ll scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances used in the erection, repairing, alteration, removal

or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed in a safe, suitable and proper manner." Section 48-425 is part of Nebraska's health and safety regulations. See Neb. Rev. Stat. §§ 48-401 to 48-446 (Reissue 2004). In *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994), we considered the issue of whether these regulations apply in an employer-independent contractor relationship. In determining that they do not apply, we stated:

> At issue is, To whom and under what circumstances do the health and safety regulations apply?
>
> First, regarding to whom the regulations apply, we find instructive the case of *Quist v. Duda*, 159 Neb. 393, 67 N.W.2d 481 (1954). In *Quist*, this court was confronted with the issue of whether one of the health and safety regulations applied to a landlord who owned an office building-parking garage. Our holding, that the regulations did not apply to the landlord, was not based upon any express statement, but upon the words used in the act. The words "employer" and "employee" were used throughout the act. From this language, we determined that the Legislature intended that the act's application be limited to the relationship of employer and employee. Although we were not specifically concerned with §§ 48-403 and 48-422 in *Quist*, those sections were a part of chapter 48, article 4, as was the section we were concerned with. Neither of those sections has been amended since *Quist* was decided. Although in these specific sections there are not as many references to the employer-employee relationship, we are convinced that the Legislature intended to limit the application of these sections to the employer-employee relationship. Thus, since that relationship does not exist between Nashua and Anderson, §§ 48-403 and 48-422 are not applicable here.

Anderson, 246 Neb. at 428-29, 519 N.W.2d at 282.

[10] The reasoning in *Anderson* is still sound. In so concluding, we note that § 48-425 is part of chapter 48, article 4, of the Nebraska Revised Statutes, and that neither § 48-425, nor the collection of statutes composing chapter 48, article 4, has been amended in any manner which would call into question this court's rationale in *Anderson, supra*, and *Quist v. Duda*, 159 Neb.

393, 67 N.W.2d 481 (1954). Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *Chapin v. Neuhoff Broad.-Grand Island, Inc., ante* p. 520, 684 N.W.2d 588 (2004); *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001). We conclude that the health and safety regulations do not apply and that, in turn, Sears did not owe a nondelegable duty to Semler. The district court's finding that § 48-425 is inapplicable was not error.

SIMPLE-TOOL DOCTRINE

[11] In his third assignment of error, Semler contends the district court erred in concluding that the simple-tool doctrine relieved Sears of any duty it may have owed Semler as a supplier of the ladder. The simple-tool doctrine operates to relieve an employer of certain duties in the course of providing tools to its employees. See, *Anderson v. Moser*, 169 Neb. 134, 98 N.W.2d 703 (1959); *Brown v. Swift & Co.*, 91 Neb. 532, 136 N.W. 726 (1912); *Vanderpool v. Partridge*, 79 Neb. 165, 112 N.W. 318 (1907).

Having already determined that the district court did not err in finding that Sears did not supply the ladder, we need not address the applicability of the doctrine. Semler's third assignment of error is also without merit.

CONCLUSION

[12] The decision of the district court granting Sears' motion for summary judgment is affirmed. In so affirming, we recognize that our reasoning in concluding that Sears owed no duty to Semler differs slightly from the reasoning employed by the district court. However, where the record demonstrates the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by trial court, an appellate court will affirm. See *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003).

AFFIRMED.

IN RE INTEREST OF BRIAN B. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JUSTINE R., APPELLEE, AND KEVIN R., APPELLANT.

689 N.W.2d 184

Filed December 3, 2004. No. S-03-1316.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights.** 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.
3. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
4. ____. Due process is flexible and calls for such procedural protections as the particular situation demands.
5. **Juvenile Courts: Parental Rights: Testimony: Notice: Intent.** When the State seeks to have a child testify in chambers at a juvenile adjudication hearing, the State must first give notice of its intent to the parents of the juvenile or their counsel prior to the adjudication hearing.
6. **Juvenile Courts: Parental Rights: Testimony.** A juvenile court must conduct a hearing separate from an adjudication hearing to determine whether reasons exist for excluding the parents from the child's testimony at the adjudication hearing.
7. **Juvenile Courts: Testimony.** When the requisite showing has been made by the State as to why a child should be allowed to testify in chambers, the juvenile court may exercise its discretion in determining whether to permit the child to testify in chambers.
8. **Juvenile Courts: Testimony: Proof.** The State need only show that there are legitimate concerns regarding a risk of harm to the child if he or she is required to testify in the presence of a parent.
9. **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.
10. **Parental Rights.** The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase.
11. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Cum. Supp. 2002).
12. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for the juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), the State must prove the allegations of the petition by a preponderance of the evidence.

Appeal from the Separate Juvenile Court of Sarpy County: ROBERT O'NEAL, Judge. Affirmed.

Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., for appellant.

Lee Polikov, Sarpy County Attorney, and Sandra K. Markley for appellee State.

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

STEPHAN, J.

This is an appeal from an adjudication by the separate juvenile court of Sarpy County that Brian B., Stephanie B., and Raymond R. are abused or neglected minors as defined in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) by reason of the conduct of Justine R., their natural mother, and Kevin R., the natural father of Raymond. The natural father of Brian and Stephanie is not a party to these proceedings. Kevin is the sole appellant.

FACTS

Brian, born November 12, 1999, and Stephanie, born October 4, 1998, had been adjudicated by the separate juvenile court on May 29, 2002, for reasons which are not entirely clear from the record, but apparently related to the sanitary conditions of their home. Thereafter, they continued to reside with Kevin and Justine, who were then married, and the couple's minor son, Raymond, born April 22, 2002. The record reflects that Kevin left the residence in July 2002 and that he did not return until June 2003. In October 2002, all three children were removed from the home and placed in foster care. On July 15, 2003, the State filed the operative "Second Amended Supplemental Juvenile Petition" alleging that all three children were as described in § 43-247(3)(a) because Kevin had sexually assaulted Stephanie, then age 4, and because Raymond, then age 6 months, had suffered an unexplained broken femur while in Justine's care in October 2002.

Prior to the adjudication hearing on these allegations, the State filed a motion to use hearsay statements made by Stephanie to her therapist and a separate motion to allow Stephanie to testify in chambers at the adjudication hearing. A pretrial hearing was held on these issues. At this hearing, the State offered the expert testimony of Mary Ellen Christ-Anderson, a child and family

therapist and a licensed mental health practitioner in the State of Nebraska. Christ-Anderson specializes in the area of play therapy with children who have experienced trauma in the form of abuse or neglect.

Christ-Anderson began seeing Stephanie in January 2003. In Christ-Anderson's opinion, Stephanie is developmentally delayed in her general knowledge, speech, and vocabulary and in her coarse motor and fine motor skills. Christ-Anderson testified that Stephanie was capable of telling what had happened to her but that "there would be a risk of harm" in forcing her to testify in front of Kevin. Christ-Anderson opined that because Stephanie had been diagnosed with posttraumatic stress disorder, testifying in a large room with many people, including Kevin, would be "very frightening." Christ-Anderson further testified that it was possible that seeing Kevin would cause Stephanie to "regurgitate" memories of the sexual abuse and "shut down." Christ-Anderson also expressed concern that Stephanie may think that talking about the abuse in front of people would cause her to get in trouble, that she may engage in negative behaviors after seeing Kevin, and that she may experience emotional flashbacks. In response to counsel's question, "Do you believe that there's a risk that [Stephanie] would shut down completely if she was forced to testify in front of [Kevin]?" Christ-Anderson replied, "Could be."

On cross-examination, Christ-Anderson conceded there was only a possibility that Stephanie would suffer irreparable harm if she testified in the courtroom in front of Kevin. She further stated that if Stephanie were frightened, there was a possibility that she would not be truthful for the court. She admitted that it was equally possible that seeing Kevin would not cause Stephanie to "shut down." She stated, however, that when a child or person with posttraumatic stress disorder is met with a similar experience or a similar trauma, such as seeing the perpetrator, "it normally results in an emotional upheaval and subsequent negative behaviors." She admitted that her suggestion that testifying could result in irreparable harm to Stephanie was merely "[a]n educated guess." However, Christ-Anderson testified that due to Stephanie's developmental and cognitive delays, her ability to understand and process the experience of testifying would be "very unique." Neither Kevin nor Justine offered evidence at the hearing.

The juvenile court determined that the State had demonstrated "legitimate concerns about the child's testimony in court" and that there "has been a showing of a risk of the child being harmed." Based upon these findings, the court permitted Stephanie to testify in chambers at the adjudication hearing, and she did so. Present in chambers during Stephanie's testimony at the adjudication hearing were the judge, the court reporter, counsel for both parties, the guardian ad litem, and Stephanie's foster father, who was designated as her support person. The court reporter's computer was set up in a separate room occupied by Kevin and the judge's bailiff so that Kevin could view the testimony on the computer screen as it was given. If Kevin wanted the testimony stopped for any reason or wanted to confer with counsel, he was to alert the bailiff, who would then knock on the chamber door, immediately ceasing all testimony. On one occasion, Kevin used this procedure to interrupt the testimony and inform the judge that he was having difficulty reading the testimony from the screen due to the speed of its presentation. Adjustments were made in order to allow him to adequately follow Stephanie's testimony.

Stephanie testified at the adjudication hearing that "Daddy Kevin touched my private" and that "Daddy Kevin hurt my private." Using anatomically correct dolls, Stephanie identified her "private" as her vagina, and she stated that "Daddy Kevin" touched her there with his tongue. She further testified that "Daddy Kevin hurt my private with his private." On cross-examination, Stephanie testified that "Daddy Kevin" hurt her in the barn and that she rode on a tractor with him. She testified there were cows and horses and giraffes in the barn. She also stated she remembered going to Disney World. Kevin subsequently testified that Stephanie had never been either on a tractor or to Disney World. He denied ever touching Stephanie in a sexual manner.

After Stephanie testified at the adjudication hearing, Christ-Anderson was permitted to testify over Kevin's hearsay objections regarding statements Stephanie made to her during the therapy sessions which began in January 2003. These statements were to the effect that "Daddy Kevin" had sexually assaulted her. Christ-Anderson testified that the statements were consistently made over the course of five or six separate sessions. She also testified that the very first time Stephanie made an allegation, it was

offered spontaneously after Christ-Anderson had asked her a question about a stuffed animal. The State argued that the statements were admissible hearsay as a statement made during a medical diagnosis, Neb. Rev. Stat. § 27-803(3) (Cum. Supp. 2002); as a statement qualifying under the residual hearsay exception, § 27-803(23); or as a prior consistent statement offered to rebut a recent charge of fabrication, Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1995). The juvenile court found that the statements fell within § 27-803(23), the residual hearsay exception, but did not qualify as a statement made during a medical diagnosis under § 27-803(3). The court did not make an express ruling on whether the statements were admissible as a prior consistent statement under § 27-801(4)(a)(ii).

On October 29, 2003, the juvenile court entered an order finding the allegations in the State's second amended supplemental juvenile petition to be true by a preponderance of the evidence and adjudging Brian, Stephanie, and Raymond as children within the meaning of § 43-247(3)(a). Kevin perfected this timely appeal, which we moved to our docket on our own motion 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

Kevin assigns, restated, that the juvenile court erred in (1) granting the State's motion to allow Stephanie to testify in chambers, (2) admitting statements made by Stephanie to her therapist under the residual hearsay exception, and (3) finding the allegations in the State's petition true by a preponderance of the evidence.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003).

ANALYSIS

Kevin argues that his due process rights were violated when the juvenile court allowed Stephanie to testify outside of his presence at the adjudication hearing. Because this is a juvenile proceeding and not a criminal case, the heightened standards of the Confrontation Clause are not applicable. See *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999). Compare *State v. Vaught, ante* p. 316, 682 N.W.2d 284 (2004) (Confrontation Clause analysis of child's statement to physician under § 27-803(3)). Instead, the proper analysis is whether Kevin's due process rights were violated. See *In re Interest of Kelley D. & Heather D., supra.*

[2] 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. *Id.* Here, while Kevin has not been shown to have any parental relationship with Stephanie, the State alleged sexual abuse perpetrated upon her by him as the basis for adjudication of all three minor children, including Raymond, who is Kevin's biological child. After finding that the allegations of the second amended supplemental juvenile petition were true, the juvenile court specifically noted that while Raymond was not alleged to have been abused by Kevin, it was "appropriate to assume jurisdiction on all children in a family where one or more are subject to abuse and neglect rather than wait for the possibility of future abuse." Thus, Kevin's due process rights are implicated by virtue of the potential effect of these proceedings upon his parental relationship with Raymond.

[3,4] The concept of due process embodies the notion of fundamental fairness and defies precise definition. *In re Interest of Kelley D. & Heather D., supra*; *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). As we noted in *In re Interest of Kelley D. & Heather D.*, Neb. Rev. Stat. § 43-279.01(1)(d) (Reissue 2004) states in part that where a parent or custodian appears in an adjudication proceeding, the court shall inform the parties of the right to confront and cross-examine witnesses. In deciding due process requirements in a particular case, we must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use. *In re*

Interest of Kelley D. & Heather D., supra. Due process is flexible and calls for such procedural protections as the particular situation demands. *Id.*; *In re Interest of L.V., supra.*

[5-7] The requirements of due process in the circumstance where the State seeks to have a child testify in chambers at a juvenile adjudication hearing were articulated in *In re Interest of Danielle D. et al.*, 257 Neb. 198, 595 N.W.2d 544 (1999). The State must first give notice of its intent to the parents of the juvenile or their counsel prior to the adjudication hearing. *Id.* When such notice is given, the juvenile court must conduct a hearing separate from the adjudication hearing to determine whether reasons exist for excluding the parents from the child's testimony at the adjudication hearing. *Id.* "A child should be allowed to testify in chambers at a separate hearing when there are legitimate concerns about the child's testifying in the presence of his or her parents," and it is "only logical that the child not be faced with the risk of being harmed when that is what the court is trying to prevent." *Id.* at 206, 595 N.W.2d at 550. When the requisite showing has been made by the State, the juvenile court may exercise its discretion in determining whether to permit the child to testify in chambers. *Id.*

[8] In *In re Interest of Danielle D. et al.*, we determined that because there was no advance notice of the State's intent to have the child testify in chambers and no showing that the presence of the parents during the child's testimony "could be harmful" to the child, the juvenile court abused its discretion in permitting in camera testimony out of the presence of the parents. 257 Neb. at 207, 595 N.W.2d at 551. Here, however, notice was given and a separate hearing was held on the issue of whether Stephanie would be permitted to testify in chambers out of the physical presence of Kevin. Based upon the evidence received at the hearing, the juvenile court determined that there were legitimate concerns about Stephanie's testifying in open court and that the State had shown "a risk of the child being harmed." In assigning error to this determination, Kevin argues that the State failed to establish with a "reasonable degree of certainty" that Stephanie would suffer "significant psychological trauma" if she were required to testify in his presence. Brief for appellant at 15, 16. This argument overstates the evidentiary showing necessary to trigger the

discretion of the juvenile court to permit in camera testimony of a minor child. The State need only show that there are legitimate concerns regarding a risk of harm to the child if he or she is required to testify in the presence of a parent. See *In re Interest of Danielle D. et al., supra.*

In this case, Christ-Anderson testified that Stephanie is developmentally delayed in her general knowledge, speech, and vocabulary and in her coarse motor and fine motor skills. She further testified "there would be a risk of harm" in forcing Stephanie to testify in the presence of Kevin. Christ-Anderson further testified that when a child or person with posttraumatic stress disorder is met with a similar experience or a similar trauma, such as seeing the perpetrator, "it normally results in an emotional upheaval and subsequent negative behaviors." In addition, Christ-Anderson testified that due to Stephanie's developmental and cognitive delays, her ability to understand and process the experience of testifying would be "very unique."

In our de novo review, we conclude that this showing was sufficient to permit the juvenile court to exercise its discretionary authority to allow the minor child to testify in chambers. We further conclude that the procedures utilized by the juvenile court were adequate to safeguard Kevin's due process rights. Although he was not allowed to personally confront Stephanie during her testimony, his counsel did so during both direct examination and extensive cross-examination. Kevin was able to view the substance of Stephanie's testimony in near real time, and he was able to confer with his counsel during the testimony. In *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999), juvenile witnesses at an adjudication hearing were situated in the courtroom so that they would not be directly confronted by their father, who was alleged to have abused them. Noting that the father's counsel was able to fully view the witnesses' facial expressions during their testimony, we concluded that the positioning of the juvenile witnesses "did not violate any right of fundamental fairness or confrontation, nor did it violate § 43-279.01(1)(d)." *In re Interest of Kelley D. & Heather D.*, 256 Neb. at 477, 590 N.W.2d at 401. We reach the same conclusion in this case.

[9] We next consider Kevin's argument that the evidence was insufficient to support the State's allegations that the three minor children came within the meaning of § 43-247(3)(a). As noted above, the two older children were already subject to the jurisdiction of the juvenile court based on a previous adjudication that is not the subject of this appeal. In his brief, Kevin does not challenge the adjudication of Raymond under count II of the second amended supplemental juvenile petition, which was based upon the injury to the child's leg. 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. *In re Petition of Omaha Pub. Power Dist., ante* p. 43, 680 N.W.2d 128 (2004). Accordingly, we focus solely on the question of whether the evidence was sufficient to support adjudication under count I, which alleged that Kevin had sexually assaulted Stephanie.

[10-12] The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001); *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999). To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *Id.* At the adjudication stage, in order for the juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. § 43-279.01(3); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002); *In re Interest of T.M.B. et al.*, 241 Neb. 828, 491 N.W.2d 58 (1992). As noted above, our review of factual issues in an adjudication proceeding is de novo on the record, but where credible evidence is in conflict on a material issue of fact, we may consider and give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003).

The central factual issue is whether Kevin sexually assaulted Stephanie as alleged in count I of the operative amended petition. There is conflicting evidence on this issue. Stephanie's testimony

at the adjudication hearing supports the allegation that the assault occurred. The juvenile court made a specific finding that "the testimony of Stephanie . . . was credible given her age and development despite [Kevin's] counsel's able effort to show Stephanie was suggestible as to the details of the assault and other matters. Stephanie did not change her assertion that she was inappropriately touched by [Kevin]." Other evidence supporting the State's allegation of sexual abuse includes the testimony of witnesses who observed Stephanie's behavior during the period in question. Debra Monestero, a licensed practical nurse and family support worker who saw Stephanie on a regular basis from March 2002 through the date of the adjudication hearing in September 2003, testified that she observed Stephanie engaging in unusual behaviors beginning in late October 2002. The child removed her clothing during Monestero's visits and attempted to rub her genital area against Monestero's leg. On another occasion, Monestero observed Stephanie engage in sexualized play with a doll. Monestero was concerned by this behavior and reported it to her supervisor. A foster parent who began caring for Stephanie in her home in November 2002 testified that she observed Stephanie rubbing her genital area against various objects on numerous occasions.

Christ-Anderson began seeing Stephanie on January 9, 2003, pursuant to a referral from Stephanie's caseworker, who was concerned about possible sexual abuse. Christ-Anderson testified that during her therapy sessions, Stephanie exhibited behaviors typical of children who have been sexually abused, including hypervigilance and sexualized play, and that Stephanie displayed a knowledge of sexuality which was atypical for a child of her age.

Evidence disputing the allegations of sexual assault included Kevin's sworn testimony that he never touched Stephanie in a sexual manner and his testimony concerning alternative sources of Stephanie's sexual knowledge, including videotapes, cable television, and an occasion when Stephanie opened a bedroom door and observed him and Justine engaged in sexual activity. Also, Justine testified that in December 2002, she told Stephanie to report that Kevin had touched her inappropriately, not because the touching had occurred, but because Justine was angry with Kevin. Justine also testified that she never observed Stephanie

engaging in any sexualized behavior before she was placed in foster care.

Based on our de novo review of the record, we conclude that the allegations of count I of the operative amended petition were proved by a preponderance of the evidence. We reach this conclusion without considering Christ-Anderson's testimony regarding statements made to her by Stephanie which were received over Kevin's hearsay objection. Because this cumulative testimony is unnecessary to our determination of the sufficiency of the evidence, we need not reach Kevin's assignment of error regarding the admission of such testimony under the residual hearsay exception. See, *In re Estate of Jeffrey B., ante* p. 761, 688 N.W.2d 135 (2004); *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985). As noted, there is no challenge to the sufficiency of the evidence with respect to count II.

CONCLUSION

For the foregoing reasons, we conclude that the juvenile court did not err in adjudicating all three minor children to be within the meaning of § 43-247(3)(a) and, therefore, subject to its jurisdiction. The judgment is therefore affirmed.

AFFIRMED.

ESTATE OF FRANKLIN NORMAN LEE COE, ALSO KNOWN AS NORMAN COE, DECEASED, ET AL., APPELLANTS, V. WILLMES TRUCKING, L.L.C., ET AL., APPELLEES.

689 N.W.2d 318

Filed December 3, 2004. No. S-03-1332.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), 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: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.

3. **Workers' Compensation: Appeal and Error.** 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. **Workers' Compensation: Negligence: Intoxication.** Neb. Rev. Stat. § 48-102 (Reissue 2004) eliminates the three common-law defenses of contributory negligence, the fellow-servant rule, and assumption of the risk from workers' compensation proceedings, preserving only the employee's willful negligence and intoxication as defenses which the employer may raise.
5. **Workers' Compensation: Insurance: Negligence.** Under Neb. Rev. Stat. § 48-103 (Reissue 2004), when an employer fails to carry workers' compensation insurance or an acceptable alternative and an injured employee elects to seek damages in a common-law action, the employer "loses the right to interpose" contributory negligence (unless the employee was intoxicated or willfully negligent), the fellow-servant rule, and assumption of the risk as defenses in the action.
6. **Workers' Compensation: Insurance.** If an employer subject to the Nebraska Workers' Compensation Act fails to carry workers' compensation insurance or an acceptable alternative, then the act is no longer the employee's exclusive remedy. Instead, the employee can elect to either proceed under the act and recover the statutorily set benefits or seek to recover damages in a common-law action against the employer.
7. **Negligence: Words and Phrases.** Reckless indifference to safety means more than lack of ordinary care.
8. ____: ____. Reckless indifference to safety implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree—a willingness to take a chance.
9. **Negligence: Proof.** To show reckless indifference to safety, an employee's conduct must manifest a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result.
10. **Negligence: Appeal and Error.** An appellate court gives considerable deference to a trial judge's determination whether particular conduct amounted to willful negligence.
11. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge of the compensation court, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
12. **Negligence: Evidence.** The violation of a statute or regulation is evidence of willful negligence, but does not automatically equate to willful negligence.
13. **Negligence.** An employer's knowledge of and acquiescence in an employee's violation of a government safety regulation is a factor that a court should consider in deciding whether the employee was willfully negligent.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

Michael E. Sullivan, of Helmann & Sullivan, P.C., and Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

CONNOLLY, J.

While Franklin Norman Lee Coe was driving a truck for his employer, Willmes Trucking, L.L.C. (Company), Coe fell asleep; he died in the resulting accident. After Coe's death, his estate and his two surviving dependents, Pamela Coe and Michael Coe (collectively the appellants), filed workers' compensation proceedings against the Company and its two members, Ronald Willmes and his wife, Sharon Willmes (collectively the appellees). The appellees alleged that the appellants could not recover because Coe had been willfully negligent. See Neb. Rev. Stat. § 48-101 (Reissue 2004). The appellees did not, however, carry workers' compensation insurance or an acceptable alternative as required by the Nebraska Workers' Compensation Act (Act). See Neb. Rev. Stat. § 48-145 (Reissue 2004). The appellants argued that the appellees' failure to carry workers' compensation insurance precluded them from raising willful negligence as a defense.

The trial judge disagreed with the appellants and ruled that Coe had been willfully negligent. A three-judge review panel affirmed. We conclude that the appellees' failure to carry workers' compensation insurance did not preclude them from raising willful negligence and that the compensation court did not err in finding that Coe had been willfully negligent.

FACTUAL BACKGROUND

Coe worked as a truckdriver for the Company. The appellees are named as the Company's comembers in its articles of organization. The Company leased its trucks to Freedom Transportation (Freedom), which scheduled hauling jobs for the Company's trucks. Although Freedom scheduled the jobs, the Company's drivers retained the ability to turn down jobs. After a driver completed a trip, Freedom would issue a check to the Company. As his pay, Coe would receive 25 percent of the income that the truck had earned.

In addition to scheduling jobs, Freedom provided dispatching services and arranged for insurance on the Company's trucks. Ronald Willmes testified that he was under the impression that Freedom had also arranged for workers' compensation insurance. This was not correct, however, and it is undisputed that the Company did not carry workers' compensation insurance when the accident occurred.

On April 23, 2001, the day before his death, Coe picked the truck up at the Company sometime between 7:30 and 8 a.m. He then drove to West Point, Nebraska, where he picked up a load of soybean meal at about 11 a.m. Coe was to deliver the soybean meal to Rupert, Idaho. The most logical route from West Point to Rupert is to get on Interstate 80 south of West Point; continue on Interstate 80 through Nebraska, Wyoming, and into Utah; and then take Interstates 15 and 84 northwest to Rupert. Credit card charges for fuel indicate Coe took this route.

The accident occurred at about 1 a.m. on Interstate 80, just across the Wyoming-Utah border. The parties stipulated that Coe fell asleep while driving and that as a result, the truck left the road and overturned. Coe was pronounced dead upon his arrival at a local hospital.

When the accident occurred, Coe was in violation of a federal regulation meant to curb accidents caused by driver fatigue. Under the regulation, once a truckdriver has driven for 10 hours, the driver must rest for at least 8 consecutive hours. See 49 C.F.R. § 398.6 (2000). It was about 17 hours from the time that Coe picked up the truck until his death. Because of the miles that he traveled, it would have been impossible for Coe to have made more than a few brief stops.

Moreover, the record suggests that Coe had difficulty staying awake at night when he was driving. In an affidavit, his mother stated that in the late 1980's, after working late one night, Coe fell asleep while driving. His vehicle left the road and struck a concrete culvert. She also stated that Coe displayed an unusual propensity for falling asleep very quickly.

Coe's problems with late-night driving led both his mother and his brother to warn him that he was pushing himself too hard and getting too little sleep. These warnings came a few months

before the accident. In addition, Ronald Willmes testified that once or twice, he had told Coe to "slow her down."

PROCEDURAL BACKGROUND

After Coe's death, the appellants commenced workers' compensation proceedings. In their petition, they named the Company as a defendant. In addition, they alleged that Ronald Willmes and Sharon Willmes, as the Company's comembers, were individually liable under Neb. Rev. Stat. § 48-145.01 (Reissue 2004). In their answer, the appellees alleged that Coe had suffered his injuries because of his own willful negligence and that therefore, the appellants could not recover.

The trial judge ruled that the appellees' failure to carry workers' compensation insurance did not preclude them from raising Coe's willful negligence as a defense. The trial judge further concluded that Coe had been willfully negligent and that therefore, the appellants could not recover. The court's review panel affirmed. We granted the appellants' petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

The appellants assign that the compensation court erred in (1) determining that the appellees were not barred from asserting willful negligence as a defense, (2) concluding that Coe was willfully negligent in driving an excessive number of hours in the 24 hours before his death, (3) failing to find that Sharon Willmes and Ronald Willmes were jointly and severally liable, and (4) failing to award the appellants benefits and funeral and medical expenses.

STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), 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. *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004).

[2] The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003).

[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. *Collins v. General Casualty*, 258 Neb. 852, 606 N.W.2d 93 (2000).

ANALYSIS

WILLFUL NEGLIGENCE AS DEFENSE WHEN EMPLOYER FAILS TO CARRY WORKERS' COMPENSATION INSURANCE

The appellants argue that because the appellees failed to carry workers' compensation insurance, they could not raise willful negligence as a defense. The appellants' argument depends upon the interaction between Neb. Rev. Stat. §§ 48-102 and 48-103 (Reissue 2004).

Section 48-102 provides:

> In all cases brought under sections 48-101 to 48-108, it shall not be a defense (a) that the employee was negligent, unless it shall also appear that such negligence was willful, or that the employee was in a state of intoxication; (b) that the injury was caused by the negligence of a fellow employee; or (c) that the employee had assumed the risks inherent in, or incidental to, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances, which grounds of defense are hereby abolished.

To better understand the purpose of § 48-102, a brief review of the common law before the adoption of the workers' compensation laws might be helpful.

[4] Before workers' compensation laws became prevalent in the early 20th century, employees had to resort to common-law negligence actions to recover for injuries arising out of and in the course of employment. But three common-law defenses made it difficult, if not impossible, for injured employees to recover: (1) contributory negligence; (2) the fellow-servant rule, which prevented the employee from recovering if the employee's injury was caused by a fellow employee; and (3) assumption of the risk. See 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law

§ 2.03 (2004). Section 48-102 limits the ability of the employer to raise these three defenses in workers' compensation proceedings. Subsection (a) prevents the employer from raising contributory negligence unless the employee was intoxicated or willfully negligent, subsection (b) prevents the employer from raising the fellow-servant rule, and subsection (c) prevents the employer from raising assumption of the risk. Thus, in effect, § 48-102 eliminates the three common-law defenses from workers' compensation proceedings, preserving only the employee's willful negligence and intoxication as defenses which the employer may raise.

Section 48-103 provides that when an employer fails to carry workers' compensation insurance or one of its acceptable alternatives, "he or she loses the right to interpose the three defenses mentioned in section 48-102 in any action brought against him or her for personal injury or death of an employee." The appellants interpret § 48-103 to mean that when an employer fails to comply with the insurance requirements of the Act, the employer, in addition to not being able to raise the three common-law defenses, also loses the right to raise the two defenses preserved in § 48-102, i.e., willful negligence and intoxication.

[5] There are two flaws in the appellants' interpretation of § 48-103 that cannot be reconciled with the language of the statute. First, under the appellants' interpretation of § 48-103, an employer who fails to carry workers' compensation insurance or an acceptable alternative loses the right to interpose only *two defenses*, willful negligence and intoxication. But construing § 48-103 so that the employer loses two defenses is not consistent with the statute's language; it plainly states that an employer who has failed to carry workers' compensation insurance or an acceptable alternative loses the right to interpose "*three defenses*." We are required to give a statutory language its plain and ordinary meaning. See *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). Construing "three defenses" to mean "two defenses" is the antithesis of that rule.

Second, the appellants' interpretation overlooks that § 48-102 is not the only section that refers to willful negligence. Three other sections in the Act explicitly make the employee's willful negligence a defense in workers' compensation proceedings. Section 48-101 provides, "When personal injury is caused to an

employee by accident or occupational disease, arising out of and in the course of 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*." (Emphasis supplied.)

Neb. Rev. Stat. § 48-109 (Reissue 2004) provides:

> If both employer and employee become subject to the Nebraska Workers' Compensation Act, both shall be bound by the schedule of compensation provided in such act, which compensation shall be paid in every case of injury or death caused by accident or occupational disease arising out of and in the course of employment, *except accidents caused by or resulting in any degree from the employee's willful negligence as defined in section 48-151.*

(Emphasis supplied.)

Finally, Neb. Rev. Stat. § 48-127 (Reissue 2004) provides, "If the employee is injured *by reason of his or her intentional willful negligence*, or by reason of being in a state of intoxication, neither he or she nor his or her beneficiaries shall receive any compensation under the Nebraska Workers' Compensation Act." (Emphasis supplied.) Section 48-103 mentions none of these other sections. If the Legislature had intended § 48-103 to limit §§ 48-101, 48-109, and 48-127, it would have drafted § 48-103 so that it referred to these three sections in addition to § 48-102.

These two flaws lead us to reject the appellants' interpretation of § 48-103. We now turn to the question, What is the correct interpretation of § 48-103?

Generally, when an employee suffers an injury arising out of and in the course of employment, the Act provides the employee's exclusive remedy against the employer. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001). This was part of the tradeoff between employers and employees that underlies the Act. Under the Act, injured employees can recover benefits even if the employers' negligence did not cause their injury. See §§ 48-101 and 48-109. See, also, *Ray v. School District of Lincoln*, 105 Neb. 456, 181 N.W. 140 (1920). In addition, employees can recover benefits, even if the common-law defenses of contributory negligence, the fellow-servant rule, or assumption of the risk would have prevented the employee from recovering

damages. § 48-102. See *Ray v. School District of Lincoln, supra.* In exchange, the compensation that the employee can recover is statutorily set. See § 48-109. This insulates the employer from large damage awards that the employee might have recovered in a common-law action.

[6] But, if an employer subject to the Act fails to carry workers' compensation insurance or an acceptable alternative, then the Act is no longer the employee's exclusive remedy. Instead, the employee can elect to either proceed under the Act and recover the statutorily set benefits or seek to recover damages in a common-law action against the employer. See § 48-145(3). Cf. *Avre v. Sexton*, 110 Neb. 149, 193 N.W. 342 (1923).

Of course, if the employer could raise the common-law defenses of contributory negligence, the fellow-servant rule, or assumption of the risk, the employee's election would be of little value. Section 48-103 makes the employee's election meaningful by incorporating § 48-102 into the common-law action. In other words, § 48-103 prevents the employer from raising as defenses to the common-law action "the three defenses mentioned in § 48-102," i.e., contributory negligence (unless the employee was intoxicated or willfully negligent), the fellow-servant rule, and assumption of the risk.

Thus, § 48-103 provides a powerful incentive for an employer to carry either workers' compensation insurance or an acceptable alternative. If the employer does not, then the injured employee may elect to pursue either a common-law action or workers' compensation proceedings. If the employee chooses the common-law action, not only will the employer be subject to common-law damages, the employer's ability to raise the three common-law defenses most likely to defeat the employee's claim will be cut off.

WAS COE WILLFULLY NEGLIGENT?

Because we have decided that the appellees could raise the willful negligence defense, we now decide whether the compensation court erred in concluding that Coe committed willful negligence.

"Willful negligence consists of (a) a deliberate act, (b) such conduct as evidences reckless indifference to safety, or (c) intoxication

at the time of the injury, such intoxication being without the consent, knowledge, or acquiescence of the employer or the employer's agent." Neb. Rev. Stat. § 48-151(7) (Reissue 2004). The appellees do not contend that Coe deliberately injured himself or that he was intoxicated. The issue is whether his conduct rose to the level of "reckless indifference to safety."

[7-9] Reckless indifference to safety means more than lack of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree—a willingness to take a chance. An employee's conduct must manifest a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000).

[10,11] The employer bears the burden to prove the employee's willful negligence. Neb. Rev. Stat. § 48-107 (Reissue 2004). An appellate court, however, gives "considerable deference to a trial judge's determination of whether particular conduct amounted to willful negligence. If the record contains evidence to substantiate the factual conclusions reached by the trial judge of the compensation court, an appellate court is precluded from substituting its view of the facts for that of the compensation court." *Guico v. Excel Corp.*, 260 Neb. at 721, 619 N.W.2d at 478.

[12] Here, we are concerned with an alleged violation of a federal regulation meant to prevent accidents caused by driver fatigue. The violation of a statute or regulation is evidence of willful negligence, but does not automatically equate to willful negligence. See 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 37.03 (2004). For example, driving 5 miles over the speed limit is not conduct that will "naturally or probably result" in injury. Likewise, even if the employee's conduct would naturally or probably result in injury, the evidence would still need to show that the employee understood the danger, but proceeded regardless. Thus, a daydreaming driver who failed to stop at a stop sign before entering a busy intersection would not be willfully negligent.

This case, however, is not one where the employee did not know of the regulation. Ronald Willmes testified that he had discussed the federal regulation with Coe. Nor is this a case where the violation resulted from a momentary lapse of judgment. Under the

federal regulation, a driver is required to rest for 8 hours after 10 hours of driving. When the accident occurred, Coe had been driving for 17 hours with only brief stops to pick up his load and for gas and restroom breaks. That Coe had exceeded the federal regulation by approximately 7 hours shows that he deliberately decided to violate the regulation.

Moreover, Coe violated the regulation knowing that he was at a high risk for the very thing that the regulation was meant to prevent—falling asleep while driving. His mother and his brother had recently warned him about pushing himself too hard. In addition, his mother stated that he had an unusual propensity for falling asleep quickly and that he had a history of falling asleep while driving. In fact, he had had one previous accident that occurred when he fell asleep at the wheel. Thus, the record supports the compensation court's conclusion that Coe knew of and appreciated the substantial risk presented by driving for as long as he did without resting, but decided to undertake that risk anyway.

[13] The appellants argue that despite Coe's violation of the federal regulation, they can recover benefits because the appellees had acquiesced in Coe's past violation of the regulation. We agree that an employer's knowledge of and acquiescence in an employee's violation of a government safety regulation is a factor that a court should consider in deciding whether the employee was willfully negligent. See 2 Larson & Larson, *supra*, § 35.04. See, also, *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000) (holding that employer's failure to enforce its own safety rule is factor to be considered in whether employee's violation of safety rule is willful negligence). But we disagree that the appellees acquiesced in Coe's violation of the federal regulation.

Generally, Ronald Willmes, who, unlike Sharon Willmes, was actively involved in running the Company, did not track Coe's progress when Coe was on a trip. Coe sent his logbooks to Freedom, and Ronald Willmes usually did not see them. The Company, however, was paid by the number of bushels that Coe hauled, and thus Ronald Willmes would have had at least a general idea of the hours Coe was driving. Further, Ronald Willmes testified that he had some concern with the amount of hours Coe

would drive in a day. But the record does not suggest that Ronald Willmes, upon learning that Coe had probably exceeded the federal regulation on a few occasions, acquiesced in the violations. Rather, Ronald Willmes testified that once or twice, he told Coe to "slow her down." While this is not overwhelming evidence of Ronald Willmes' enforcing the government safety regulation, it is enough to support the compensation court's decision under our deferential standard of review.

CONCLUSION

The appellees' failure to carry workers' compensation insurance did not preclude them from raising the willful negligence defense, and the compensation court did not err in concluding that Coe had been willfully negligent. As a result, it is unnecessary for us to consider the appellants' final assignment of error.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD GALE ZLOMKE, APPELLANT.

689 N.W.2d 181

Filed December 3, 2004. No. S-04-007.

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.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

Jon P. Worthman for appellant.

Jon Bruning, Attorney General, Don Kleine, and Matthew M. Enenbach for appellee.

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

WRIGHT, J.

NATURE OF CASE

In this appeal, we are asked to determine whether a person charged with a felony who has been released on bond may, by his absence, waive the right to be present at all stages of his trial.

SCOPE 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. Thomas, ante* p. 570, 685 N.W.2d 69 (2004).

FACTS

On May 31, 2002, Richard Gale Zlomke was charged with possession of a firearm by a felon, a Class III felony; assault in the second degree, a Class IIIA felony; and use of a firearm to commit a felony, a Class II felony. Zlomke appeared with counsel for arraignment and entered pleas of not guilty. Following arraignment, he remained free on bond. Prior to trial, Zlomke filed a motion asking the court to discharge his counsel so he could represent himself, and the motion was granted.

Trial commenced on November 6, 2002, with Zlomke appearing pro se. The jury was selected, and opening statements were made. After the State presented its evidence and rested, Zlomke began to present his case. Trial was then recessed until the following day. Zlomke failed to appear on November 7, and, on the court's own motion, the matter was continued to November 13.

When Zlomke again failed to appear before the court on November 13, 2002, the State requested that the trial proceed. It then presented evidence to establish that Zlomke's absence was voluntary. The court found his absence to be voluntary and allowed the trial to proceed. Because of Zlomke's absence, the court presumed that he had rested his case, and the State renewed its rest. The jury was instructed, and the State presented closing arguments. The court held that because Zlomke was voluntarily absent, he had waived his closing argument. The jury returned a verdict finding him guilty of all three charges.

On August 19, 2003, Zlomke was arraigned in a separate matter for failure to appear in connection with the above charges. He

was present at the arraignment and was represented by counsel. He subsequently entered a plea of guilty to this additional charge.

On December 2, 2003, Zlomke was sentenced on all four charges. He timely perfected this appeal.

ASSIGNMENT OF ERROR

Zlomke assigns as error the trial court's decision to proceed with closing arguments, instruct the jury, and accept a verdict when he was absent from the courtroom and not represented by counsel.

ANALYSIS

Whether Zlomke could and, in fact, did waive his right to attend all stages of his trial presents a question of law. The evidence was undisputed, and Zlomke presented no evidence to explain why he was not present for the remainder of the trial. 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. Thomas, supra.*

Zlomke argues that the court erred in allowing the trial to proceed while he was absent and not represented by counsel. He relies upon Neb. Const. art. I, § 11, which states: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel . . . ." He also relies upon Neb. Rev. Stat. § 29-2001 (Reissue 1995), which provides:

> No person indicted for a felony shall be tried unless personally present during the trial. Persons indicted for a misdemeanor may, at their own request, by leave of the court be put on trial in their absence. The request shall be in writing and entered on the journal of the court.

This court interpreted the predecessor statute to § 29-2001 in *Scott v. State*, 113 Neb. 657, 204 N.W. 381 (1925), in which a jury instruction was read during the voluntary absence of the defendant, who had been released on bail. We stated:

> It is insisted, and no doubt is the law, that under this statute defendant has a right to be present at all times when any proceeding is taken during the trial, from the impaneling of the

> jury to the rendition of the verdict, inclusive, unless he has waived such right . . . .

Id. at 659, 204 N.W. at 381.

Addressing a situation where the defendant failed to appear while he was released on bail, we stated: "[I]t is the duty of the defendant under bail to attend the sessions of the court, and especially when his case is being tried, and his failure to do so constitutes a voluntary absence on his part and a waiver of his right under the statute quoted." *Id.* As a matter of policy, we stated that "[i]f defendant, out on bail, may prevent the completion of the trial by voluntarily absenting himself, and thus tie the hands of justice, he would be permitted to take advantage of his own wrong." *Id.* at 660, 204 N.W. at 382.

We elaborated further upon this issue in *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991). After acknowledging that a defendant may waive his right to be present at any proceeding during his trial, we stated that "[i]f a defendant is to effectively waive his presence at trial, that waiver must be knowing and voluntary." *Id.* at 325, 476 N.W.2d at 225.

On November 13, 2002, the second day that Zlomke was absent from the trial, the court proceeded to determine if Zlomke's absence was voluntary. The State presented the testimony of a number of witnesses. A Sheridan County deputy sheriff testified that as of the date of the hearing, Zlomke had not been arrested in another jurisdiction and that law enforcement officials had had no contact with Zlomke. Another deputy sheriff testified as to failed attempts to contact Zlomke at his home and as to notice given to his wife regarding the court proceedings. Zlomke's son testified that on the evening of November 6, Zlomke had spoken of "taking off" because he was dissatisfied with the way the trial was proceeding. Finally, the clerk of the district court testified that the clerk's office had had no contact with Zlomke or one of his agents since the first day of the trial. This was sufficient evidence to allow the court to proceed with the trial in Zlomke's absence.

Further evidence of the voluntary and knowing nature of Zlomke's absence was adduced at a later proceeding where he was represented by counsel. Counsel explained that Zlomke "was so overwhelmed by the situation that he was in, by representing

himself at trial, by the circumstances that were going on, that he simply could not come back to court." At the sentencing hearing, Zlomke stated: "As far as the failure to appear, I didn't come back because I just couldn't get here in front of everybody that day. I was under a lot of duress . . . ."

We conclude that Zlomke's absence during his trial was knowing and voluntary. Based upon our decisions in *Scott v. State*, 113 Neb. 657, 204 N.W. 381 (1925), and *State v. Red Kettle, supra*, Zlomke waived his rights under Neb. Const. art. I, § 11, and § 29-2001. The court did not err in proceeding with the trial in Zlomke's absence.

CONCLUSION

For the reasons stated herein, Zlomke's convictions and sentences are affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ELAINE A. WAGGONER, RESPONDENT.

689 N.W.2d 316

Filed December 3, 2004. No. S-04-958.

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 August 23, 2004, formal charges were filed against respondent. The formal charges set forth two counts that included 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 Canon 6,

DR 6-101(A)(3) (neglecting legal matter), as well as her oath of office as an attorney. Neb. Rev. Stat. § 7-104 (Reissue 1997). On September 30, 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 did not challenge or contest that she violated DR 1-102(A)(1) and DR 6-101(A)(3), 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 stated form of judgment. The discipline to which respondent has agreed is a formal public reprimand and the imposition of 12 months' probation and monitoring to be ordered consecutively to the 18 months' probation and monitoring previously ordered by this court in *State ex rel. Counsel for Dis. v. Waggoner*, 267 Neb. 583, 675 N.W.2d 686 (2004) (*Waggoner I*). Upon due consideration, the court approves the conditional admission and imposes discipline as outlined *infra*.

FACTS

In summary, the formal charges allege that during the course of her representation of a client, respondent unduly delayed in completing certain legal matters entrusted to her on behalf of that client. The formal charges further allege that as to a second client, respondent failed to adequately communicate with that client. As noted above, respondent filed a conditional admission in this case on September 30, 2004.

By virtue of this court's order in *Waggoner I* in which we approved a conditional admission, respondent is currently subject to 18 months' probation with monitoring. Although the present case involves clients distinct from those involved in *Waggoner I*, we note that the events in *Waggoner I* and in the present case occurred during the same timeframe and preceded the imposition of discipline in *Waggoner I*. In *Waggoner I*, we publicly reprimanded respondent. In addition to the public reprimand, we ordered that respondent be subject to probation with monitoring for a period of 18 months, 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."

Waggoner I, 267 Neb. at 585, 675 N.W.2d at 688.

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 she violated DR 1-102(A)(1) and DR 6-101(A)(3), 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 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 DR 6-101(A)(3), as well as her oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. We further order that respondent's probation with monitoring previously ordered in *Waggoner I* and outlined above be continued for a period of 12 months consecutively to the previously ordered 18 months' probation, for a total probationary period of 30 months. Respondent 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 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND AND PROBATION.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. KENNETH C. FRITZLER, RESPONDENT.

689 N.W.2d 193

Filed December 3, 2004. No. S-04-1339.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, Kenneth C. Fritzler, was admitted to the practice of law in the State of Nebraska on June 22, 1970, and at all times relevant hereto was engaged in the private practice of law in Kearney, Nebraska. A statement regarding respondent's conduct stemming from his relationship with Jean Myers and Myers' attempt to defraud William Crosier of approximately $9,400 was received by the Counsel for Discipline. The allegations were treated by the Counsel for Discipline as a grievance.

On October 4, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest that he violated Canon 1, DR 1-102(A)(1) (violating disciplinary rule) and DR 1-102(A)(6) (engaging in conduct adversely reflecting on fitness to practice law), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). In his conditional admission, respondent waived all proceedings against him in connection therewith in exchange for a stated form of a consent judgment of a public reprimand. Upon due consideration, the court approves the conditional admission and orders that respondent be publicly reprimanded.

FACTS

In his conditional admission, respondent has stipulated to certain facts that can be summarized as follows: Myers was a former employee and friend of respondent. In August 2002, Myers was convicted of theft by deception, a Class III felony, and placed on probation, the terms of which required her to maintain full-time employment and make restitution of $28,400. Respondent

attempted to assist Myers in finding employment. Unbeknownst to respondent, Myers undertook a new scheme in which she defrauded Crosier of approximately $9,400. Crosier discovered Myers' scheme and demanded the return of his money.

At Myers' request, on December 11, 2002, respondent wrote a check on his personal checking account payable to Crosier. At the time respondent wrote the check, there were insufficient funds in his checking account to cover the check amount. After giving the check to Crosier, respondent placed a stop-payment order on the check. Crosier contacted the Kearney police to report the theft after he was unable to cash respondent's check.

Respondent cooperated with the police in their investigation of Myers, and on March 19, 2004, respondent entered a no contest plea to a misdemeanor charge. On May 10, respondent was sentenced to 1 year's probation and a $1,000 fine, and he was ordered to make restitution in the amount of $9,400 to Crosier. Respondent has paid the fine and has made full restitution to Crosier. According to the conditional admission, respondent has no prior criminal record.

ANALYSIS

Rule 13 provides in pertinent part:

> (A) At any time prior to the Clerk's entering a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of a Grievance or of a Complaint in exchange for a stated form of consent judgment of discipline as to all or a part of the Grievance or Complaint pending against him or her as determined to be appropriate by the Counsel for Discipline and the appropriate Committee on Inquiry; 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 truth of the matters conditionally admitted and knowingly

does not challenge or contest that he violated DR 1-102(A)(1) and (6), 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 (6), as well as his oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. Respondent 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 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

WYATT RICHARDS AND JOAN RICHARDS, HUSBAND AND WIFE, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF ASHLEY RICHARDS, A MINOR CHILD, APPELLANTS, V. LLOYD MEESKE AND MEESKE LAND & CATTLE CO., INC., A NEBRASKA CORPORATION, APPELLEES.

689 N.W.2d 337

Filed December 10, 2004. No. S-02-1184.

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 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. **Pleadings.** The issues in a case are framed by the pleadings.
4. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled.

5. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, 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.
6. **Summary Judgment.** Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.
7. **Negligence.** A possessor of land has a duty to protect those lawfully on the land from the accidental, negligent, or intentionally harmful acts of third persons if those acts are foreseeable.
8. ____. Determining whether a legal duty exists is a question of law dependent on the facts of a particular case.
9. ____. Duty is not sacrosanct in itself but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Chase County, JOHN J. BATTERSHELL, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed.

Sally A. Rasmussen, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellants.

Stephen W. Kay, of Kay & Kay, for appellee Meeske Land & Cattle Co., Inc.

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

CONNOLLY, J.

Lloyd Meeske gave his 9-year-old daughter, Ashley Richards, permission to drive an all-terrain vehicle (ATV) on land owned by Meeske Land & Cattle Co., Inc. (Meeske Land & Cattle). Ashley lost control of the ATV and allegedly suffered injuries in the resulting accident. Joan Richards, who is Ashley's mother, and Wyatt Richards, who adopted Ashley after the accident (collectively the appellants), brought suit against Lloyd and Meeske Land & Cattle on Ashley's behalf. Meeske Land & Cattle moved for summary judgment. The trial court entered summary judgment for Meeske Land & Cattle and allowed the appellants to

immediately appeal under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002). The Nebraska Court of Appeals affirmed. We affirm in part, and in part reverse.

I. BACKGROUND

1. Relationship Between Parties

This case involves an unusual web of relationships. Joan married Lloyd in 1986. During the marriage, they had two children, including Ashley. Lloyd also adopted a child that Joan had from a prior relationship. Lloyd and Joan divorced in either 1992 or 1993. Joan later married her current husband, Wyatt. Since the accident, Wyatt has adopted Ashley and her two sisters. Thus, when the accident occurred, Lloyd was Ashley's biological and legal father.

Ashley's accident occurred when she was visiting Lloyd. Lloyd lives on and farms land owned by Meeske Land & Cattle. At the time of the accident, Henry Meeske (Lloyd's grandfather) served as the corporation's president and treasurer, and Pauline Meeske (Lloyd's great-aunt) served as the vice president.

It is clear that Lloyd was neither a shareholder in, nor an officer of, Meeske Land & Cattle. The evidence, however, on the legal relationship between Lloyd and Meeske Land & Cattle is sketchy. Some evidence suggests that Meeske Land & Cattle leased to Lloyd the land on which the accident occurred and that the corporation was, in effect, an out-of-possession landlord. But other evidence suggests that Meeske Land & Cattle used the land for corporate purposes and that Henry was regularly on the land to oversee these corporate activities. Because this is an appeal from a grant of summary judgment, we cannot resolve disputes in the evidence. See *Woodhouse Ford v. Laflan, ante* p. 722, 687 N.W.2d 672 (2004). Thus, like the Court of Appeals, we will assume that Lloyd and Meeske Land & Cattle copossessed the land.

2. Ashley's Accident

The accident occurred in December 1996 while Ashley and her two sisters were visiting Lloyd. Lloyd's two stepdaughters from his current marriage were also visiting.

On the day of the accident, Lloyd decided to repair a fence near his residence. Initially, Ashley, one of her sisters, and one of Lloyd's stepdaughters helped Lloyd, but after a while, they grew

tired of repairing the fence and asked if they could drive the ATV, which Lloyd owned. Lloyd agreed to let the girls drive the ATV, and he designated a path along which he wanted the girls to drive. The path was located in the area immediately around Lloyd's residence, and, according to Lloyd, he had laid it out so that he could hear the girls while they were driving the ATV.

The girls took turns driving the ATV. Ashley testified that the accident occurred when she swerved to miss a cat that had leapt in front of her. Lloyd, however, testified that Ashley had been driving at about 10 m.p.h., which he described as a "little fast," and lost control when she left the designated path and went through an uneven area.

The day of the accident was not the first time that Lloyd had allowed the girls to drive the ATV. He testified that before the summer of 1996, he had allowed Ashley and her sisters, as well as his two stepdaughters, to ride the ATV as passengers. Lloyd further testified that since the summer of 1996, he had allowed all the girls to drive the ATV.

Ashley's accident was not the first time that someone was injured while using the ATV on the land. Ashley testified that her younger sister had burned herself while trying to get off the ATV. In addition, Lloyd testified that he had had several accidents on the ATV, including a time in 1986 when he rolled the ATV while driving in a pasture.

Joan believed that the ATV was dangerous, and on several occasions, she told Lloyd that she did not want the girls to ride on or drive the ATV. Despite these complaints and his own previous accidents, Lloyd testified that he believed the girls were mature enough and physically large enough to drive the ATV. Lloyd also testified that he did not provide the girls with helmets or any other kind of protective gear when they were using the ATV.

3. Henry and Pauline's Knowledge of Children Using ATV

As noted earlier, Henry and Pauline were officers in Meeske Land & Cattle when the accident occurred. They were elderly and lived together in a house about one-quarter mile from Lloyd's residence.

Neither Henry nor Pauline was present at Lloyd's residence when the accident occurred. Some evidence in the record, however, suggests that on previous occasions, they had seen the girls driving the ATV. Joan testified that during the summer of 1996, the girls were visiting Lloyd. When she arrived to pick up the girls, they were riding the ATV. According to Joan, Henry and Pauline, as well as Lloyd, were present. Joan claims that she told them that she did not want the girls to ride on the ATV. In addition, Ashley testified that on one occasion, the girls rode the ATV at Henry and Pauline's residence when Pauline was present. It is not clear if Henry was home then. Lloyd testified that Henry and Pauline did not know that he allowed the girls to ride on or drive the ATV.

4. Proceedings Below

The appellants filed a petition on behalf of Ashley, naming Lloyd, Henry, Pauline, and Meeske Land & Cattle as defendants. In their answers, each of the defendants denied that they had been negligent and affirmatively alleged that Ashley had been negligent.

The appellants eventually dismissed Henry and Pauline as individual defendants. Meeske Land & Cattle moved for summary judgment. It supported its motion with the pleadings, Lloyd's affidavit, and Ashley's deposition. The appellants opposed the motion with Lloyd's deposition, Joan's deposition, and answers to interrogatories. The trial court granted summary judgment for Meeske Land & Cattle. In addition, the trial court expressly entered judgment and found that there was no just reason for delay. See § 25-1315(1).

The appellants then appealed to the Court of Appeals. In *Richards v. Meeske*, 12 Neb. App. 406, 675 N.W.2d 707 (2004), the Court of Appeals affirmed the trial court's decision. We granted the appellants' petition for further review.

II. ASSIGNMENTS OF ERROR

In their petition for further review, the appellants assign that the Court of Appeals erred in (1) finding that the duty of Meeske Land & Cattle to foresee the possibility of harm was limited to the day of the accident, (2) setting forth a new policy unsupported by

case law, (3) determining facts which may give rise to differing inferences, and (4) failing to address the appellants' assignment of error that the burden of proof on summary judgment does not shift to the nonmoving party until the movant makes a prima facie case.

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. *Jensen v. Board of Regents, ante* p. 512, 684 N.W.2d 537 (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. *Plowman v. Pratt, ante* p. 466, 684 N.W.2d 28 (2004).

IV. ANALYSIS

This case has several murky aspects, and we find it useful to set out a roadmap of the issues we will consider. First, we need to determine how the appellants' claim against Meeske Land & Cattle fits into Nebraska's premises liability framework, a task that, as this case demonstrates, is not always straightforward. After determining where the appellants' claim fits within the framework, we then examine the grounds that the trial court and the Court of Appeals used to grant summary judgment. We conclude that one of these grounds has merit, but that it only entitles Meeske Land & Cattle to partial summary judgment. Finally, we briefly touch on a lurking issue that might possibly justify granting summary judgment for Meeske Land & Cattle. It is whether a possessor of land owes a duty to protect a child lawfully on the land from the negligent parenting decisions of the child's parent. We conclude, however, that it would not be prudent to rule on that issue at this stage of the litigation.

1. Nebraska's Framework for Premises Liability and Appellants' Claim Against Meeske Land & Cattle

Within Nebraska's framework for premises liability, there are generally three categories of duties that a possessor of land owes

to those lawfully on the premises. First, the possessor must take reasonable steps to protect the lawful entrant from conditions on the land. See, e.g., *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004); *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003). Second, the possessor must take reasonable steps to protect the lawful entrant from the possessor's dangerous activities. Restatement (Second) of Torts § 341 A (1965). Finally, the possessor must take reasonable steps to protect the lawful entrant from accidental, negligent, and intentional harmful acts of third parties if those acts are foreseeable. See, e.g., *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000); *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999).

While the lower courts recognized that the appellants' claim against Meeske Land & Cattle was based upon premises liability, they had difficulty determining into which category the claim falls. Portions of the trial court's order, the Court of Appeals' opinion, and Meeske Land & Cattle's brief appear to treat the case as one involving a condition on the land. We, however, disagree with this categorization of the appellants' claim against Meeske Land & Cattle.

[3] The issues in a case are framed by the pleadings. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). Summarized, the appellants' claim against Meeske Land & Cattle consists of the following allegations:

(1) Meeske Land & Cattle was a possessor of the land on which the accident occurred;

(2) ATV's are too dangerous for children Ashley's age to drive, especially when driven without proper safety gear;

(3) Lloyd acted negligently in allowing Ashley to drive the ATV;

(4) Henry and Pauline

(a) were actually aware that Ashley was driving the ATV when the accident occurred, and/or

(b) knew that in the past, Lloyd had allowed children to drive the ATV; and

(5) either because of their knowledge that Ashley was driving the ATV when the accident occurred or because of their knowledge that Lloyd had allowed children to drive the ATV in the past, Henry and Pauline, as officers of Meeske Land & Cattle,

should have exercised reasonable care to prevent Lloyd from allowing Ashley to drive the ATV.

When the allegations are crystallized, the focus is on whether Meeske Land & Cattle, as a possessor of the land on which the accident occurred, should have protected Ashley from Lloyd's decision to allow her to drive the ATV. Thus, we interpret the appellants' claim as one based upon the duty of a possessor of land to protect a lawful entrant from the harmful negligent behavior of a third party.

2. Reasons Used by Lower Courts for Granting Summary Judgment

Having determined where the appellants' claim against Meeske Land & Cattle fits within Nebraska's premises liability framework, we now turn our attention to whether the reasoning used by the lower courts in granting summary judgment to Meeske Land & Cattle was correct. Both courts concluded that to the extent the appellants' claim against Meeske Land & Cattle was based on Henry and Pauline's knowledge that Ashley was driving the ATV when the accident occurred, Meeske Land & Cattle was entitled to summary judgment. In addition, the Court of Appeals held that summary judgment was appropriate because the undisputed evidence showed that any attempt to exercise reasonable care on the part of Henry and Pauline would have been futile.

(a) Henry and Pauline's Knowledge That Ashley Was Driving ATV When Accident Occurred

In their petition, the appellants alleged that Henry and Pauline actually knew that Ashley was driving the ATV when the accident occurred and that as officers of Meeske Land & Cattle, they should have intervened to stop Lloyd. Both the trial court and the Court of Appeals held that summary judgment was appropriate because the undisputed evidence showed that Henry and Pauline did not know that Ashley was driving the ATV when the accident occurred.

[4,5] The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). A party moving for summary judgment must make a prima facie case by

producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, 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. *Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002).

In support of its motion for summary judgment, Meeske Land & Cattle presented an affidavit from Lloyd and Ashley's deposition testimony. Both the affidavit and the deposition testimony support the conclusion that Henry and Pauline were not present when the accident occurred. This was sufficient to make a prima facie showing that when the accident occurred, Henry and Pauline did not know that Ashley was driving the ATV. The burden to produce contradictory evidence then shifted to the appellants.

[6] The appellants' evidence, however, also showed that Henry and Pauline were not present when the accident occurred. The appellants suggest that it was possible that Henry and Pauline knew that Ashley was driving the ATV, even though they were not present. But this is nothing more than unsupported speculation. Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment. *Mefferd v. Sieler & Co.*, 267 Neb. 532, 676 N.W.2d 22 (2004). Thus, to the extent that the appellants' claim against Meeske Land & Cattle is based on Henry and Pauline's knowledge that Ashley was driving the ATV when her accident occurred, Meeske Land & Cattle is entitled to summary judgment.

Henry and Pauline's knowledge that Ashley was driving the ATV when the accident occurred, however, was not the only basis for the appellants' claim against Meeske Land & Cattle. The appellants also alleged that even if Henry and Pauline were not present when the accident occurred, both knew that Lloyd had allowed the children to drive the ATV in the past. The appellants argue that because of this knowledge, Henry and Pauline, as officers of Meeske Land & Cattle, should have instructed Lloyd not to allow children to drive the ATV. Thus, the undisputed fact that Henry and Pauline did not know that Ashley was driving the ATV when the accident occurred narrows the scope

of the appellants' claim against Meeske Land & Cattle, but it is not fatal.

(b) Ability to Prevent Lloyd From Allowing Ashley to Drive ATV

It appears that the trial court did not consider the appellants' claim that Henry and Pauline's past knowledge should have prompted them to instruct Lloyd to not allow children to drive the ATV. The Court of Appeals, however, did consider the issue.

In its opinion, the Courts of Appeals assumed that Meeske Land & Cattle had a duty to protect Ashley from Lloyd's decision to drive the ATV. It also concluded that there was conflicting evidence on whether Henry or Pauline knew that Lloyd had allowed children to drive the ATV on the land in the past. The Court of Appeals, however, noted that Lloyd had ignored Joan when she had told him to stop letting Ashley and her sisters use the ATV. From this, it inferred that even if Henry and Pauline had told Lloyd to not allow children to drive the ATV, he would have ignored them. Thus, the Court of Appeals ruled that summary judgment was appropriate because it was undisputed that any attempt on the part of Henry or Pauline to instruct Lloyd not to allow the children to drive the ATV would have been futile.

The Court of Appeals' conclusion is inconsistent with how an appellate court reviews a grant of summary judgment. It is reasonable to infer from the evidence that Lloyd would have ignored Henry and Pauline if they had instructed him not to allow children to drive the ATV. But summary judgment would be appropriate only if this was the lone reasonable inference that the evidence would support. It is not.

The relationship between Lloyd and Joan was different from the relationship between Lloyd, Henry, and Pauline. The evidence shows that Lloyd and Joan were divorced and that they often clashed on how to raise the children. Because of their hostile relationship, it is not surprising that Lloyd would ignore Joan's instructions that the children were not to ride or drive the ATV. Henry and Pauline, on the other hand, were officers in Meeske Land & Cattle, the entity that allowed Lloyd to live and work on the land on which the accident occurred. Thus, Henry and Pauline, unlike Joan, could have instructed Lloyd that if he

continued to allow children to drive the ATV, he would be endangering his ability to live and work on the land. A fact finder could reasonably conclude that such an instruction, unlike Joan's instructions, would not go unheeded. We conclude that the Court of Appeals erred in ruling that it was undisputed that Lloyd would have ignored Henry and Pauline had they instructed him not to allow children to drive the ATV.

3. Duty of Possessor of Land to Protect Child Lawfully on Premises From Parent's Negligent Parenting Decision

[7] There is one issue that neither the trial court nor the Court of Appeals considered. As we discussed earlier, the appellants claim that Meeske Land & Cattle had a duty to protect Ashley from Lloyd's negligent parenting decision. It is true that a possessor of land has a duty to protect those lawfully on the land from the accidental, negligent, or intentionally harmful acts of third persons if those acts are foreseeable. See *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999) (holding that university had duty to protect student from reasonably foreseeable fraternity hazing). But we have never decided whether this duty extends to protecting a child lawfully on the possessor's land from the negligent parenting decisions of the child's parent.

[8,9] Determining whether a legal duty exists is a question of law dependent on the facts of a particular case. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). Duty is not sacrosanct in itself but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection. *Id.*

Here, a policy consideration might prevent the imposition of a duty on Meeske Land & Cattle to protect a child lawfully on the land from negligent parenting decisions of the child's parents. Courts have traditionally recognized that parents are entitled to discretion in how they raise and discipline their children. As a result, courts have been hesitant to impose tort liability because of a legitimate parental decision. This court, for example, has adhered to a modified version of the parent-child tort immunity, holding that a child cannot recover in tort from his or her parent unless " 'the child is subjected to . . . brutal, cruel, or inhuman

treatment.' " *Pullen v. Novak*, 169 Neb. 211, 223, 99 N.W.2d 16, 25 (1959). See, also, *Frey v. Blanket Corp.*, 255 Neb. 100, 582 N.W.2d 336 (1998). We recognize that several jurisdictions have either abrogated the parent-child tort immunity or adopted a more lenient version of the rule. See, e.g., *Gibson v. Gibson*, 3 Cal. 3d 914, 92 Cal. Rptr. 288, 479 P.2d 648 (1971); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). See, generally, Annot., 6 A.L.R.4th 1066 (1981 & Supp. 2004). But, most courts and commentators still recognize that parents are entitled to a zone of reasonable discretion, albeit a zone smaller than what Nebraska has traditionally recognized. For example, while the Restatement (Second) of Torts § 895G (1979) repudiates the parent-child tort immunity, the comments to the section provide that when the parent's conduct involves the exercise of parental discretion, the conduct must be "palpably unreasonable" to impose liability. Restatement, *supra*, comment *k*. at 431.

Arguably, the public policy interest in granting discretion to parental judgments suggests that possessors of land should not be required to protect a child lawfully on the land from the negligent parenting decisions of the child's parent, at least when those decisions are not palpably unreasonable. However, it would be imprudent for this court to answer the question at this stage of the litigation. The issue is intertwined with the question whether Lloyd's decision to allow Ashley to drive the ATV can form the basis of Ashley's claim against Lloyd. That claim, however, is still pending in the trial court. Thus, Lloyd is not a party to this appeal. Moreover, the appellants have not briefed the issue. Because of this case's procedural posture, we conclude that it would not be fair to the appellants or Lloyd to issue a definitive ruling on the duty question.

V. CONCLUSION

Meeske Land & Cattle is entitled to summary judgment on the appellants' claim that it was liable because Henry and Pauline knew that Ashley was driving the ATV when the accident occurred. But the Court of Appeals erred in affirming the trial court's granting of summary judgment on the appellants' claim that Meeske Land & Cattle was liable because Henry and Pauline knew that Lloyd allowed children to drive the ATV and should have taken reasonable steps to stop him. At this stage of

the litigation, we express no opinion on whether a possessor of land has a duty to protect a child lawfully on the land from the allegedly negligent parenting decisions of the child's parent.

AFFIRMED IN PART, AND IN PART REVERSED.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
HUSSAIN AL-SAYAGH, APPELLANT.

689 N.W.2d 587

Filed December 10, 2004. No. S-03-906.

1. **Judgments: Pleadings: Appeal and Error.** Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
2. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
3. **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.
4. **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.
5. **Criminal Law: Statutes.** Whether a particular course of conduct involves one or more distinct offenses under a statute depends on how a legislature has defined the allowable unit of prosecution.
6. **Indictments and Informations.** Objections to the form or content of an information should be raised by a motion to quash.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

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

James Martin Davis, of Davis & Finley Law Offices, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Hussain Al-Sayagh (Hussain) appeals from his convictions on one count of second degree assault, one count of terroristic threats, one count of first degree false imprisonment, and three counts of use of a weapon to commit a felony. He was sentenced to imprisonment on each of the six counts, to be served consecutively, for a total commitment of 18 years 8 months to 30 years.

BACKGROUND

Hussain is the father of Amar Al-Sayagh (Amar). Amar is married to the daughter of Fadhilah Al-Rubaiai (Fadhilah). Circumstances surrounding the marriage had produced a strained relationship between the two families, and on December 11, 2000, Hussain and Amar called Fadhilah and proposed that they attempt a reconciliation of their dispute.

The reconciliation took place 2 days later at Amar's automobile shop. Fadhilah was accompanied by a mutual friend of both families, Safadin Al-Batat (Safadin), who was to act as a neutral third party during the reconciliation. Hussain and Amar were present at the automobile shop when Fadhilah and Safadin arrived. The four of them went into the office portion of the shop to talk, during which time, Hussain was apologetic and spoke kindly to Fadhilah. After less than an hour, Hussain went into the garage portion of the shop and beckoned Safadin to join him. Convinced that the dispute had been settled, Safadin said that he was going to go home, after first dropping Fadhilah off at her house. However, Hussain offered to take Fadhilah home himself, so Safadin left.

After Safadin left the shop, Hussain asked Fadhilah to join him in the garage portion of the shop. She sat down on a chair in the middle of the garage, as did Hussain, while Amar stood near the doorway to the office. At that point, Fadhilah testified that "the looks on their faces changed." Amar approached Fadhilah, and Hussain walked toward a microwave oven near the doorway. Hussain pulled a knife and pair of gloves out of the microwave as Amar grabbed Fadhilah's mouth and neck. Hussain began insulting Fadhilah as he approached her and cut her dress with the knife.

Fadhilah was able to push Hussain away from her with her leg, but Hussain came back at her again and cut her arm, causing her to "[bleed] all over." Fadhilah fell to the ground, and the two men dragged her into a corner of the garage. With Amar choking her, Fadhilah testified that Hussain took off some of her clothes, took a number of photographs as the assault occurred, and attempted to tear off some duct tape. Fadhilah was able to free herself from Amar's grasp and escape from the automobile shop.

Hussain was originally charged by information on February 23, 2001, with just three counts, each of them felonies: second degree assault, terroristic threats, and first degree false imprisonment. His case was set for trial during the December 3 jury term. However, on November 15, the State filed a motion seeking leave to file an amended information adding three counts of use of a weapon to commit a felony. The district court denied the State's motion. In response, the State filed a motion to dismiss. On November 30, the court granted the motion and dismissed, without prejudice, the information against Hussain.

On December 28, 2001, the State filed a new information against Hussain, charging him with second degree assault (count I), terroristic threats (count III), first degree false imprisonment (count V), and three counts of use of a weapon to commit a felony (counts II, IV, and VI). Hussain filed a motion to quash, arguing that the newly filed six-count information circumvented the district court's prior ruling denying the State leave to amend the original three-count information. Despite the court's "disapprov[al] of the state's end run around" the court's earlier ruling, the court determined that the State had the authority to refile an information against a defendant with additional charges and thus denied Hussain's motion to quash.

The case proceeded to a jury trial in May 2003. Hussain requested, among other things, that the jury be instructed on second degree false imprisonment as a lesser-included offense of first degree false imprisonment. The court declined to do so. The jury found Hussain guilty on all counts. He was sentenced to prison for a period of 3 to 5 years on count I, 3 to 5 years on count II, 20 months to 5 years on count III, 3 to 5 years on count IV, not less than 5 years nor more than 5 years on count V, and 3 to 5 years on count VI. The court ordered Hussain to serve the sentences on

each of the six counts consecutively to each other. Hussain filed this appeal, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

Hussain claims the district court erred in (1) denying his motion to quash, (2) failing to instruct upon second degree false imprisonment as a lesser-included offense of first degree false imprisonment, and (3) convicting him on three counts of use of a weapon to commit a felony when only one weapon was involved in a single incident or, alternatively, sentencing him to three consecutive terms of incarceration for the use of a weapon to commit a felony when only one weapon was involved in a single incident.

STANDARD OF REVIEW

[1] Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court. *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003).

[2,3] Whether jury instructions given by a trial court are correct is a question of law. *State v. Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004). 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

MOTION TO QUASH

In his first assignment of error, Hussain argues that the district court erred in denying his motion to quash. A three-count information was originally filed against Hussain, but the State later sought to amend the information by adding a count of use of a weapon to commit a felony for each of the three charges. When the State was denied an opportunity to amend, it successfully moved to dismiss the original information and then filed a six-count information against Hussain. He now argues that his motion to quash should have been granted because the operative six-count information filed against him improperly circumvented the earlier court order denying the State leave to amend the initial three-count information.

In support of his argument, Hussain cites to a line of cases from Indiana, beginning with *Davenport v. State*, 689 N.E.2d

1226 (Ind. 1997). There, the defendant was originally charged with murder. Four days before trial, the state sought to amend the information by adding charges for felony murder, attempted robbery, and automobile theft. The state's motion to amend was denied, so the state dismissed the murder charge, refiled it along with the three additional charges, and transferred the case to a different court.

On appeal, the Indiana Supreme Court recognized that the dismissal of an information is not necessarily a bar to refiling, but that the state may not refile if doing so would "prejudice the substantial rights of the defendant." *Id.* at 1229. The court further explained that a defendant's substantial rights are not prejudiced in situations where a "defendant can receive a fair trial on the same facts and employ the same defense in the second trial as in the first." *Id.* Concluding that this was not the case on the facts presented, the court held that the defendant's substantial rights had been prejudiced and reversed the convictions on the subsequently added charges.

A similar issue was presented in *Johnson v. State*, 740 N.E.2d 118 (Ind. 2001). There, the defendant was charged with sexual misconduct. When the trial court ruled that certain evidence offered by the state should be excluded, the state dismissed the charge and then refiled it, along with 10 additional charges. The Indiana Supreme Court relied heavily on its decision in *Davenport v. State, supra*, when it reversed the trial court's denial of the defendant's motion to dismiss. The court stated that the dispositive fact in *Davenport* was "an abuse of prosecutorial discretion in circumventing a court order and prejudicing the defendant's substantial rights." *Johnson v. State*, 740 N.E.2d at 120. See, also, *State v. Klein*, 702 N.E.2d 771 (Ind. App. 1998).

Although Hussain urges us to follow these Indiana cases, we decline to do so because of an important distinction between Indiana and Nebraska law. In Indiana, a trial court has no discretion to deny a motion to dismiss criminal charges made before sentencing. *Joyner v. State*, 678 N.E.2d 386 (Ind. 1997). However, in Nebraska, we have interpreted Neb. Rev. Stat. § 29-1606 (Reissue 1995) to require approval of the court to dismiss an information. *State v. Sanchell*, 191 Neb. 505, 216 N.W.2d 504 (1974), *modified on other grounds* 192 Neb. 380, 220 N.W.2d 562. Thus, an Indiana

trial court cannot prevent the state from using the tactics utilized in *Davenport v. State, supra*, and its progeny, but a Nebraska trial court can do so by denying the State's motion to dismiss and requiring the State to proceed on the original charges. The district court in this case agreed to dismiss the original charges without prejudice. Once that occurred, the State was free to file a new information against Hussain that included additional charges. This assignment of error is without merit.

LESSER-INCLUDED OFFENSE

[4] In Hussain's next assignment of error, he argues that the district court erred in failing to instruct the jury upon second degree false imprisonment as a lesser-included offense of first degree false imprisonment. 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. Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

The State argues, and we agree, that the evidence does not produce a rational basis for acquitting Hussain of first degree false imprisonment and convicting him of second degree false imprisonment. Fadhilah testified that while in the garage, Amar grabbed her mouth and neck and held her while Hussain approached with a knife. Her arm and dress were cut by Hussain before she was dragged into another portion of the garage and choked. The evidence does not support a rational basis for submitting an instruction for the lesser-included offense. Accordingly, the district court correctly concluded that Hussain was not entitled to an instruction on second degree false imprisonment.

MULTIPLE COUNTS OF USE OF WEAPON TO COMMIT FELONY

Finally, Hussain argues that the district court erred in allowing him to be convicted and sentenced on three counts of use of a weapon to commit a felony rather than just one when only one weapon was used in a single incident.

[5] Whether a particular course of conduct involves one or more distinct offenses under a statute depends on how a legislature has defined the allowable unit of prosecution. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002). The Legislature has defined the crime of use of a weapon to commit a felony as follows:

> Any person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or who unlawfully possesses a firearm, a knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony.

Neb. Rev. Stat. § 28-1205(1) (Reissue 1995). Thus, the statute concentrates on the use of "a" weapon to commit "any felony."

[6,7] The information filed against Hussain charged him with three different felonies. However, Hussain failed to argue in his motion to quash that it was improper for the State to charge him with three counts of use of a weapon to commit a felony for each of the three felonies charged. We have held that objections to the form or content of an information should be raised by a motion to quash. *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999). Hussain's failure to present this issue to the district court in his motion to quash prevents us from considering it on appeal. See *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003) (appellate court will not consider issue on appeal that was not presented to or passed upon by trial court).

Hussain also contends, in the alternative, that the district court erred in sentencing him to three consecutive terms of incarceration for his violations of § 28-1205. This argument is without merit. Section 28-1205(3) plainly provides that sentences imposed for violations of § 28-1205 shall be consecutive to any other sentence imposed. Because the district court did not err in convicting Hussain on three counts of use of a weapon to commit a felony, there was no error in sentencing him to consecutive terms of imprisonment for each of those convictions.

CONCLUSION

The district court did not err in denying Hussain's motion to quash or in refusing his instruction on second degree false

imprisonment as a lesser-included offense of first degree false imprisonment. Finally, Hussain failed to preserve his argument that he could not be convicted of multiple counts of use of a weapon to commit a felony, and his consecutive sentences on those counts were not erroneous. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
TIMOTHY F. TOLLIVER, APPELLANT.
689 N.W.2d 567

Filed December 10, 2004. No. S-03-1300.

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: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
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 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.
4. **Trial: Expert Witnesses.** Whether a witness is qualified as an expert is a preliminary question for the trial court.
5. **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.
6. **Trial: Rules of Evidence: Expert Witnesses.** A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. The court must first determine whether the witness is qualified to testify as an expert. If it is necessary for the court to conduct an analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. Once the reasoning or methodology has been found to be reliable, the court must determine whether the methodology can properly be applied to the facts in issue. Finally, the court determines whether the expert evidence and the opinions related thereto are more probative than prejudicial, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).
7. **Criminal Law: Trial: Evidence.** Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence,

tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.

8. ____: ____: ____. Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue.
9. **Trial: Evidence.** Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis.
10. **Motions to Suppress: Judgments: Appeal and Error.** In determining whether the findings of fact on a motion to suppress evidence are clearly erroneous, 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.
11. **Criminal Law: Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.
12. **Criminal Law: Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.

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

Thomas C. Riley, Douglas County Public Defender, for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Timothy F. Tolliver appeals from his conviction for manslaughter. He was sentenced to 16 to 20 years' imprisonment.

SCOPE 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*, 267 Neb. 397, 675 N.W.2d 89 (2004).

[2] A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

FACTS

In the early morning hours of June 9, 2002, the body of Richard Edward Rice, Jr., was discovered in an Omaha park. An autopsy revealed that Rice had died as a result of manual strangulation.

At the time of his death, Rice was employed as a driver for an unlicensed taxi service. Rice drove a white Oldsmobile, and his logbook revealed that he went out on two calls on the evening of June 8, 2002, before midnight.

At approximately 11:50 p.m. that evening, police were called to the home of Monica Davis to investigate damage to the front quarter panel of her black Ford Bronco. Police observed white paint transfer on the Bronco, and a piece of tail light from an Oldsmobile was found near the Bronco. Davis had heard a noise outside her home around 11 p.m. and had observed a white vehicle in a driveway across the street.

Davis' mother, Angie Cutler, had been involved romantically with Tolliver. On the evening of June 8, 2002, Tolliver telephoned Angie Cutler and asked for money and a ride to the bus station. She refused, Tolliver became angry, and they argued. At approximately 10:30 p.m., Angie Cutler heard a loud crash outside her home. The next morning, she observed that her garage door had been damaged.

Around 2 a.m. on June 9, 2002, Letitia Cutler, a niece of Angie Cutler, was standing across the street from Letitia Cutler's residence. She was talking to her cousin and another acquaintance. Letitia Cutler saw a white four-door car arrive in front of her cousin's house. A bald black male exited the vehicle and walked up the driveway where they were standing. The man was there for about 15 minutes, and Letitia Cutler heard him speak to her cousin. When police arrived at the scene, the man had run away.

At approximately 3 a.m., an Omaha Police Department (OPD) officer responded to a call about a disturbance near the area of Letitia Cutler's residence. Upon her arrival, the officer discovered an unoccupied white Oldsmobile with its engine running. The rear of the vehicle was damaged, and one of its tail lights was missing. The car was later found to belong to Rice.

Sometime after June 9, 2002, police officers went to Letitia Cutler's house and wanted to talk to her brother. She told them that her brother did not know anything about the incident involving the white Oldsmobile but that she did. For some reason, the officers did not question her. After the discovery of Rice's body, several articles appeared in the Omaha World-Herald newspaper. Letitia Cutler had seen one of the articles that mentioned Tolliver and her aunt.

Det. Ken Kanger subsequently interviewed Letitia Cutler. The detective stated that the police had the man responsible in jail and that they were trying to "shore up" some information. He told her that an elderly man had been killed and that the police would like to do what they could to make sure that person did not do it again.

Letitia Cutler told Kanger that she saw a white car pull up in the early morning hours of June 9, 2002, and that a black man got out of the car. She described him as bald and wearing a T-shirt. Letitia Cutler was then asked to look at a photographic array, and Kanger read her written admonishments located on the photographic array form.

Letitia Cutler viewed the photographic array, which consisted of six photographs of black males with some facial hair and either little or no hair on their heads. She selected the photograph of Tolliver and said that he looked like the man who had exited the white car and stood next to her for approximately 15 minutes in the early morning hours of June 9, 2002. She told Kanger that the man she identified had previously dated her aunt, Angie Cutler, and that she had seen him once before June 9 at a casino. She stated that she had not immediately recognized Tolliver that night because he did not look the same.

Later, the police searched the site of a company where Tolliver had recently been employed as a truckdriver. The search produced a pair of tennis shoes belonging to Tolliver. The shoes were taken into police custody and later sent to the University of Nebraska Medical Center's human DNA identification laboratory (DNA lab) for testing. Tolliver was subsequently arrested and charged with first degree murder.

Prior to trial, Tolliver filed a motion in limine requesting that the district court preclude the use of any testimony concerning

the DNA testing and its results. Following a hearing, the court concluded that the State's witnesses were qualified as experts and could testify regarding the DNA issues. It found that based upon the evidence received at the hearing, the theory and methodology of the DNA testing and the technique had been generally accepted by the scientific community. The court concluded that the methodology utilized for the DNA testing was reliable. It overruled Tolliver's motion in limine and allowed the State to introduce testimony concerning the DNA testing and the results of those tests.

Tolliver also moved to suppress Letitia Cutler's identification. He claimed the photographic array was unduly suggestive and was not reliable based upon the totality of the circumstances. The district court concluded that the procedure utilized for the photographic identification by Letitia Cutler was not unduly suggestive or conducive to a substantial likelihood of irreparable mistaken identification. It overruled Tolliver's motion to suppress the witness' identification.

The jury convicted Tolliver of manslaughter, and he was sentenced to 16 to 20 years in prison. He timely appealed.

ASSIGNMENTS OF ERROR

Tolliver assigns that the district court erred in (1) allowing the State to present evidence derived from certain DNA tests, because the State failed to satisfy the reliability standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); (2) allowing the State to present evidence concerning the DNA taken from a pair of tennis shoes, because there was a break in the chain of custody necessary to preserve the integrity of the evidence; and (3) failing to sustain his motion to suppress the testimony of Letitia Cutler, because the identification procedures used by OPD to obtain her testimony were unduly suggestive and a violation of due process.

ANALYSIS

Tolliver claims that the district court erred in allowing the State to present expert testimony that did not comport with the *Daubert* standard for admissibility. He argues that the State failed to sustain its burden of proof with regard to the reliability of the methodology of the DNA testing that was used on samples taken from

Tolliver's tennis shoes. In particular, he challenges the reliability of the DNA lab's characterization of a mixed sample of DNA and its designation of the major and minor contributors to the sample being tested.

[3] 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*, 267 Neb. 397, 675 N.W.2d 89 (2004). 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. *Id.*

[4,5] Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), governs the admissibility of expert testimony. Under rule 702, "[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." Whether a witness is qualified as an expert is a preliminary question for the trial court. *Carlson v. Okerstrom, supra.* 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.*

The validity of the DNA testing was described by the State's expert witnesses. In its evaluation of the admissibility of the evidence regarding the DNA testing, the district court first determined that the State's witnesses were qualified as experts by their knowledge, skill, experience, training, and education. The DNA lab was supervised by James Wisecarver and Ron Rubocki. Wisecarver has a Ph.D. in physiology and is a licensed doctor of medicine. Rubocki has a Ph.D. in microbiology. The testing was done by Kelly Duffy and Mellissa Helligso, who are both certified medical technologists. The court did not err in permitting the State's witnesses to testify as experts.

By deposition, Wisecarver explained the theory and methodology underlying the DNA testing. Wisecarver and Rubocki testified regarding written protocols that were utilized by the DNA

lab during the testing of the samples in question. Duffy explained her testing of certain samples and stated that she followed the DNA lab's protocol with only minor deviations that did not affect the results.

The State's experts gave a general description of the DNA testing utilized in this case. Polymerase chain reaction (PCR) amplification was used to amplify a targeted loci of the sample of DNA by replicating the process by which DNA duplicates itself naturally. The DNA lab was then able to produce a substantial number of specific targeted segments of DNA which could be typed and compared. Short tandem repeat (STR) analysis was used to type and compare the DNA. Statistics were then used to evaluate how likely it was that a similar match would occur if the DNA samples were drawn randomly from the population.

Wisecarver also discussed the issue of mixed samples with the PCR-STR technique. A mixed sample is one which contains DNA from two or more individuals. He described the means by which the DNA lab separated such a sample into major and minor contributors. He stated that this technique was widely accepted among forensic scientists and in courts throughout the country and that it was utilized in Federal Bureau of Investigation laboratories and the Armed Forces Institute of Pathology. He also testified as to the extremely low known rate of error associated with this test.

Wisecarver discussed the DNA lab's accreditation and stated that it was inspected by the American Society of Crime Laboratory Directors (ASCLD) and had received a certificate of accreditation. ASCLD is a national accreditation source for forensic DNA laboratories and is referenced by the Legislature in Neb. Rev. Stat. § 29-4120(6) (Cum. Supp. 2002). Through ASCLD, the DNA lab participated in proficiency tests and a review of its protocols in order to examine its quality control and accuracy in its procedures. The evidence established that the DNA lab regularly maintained and updated its written protocols.

Rubocki testified that he was an assistant professor in the Department of Pathology and Microbiology at the University of Nebraska Medical Center and the technical director of the DNA lab. He discussed the procedures used by the DNA lab for identification in mixed samples and opined that the procedure was

based upon recognized scientific principles that had been tested and accepted in the scientific community.

Rubocki stated that the equipment utilized was working properly, the technicians followed the protocols, and the results of the testing were accurate. He stated that there were no deviations from the protocol of any significance on the results and that any deviations that occurred were minor. Rubocki further testified that the general genetic principles utilized are all accepted by the scientific community.

Duffy testified that she was one of two laboratory technicians who conducted the PCR-STR tests performed on the samples taken from Tolliver's shoes. She explained the particulars of the technique in general, the ASCLD accreditation, and the proficiency tests in which the DNA lab participated. Both Wisecarver and Rubocki signed off on her report concerning the results of the test.

In this case, some of the DNA tests involved specimens from the victim, Tolliver, and another suspect, which specimens were analyzed by PCR amplification. Small droplets on Tolliver's tennis shoes that appeared to be blood were also tested. Based on the testing, the victim's DNA was not excluded as the major contributor of blood found on the tennis shoes belonging to Tolliver, and the probability of an unrelated individual matching the major DNA profile from the blood on the tennis shoes was 1 in 1 quintillion for African Americans and 1 in 1 sextillion for Caucasians and American Hispanics.

[6] A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. The court must first determine whether the witness is qualified to testify as an expert. It must examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education. If it is necessary for the court to conduct a *Daubert* analysis, then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. To aid the court in its evaluation, the judge may consider several factors, including but not limited to whether the reasoning or methodology has been tested and has general acceptance within the relevant scientific community. Once the reasoning or methodology has been found to be reliable, the court

must determine whether the methodology can properly be applied to the facts in issue. In making this determination, the court may examine the evidence to determine whether the methodology was properly applied and whether the protocols were followed to ensure that the tests were performed properly. Finally, the court determines whether the expert evidence and the opinions related thereto are more probative than prejudicial, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

We recently discussed our standard for the admissibility of expert testimony in *Carlson v. Okerstrom*, 267 Neb. 397, 410, 675 N.W.2d 89, 103 (2004): "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." In *Schafersman v. Agland Coop*, 262 Neb. 215, 232, 631 N.W.2d 862, 876-77 (2001), we stated:

> [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 [rule] 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.

In *Carlson*, we noted that Fed. R. Evid. 702 had been amended in 2000 in order to codify *Daubert*. In doing so, "[t]he 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 omitted.) *Carlson v. Okerstrom*, 267 Neb. at 413, 675 N.W.2d at 104-05.

Based upon the evidence offered by the State, the district court concluded that the theory and methodology of PCR-STR DNA testing had been generally accepted by the scientific community. The court also found that the theory and methodology had been subjected to peer review and that standards existed and

were maintained for controlling the techniques, operation, and known rates of error.

In *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998), we concluded that the trial court was correct in determining that the PCR-STR DNA test used was generally accepted in the scientific community under the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). More recently, in *State v. Fernando-Granados, ante* p. 290, 682 N.W.2d 266 (2004), we also recognized the validity of the PCR-STR method of testing.

Nebraska's DNA Testing Act is codified at Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2002 & Supp. 2003). When § 29-4118(3) was enacted, effective September 1, 2001, the Legislature stated that

> new forensic DNA testing procedures, such as polymerase chain reaction amplification, DNA short tandem repeat analysis, and mitochondrial DNA analysis, make it possible to obtain results from minute samples that previously could not be tested and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce.

Thus, the Legislature has also recognized the reliability of PCR-STR DNA testing and its acceptance within the scientific community.

A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002). The testimony from the *Daubert* hearing established that the PCR-STR technique had been tested and subjected to peer review. The witnesses described the protocols that were maintained to control the techniques. These protocols had been presented with approval to ASCLD, a national accreditation body for forensic DNA laboratories. Evidence was also presented with regard to the known rate of error of the techniques.

The district court determined that the application of the technology and the conduct of the tests established that the technology was properly applied and that the experts followed the protocols in place to ensure the tests were performed properly. It noted that the challenges made by Tolliver were relevant to the weight of the evidence rather than to its admissibility. It found

that the methodology was reliable and that the existence of a subjective element in the identification of the major and minor contributors to the DNA examined did not render the opinions inadmissible.

We conclude that the district court did not abuse its discretion in admitting this evidence, and Tolliver's first assignment of error is without merit.

[7,8] Tolliver next argues that the district court erred in admitting the results of the DNA tests because there was a break in the chain of custody with respect to the tennis shoes from which the DNA samples were taken. Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence. *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977). It is elementary that objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue. *Id.* Our review concerning the admissibility of this evidence is for abuse of discretion. See *State v. Mather, supra.*

Officer Daniel Hayes of OPD testified that he collected the tennis shoes from Tolliver's truck on June 13, 2002. They were placed in separate bags and sealed with adhesive tape. Karenina Smith testified that she worked in the OPD crime laboratory and received the tennis shoes on the evening of June 13. The bags were placed in the property room, and she could not remember how they were packaged.

Paul Merkuris testified that he worked in the OPD property room and that he retrieved the bags on the morning of June 14, 2002. They were handed over to Officer Catherine Milone. Merkuris believed the bags were taped shut at that point. Milone testified that she retrieved the bags and took them to the DNA lab. She could not recall how the evidence was packaged.

Duffy testified that she received the bags at the DNA lab and noted in her report that the bags were not sealed. She also testified that the DNA lab does not consider certain types of adhesive tape to be a "proper seal." Accordingly, in such situations, the DNA lab will use its own evidence tape to seal an item and ensure

that the item is not tampered with while in the DNA lab's custody. Duffy stated that she sealed the bags with the DNA lab's tape after processing the shoes for testing.

It must be shown to the satisfaction of the trial court that no substantial change has taken place in an exhibit so as to render it misleading. See *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992). Important in determining the chain of custody are the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. See *State v. Apker*, 204 Neb. 577, 284 N.W.2d 14 (1979). Tolliver argues that the fact that Duffy noted that the bags were not sealed constitutes undisputed evidence of tampering with the evidence. We disagree.

[9] Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis. *State v. Smith*, 238 Neb. 111, 469 N.W.2d 146 (1991). In *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998), we held that proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence.

Evidence established that the tennis shoes were in the custody of law enforcement officials from the time they were placed in the bags and sealed with adhesive tape until they were delivered to the DNA lab. Tolliver has not established that anyone tampered with the shoes. Tolliver does not argue that tampering occurred after the shoes were delivered to the DNA lab. He unsuccessfully attempts to infer that the sacks containing the shoes were not sealed. Since a continuous chain of custody was established with law enforcement officials which clearly identified the evidence, we cannot say that the district court abused its discretion in allowing the evidence to be introduced. Tolliver's second assignment of error lacks merit.

Tolliver assigns as error the district court's failure to sustain his motion to suppress the testimony of Letitia Cutler, claiming that the identification procedures were unduly suggestive and violated due process. From a photographic array, Letitia Cutler identified Tolliver as the man she witnessed arriving in a white vehicle in the early morning hours of June 9, 2002. Tolliver

moved to suppress and exclude her testimony, claiming that her identification was the result of a photographic lineup conducted by police that denied him due process. He argued that the lineup was unduly suggestive, the actions of the police prior to and during the lineup were unduly suggestive, and Letitia Cutler's identification of Tolliver was not the result of her actual observations. He contended that there was a substantial likelihood of irrefutable misidentification of him as the individual who arrived in the white car. The court overruled this motion.

[10-12] In determining whether the findings of fact on a motion to suppress evidence are clearly erroneous, 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. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001). An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Garcia*, 235 Neb. 53, 453 N.W.2d 469 (1990). Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991).

The initial inquiry is whether the identification procedure was suggestive. See *State v. Garcia, supra*. Tolliver argues that the statements made to Letitia Cutler by Kanger during the photographic lineup on July 17, 2002, were unduly suggestive. Prior to the lineup, Kanger told Letitia Cutler that an elderly gentleman had been killed and that the police would like to do what they could to make sure the perpetrator did not kill again. Kanger stated that the police had the person responsible in jail and that they were trying to shore up some information they had. After showing her six photographs, Kanger told her that the police wanted to "make sure this clown doesn't get out of jail." Tolliver contends that these statements were an attempt to influence Letitia Cutler by playing on her emotions and suggesting that her failure to identify the right person would result in the culprit's being released.

A statement made by a police officer at a photographic lineup indicating that the array of photographs contains the suspect's picture does not render the identification procedure unduly suggestive. See, *State v. Garcia, supra*; *State v. Joseph*, 202 Neb. 268, 274 N.W.2d 880 (1979). Kanger's statements did not tell Letitia Cutler whom to pick from the lineup. Even if the statements had an emotional appeal, they did not guide her toward picking one photograph or another. The photographic array consisted of six photographs of black males with some facial hair and either little or no hair on their heads. In making an assessment of whether the procedures were unduly suggestive, a court can consider such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness, and the length of time between the crime and the identification. See *State v. Wilson*, 5 Neb. App. 125, 556 N.W.2d 643 (1996). The same factors can be considered in determining the reliability of a witness.

Tolliver next argues that the identification was not reliable because Letitia Cutler's attention was not focused on the individual on the night in question. He contends that she may have seen a photograph of Tolliver in the newspaper and that her description was minimal, her level of certainty was questionable, and her identification was made 6 weeks after the incident.

Letitia Cutler stated that she watched the individual leave the vehicle and that he stood next to her for approximately 15 minutes. During that time, she heard him speak. She had ample opportunity to make her observation, and there is no evidence that any lapse in her attention span would have resulted in an unreliable observation. Her initial description was that of a bald black male. While this description is minimal, it fits the description of Tolliver.

At the photographic lineup, Letitia Cutler selected the photograph of Tolliver and stated that he looked like the individual she had observed. Tolliver claims that this did not constitute a positive identification and that Letitia Cutler should have been familiar with him because he was her aunt's ex-boyfriend. We disagree.

Tolliver also argues that too much time elapsed between Letitia Cutler's observation and the lineup. Her observation was made on June 9, 2002, and the lineup occurred nearly 6 weeks later on July 17. We have concluded that longer stretches of time are reasonable. See, *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990) (2 months); *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988) (2 months); *State v. Packett*, 207 Neb. 202, 297 N.W.2d 762 (1980) (2½ months). In addition, there was no evidence presented which would show that the passage of time adversely affected Letitia Cutler's ability to make an identification.

Tolliver also asserts that Letitia Cutler may have viewed his photograph prior to the lineup in a newspaper article that she admitted to having seen. He claims this was an improper basis for her identification. As noted, Letitia Cutler had an independent basis for her identification of Tolliver—the 15 minutes she stood next to him after he exited the vehicle on June 9, 2002. The extent to which external sources have influenced an identification is a matter for the trier of fact. See *Robinson v. Wyrick*, 735 F.2d 1091 (8th Cir. 1984). We conclude from the totality of the circumstances that the district court correctly found that the identification process did not violate Tolliver's right to due process. Tolliver's final assignment of error is without merit.

CONCLUSION

For the reasons stated herein, we affirm the judgment and sentence of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
VICTOR HERNANDEZ, APPELLANT.

689 N.W.2d 579

Filed December 10, 2004. No. S-03-1365.

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. **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.

3. **Search Warrants: Affidavits: Probable Cause.** The magistrate who is evaluating a 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. **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.
5. **Search Warrants: Affidavits.** An informant's reliability 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.
6. **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), 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, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
7. **Warrants: Affidavits: Probable Cause: Proof.** Under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the defendant must make a substantial preliminary showing, including allegations of deliberate falsehood or of reckless disregard for the truth, supported by an offer of proof.
8. **Warrants: Affidavits: Probable Cause.** Under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), no hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set aside, there remains sufficient content in the warrant affidavit to support a finding of probable cause.
9. **Pleas: Trial: Waiver.** Under Neb. Rev. Stat. § 29-1816 (Reissue 1995), if an accused appears in person and by counsel and goes to trial before a jury regularly impaneled and sworn, he or she shall be deemed to have waived arraignment and a plea of not guilty shall be deemed to have been made.
10. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Christopher J. Lathrop for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

CONNOLLY, J.

Victor Hernandez appeals his jury convictions for first degree murder and use of a deadly weapon to commit a felony. He contends that (1) an affidavit for a search warrant was not supported by probable cause; (2) his counsel was ineffective for failing to request a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); (3) he should have been rearraigned after the information was amended to include language charging aiding and abetting; (4) DNA evidence was improperly admitted; and (5) a Spanish language *Miranda* advisory form failed to properly inform him of his rights. We affirm.

On May 26, 2002, the victim, Mindy Schrieber, was murdered during a robbery at her place of employment. The cause of death was multiple stab wounds, and she had additionally been driven over by a vehicle. In connection with the death, Hernandez and Luis Fernando-Granados, also known as Luis Vargas, were later charged and convicted for first degree murder and use of a deadly weapon to commit a felony.

BACKGROUND

AFFIDAVIT AND SEARCH WARRANT

After the murder, the Omaha police received an anonymous telephone call from a person subsequently identified as Meagan Kane. Kane provided information about the crime. She stated that the vehicle involved in the homicide was parked behind an apartment building near 31st and California Streets in Omaha, and she described it as a blue 1991 or 1992 Ford Escort on blocks. She stated that the vehicle's owner, "Victor," a Hispanic male about 21 years old, bragged about killing Schrieber. She also gave Hernandez' telephone number. It was later determined that Kane was Fernando-Granados' girl friend, although the officers did not know that at the time the call was taken.

Sgt. Mark Gentile of the Douglas County sheriff's office determined that the telephone number was listed to Hernandez and obtained the address for the number. He went with another officer to the 31st and California Streets area and then to Hernandez' address, where they located a Ford Escort in a parking lot; the vehicle was registered to Hernandez. The officers compared photographs of tire tread taken from Schrieber's pants to the left front tire of the Escort. In an application for a search warrant, the officers averred that the Escort was blue and that the tire tread matched. The officers examined the vehicle's undercarriage and averred in the warrant application that it matched an imprint on Schrieber's pants. The officers also observed small, thick, tissue-type substances splattered on the undercarriage in the same general area as a red and brown substance. The officers believed the substances to be bodily fluids such as blood and body tissue.

The officers described Kane's telephone call and their observations in an application for a search warrant. After the warrant was obtained, they seized various property, including a certificate of title showing that Hernandez owned the vehicle.

Hernandez' Confession

On June 6, 2002, Hernandez gave a statement in Spanish to officers in Douglas County. Deputy Robert Jones—who is fluent in Spanish—used a Spanish language form to advise Hernandez of his *Miranda* rights. Hernandez stated that he understood his rights and did not request an attorney; he then confessed his involvement in the crime.

After Hernandez spoke with the officers, they obtained a search warrant for a residence where Hernandez had told them Fernando-Granados hid money. The officers found currency with blood on it that was sent to a forensic laboratory for testing.

Pretrial Proceedings

Before trial, Hernandez moved to suppress evidence obtained from the search warrant. In the application for the warrant, Gentile averred that the tread and oil pan patterns "matched" photographs taken at the crime scene. However, at the hearing on the motion, Gentile stated that the patterns were "similar" to the photographs. Hernandez' motion was overruled, and the

certificate of title and photographs showing the vehicle's license plates were admitted into evidence at trial.

Hernandez also moved to suppress his statements, arguing that the Spanish *Miranda* warning was improperly worded so that it insufficiently explained that the accused had a right to an attorney. The motion was overruled.

Finally, a *Daubert* hearing was held about admissibility of the results of DNA testing on the currency using a polymerase chain reaction amplification (PCR) and short tandem repeat (STR) analysis. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The person who performed the test testified about the methods, his qualifications, and the laboratory's accreditation. The court determined that the test results were admissible.

In July 2002, Hernandez was initially charged with first degree murder and use of a deadly weapon to commit a felony. Hernandez was arraigned and pleaded not guilty. In September 2003, an amended information was filed charging aiding and abetting first degree murder. The record is silent whether Hernandez was rearraigned on the amended information. A jury found Hernandez guilty, and he received consecutive sentences of life in prison for the murder conviction and 10 to 20 years' imprisonment for the use of a deadly weapon to commit a felony conviction.

ASSIGNMENTS OF ERROR

Hernandez assigns that the district court erred by (1) overruling his motion to suppress evidence seized as a result of the search warrant, (2) failing to rearraign him on the amended information, (3) overruling his motion to suppress his statements, and (4) admitting the DNA test results. He also assigns that his counsel was ineffective for failing to seek a hearing about officer misrepresentations in the affidavit for the application for a search warrant.

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. Thomas, ante* p. 570, 685 N.W.2d 69 (2004).

ANALYSIS

MOTION TO SUPPRESS EVIDENCE SEIZED FROM SEARCH WARRANT

Hernandez contends that the court should have sustained his motion to suppress because the affidavit failed to show probable cause for a search warrant. In arguing there was no probable cause, Hernandez points to the anonymous call, differences between where the vehicle was reported to be and actually found, and differences between information provided in the affidavit and in later testimony. In particular, he contends that the officers' comparison of photographs of tread marks and oil pan marks to the vehicle and statement that there was a "match" was not sufficient for probable cause. Instead, he contends that information from a crime laboratory was required to establish probable cause.

[2,3] 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. *State v. Lammers*, 267 Neb. 679, 676 N.W.2d 716 (2004). 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. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004).

[4] 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. *State v. Lammers, supra.*

[5] An informant's reliability 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. *State v. Lammers, supra.*

Here, the officers independently established the informant's reliability. They established that the telephone number was registered to a person named "Victor" and discovered a vehicle of the same reported model at the parking lot behind his residence. At this point, the officers could plainly observe further items that led to probable cause. Comparing photographs of tread and oil pan marks to the vehicle, the officers determined that there was a "match." They also observed what they believed was body fluid on the vehicle's undercarriage.

We also disagree with Hernandez' argument that a crime laboratory specialist should have provided information about the tread and oil pan marks before probable cause could be established. The statements provided in the affidavit were sufficient for a magistrate to believe there was a fair probability that contraband or evidence of a crime would be found in Hernandez' residence. We determine that the district court did not err when it overruled Hernandez' motion to suppress.

Ineffective Assistance of Counsel

Hernandez contends that his counsel was ineffective because he failed to challenge the affidavit for the search warrant by filing a motion based on *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). In *Franks*, the Court held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded

> to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56.

Hernandez argues he was entitled to a *Franks* hearing because evidence later showed that the vehicle was black instead of blue and points to testimony where the officers said at the suppression hearing that the tread and oil pan marks looked "similar" instead of stating that they "matched."

[6] Under the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), 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, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

[7,8] Although the record shows that Hernandez' counsel did not request a *Franks* hearing, we determine that such a failure did not demonstrate deficient performance by counsel. We have noted that under *Franks*, the defendant must make a substantial preliminary showing, including allegations of deliberate falsehood or of reckless disregard for the truth, supported by an offer of proof. *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). Further, no hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set aside, there remains sufficient content in the warrant affidavit to support a finding of probable cause. *Id.*

Here, the facts do not suggest that any statement in the affidavit was a deliberate falsehood or showed reckless disregard for the truth. A review of the record shows that when the officers stated in the affidavit that the tread and oil pan marks "matched," it was because the marks were "similar" to the patterns available in the pictures that the officers used for comparison. Hernandez' complaint about the use of the word "match" as compared to the word "similar" raises nothing more than a debate about differing interpretations of the words used and does not raise questions of deliberate or reckless falsehoods. Although the record states that

the vehicle was black instead of blue, Hernandez does not point to any intent of the officers to deceive. Further, we determine that without information about the vehicle's color, the warrant would still be sufficient to support a finding of probable cause. We conclude that Hernandez has not demonstrated that his trial counsel was ineffective for failing to request a *Franks* hearing. See *State v. Ildefonso, supra.*

AMENDED INFORMATION

[9] Hernandez argues that he should have been rearraigned when the information was amended to add language about aiding and abetting. Neb. Rev. Stat. § 29-1816 (Reissue 1995) provides in part:

> The accused shall be arraigned by reading to him or her the indictment or information, unless the reading is waived by the accused when the nature of the charge is made known to him or her. The accused shall then be asked whether he or she is guilty or not guilty of the offense charged. If the accused appears in person and by counsel and goes to trial before a jury regularly impaneled and sworn, he or she shall be deemed to have waived arraignment and a plea of not guilty shall be deemed to have been made.

Here, Hernandez appeared, was represented by counsel, and went to trial. Accordingly, he has waived any argument that he should have been rearraigned.

[10] At oral argument, Hernandez argued that he should have also been provided proper notice of the amended information to prepare for trial and that the trial court had a duty to make a record to show that his counsel never raised the issue. Hernandez' assignment of error, however, addresses only the possibility that the court failed to rearraign him. An appellate court does not consider errors which are argued but not assigned. *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002). We conclude that Hernandez' assignment of error is without merit.

MIRANDA ADVISORY FORM AND ADMISSIBILITY OF DNA TESTS

We recently decided the issues raised about the *Miranda* advisory form and admissibility of DNA tests in *State v. Fernando-Granados, ante* p. 290, 682 N.W.2d 266 (2004). Based

on *Fernando-Granados*, we conclude that these assignments of error are without merit.

CONCLUSION

We conclude that there was sufficient evidence to support a finding of probable cause to issue the search warrant and that Hernandez' counsel was not ineffective by failing to request a *Franks* hearing. We further conclude that the district court did not err when it did not rearraign Hernandez or make a record showing that he had been rearraigned. Finally, the court did not err when it overruled Hernandez' motion to suppress statements and when it admitted into the evidence the results of DNA tests.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
COLIN E. BROWN, APPELLANT.

689 N.W.2d 347

Filed December 10, 2004. No. S-04-176.

1. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion.
2. **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.
3. **Criminal Law: Pleas.** A criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made.
4. **Pleas.** A trial court has a large measure of discretion in deciding whether to accept a guilty plea.
5. **Trial: Pleas: Time: Notice: Good Cause: Proof: Waiver.** A trial court may impose and enforce a plea cutoff deadline as part of its case management authority. In order to prevent arbitrary rejection of untimely pleas, however, a trial court must provide adequate notice to the parties of the plea cutoff deadline and must permit an exception to the deadline for good cause. The parties, not the court, bear the burden of establishing an exception to the plea cutoff deadline. Unless the parties specifically inform the court of facts constituting good cause, the parties waive any objection to the court's enforcement of the deadline.

6. **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.
7. **Effectiveness of Counsel: Presumptions: Appeal and Error.** When considering whether a counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. An appellate court will not second-guess reasonable strategic decisions by counsel. The presumption can be rebutted without an evidentiary hearing only when a decision by counsel cannot be justified as a result of a plausible trial strategy.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Ann C. Addison-Wageman, of Wageman & Whitworth, for appellant.

Jon Bruning, Attorney General, Kimberly A. Klein, and Dan Money, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

Colin E. Brown appeals from his convictions on one count of conspiracy to manufacture a controlled substance, a Class III felony for which he was sentenced to a term of incarceration of 30 months to 4 years, and one count of possession of methamphetamine, a Class IV felony, for which he was sentenced to a concurrent term of incarceration of 12 to 18 months.

BACKGROUND

An information charging Brown with the two offenses was filed on August 9, 2001. At his arraignment on August 17, Brown entered pleas of not guilty on both charges. At arraignment, Brown and his counsel were given a case progression order. The order provided that the case would be set for trial at a docket call to be held on October 16, that "all pretrial issues" would be addressed at an "omnibus hearing" scheduled for October 3, and that, except for good cause shown, pretrial motions were required to be filed on or before September 25. It further provided that "if

there are no pretrial motions and upon agreement of counsel, a plea agreement may be heard in lieu of pretrial matters." The journal entry noted "[a]ll plea negotiations shall cease at time of docket call."

Brown failed to appear for the omnibus hearing on October 3, 2001. His counsel informed the court that Brown was incarcerated in Oregon and requested a continuance. The State's motion for a capias and bond forfeiture was continued until docket call on October 16. Brown did not appear at the October 16 docket call, and the court denied his counsel's request for a continuance. The court also granted the State's motion for capias and bond forfeiture. The capias was issued October 26. The State's motion of default on recognizance was granted on November 9. No further proceedings were held until after Brown was arrested on the capias and appeared before the court on September 26, 2003. On that date, the matter was set for docket call on November 4 and bond was set at $20,000.

On October 17, 2003, Brown appeared in court and attempted to enter a plea pursuant to an agreement with the Sarpy County Attorney. After reviewing the history of the case, the judge stated: "I am not sure we can dismiss anything. . . . [W]e passed the time [for] plea agreements." During the ensuing discussion with counsel, conflicting information was presented regarding Brown's previous failures to appear. Defense counsel again stated that Brown had been incarcerated in Oregon. The prosecutor stated that Brown was originally thought to be in Virginia but that he was eventually arrested in North Carolina. At that point, the judge stated: "Leave it on for docket call. It's passed." On November 4, Brown appeared with counsel and waived his right to trial by jury. The court scheduled a bench trial and continued Brown's bond.

Immediately prior to the commencement of trial on November 20, 2003, Brown's counsel stated:

> Judge, I would like to make a motion if I could. The defendant is charged with a Class III Felony and Class IV Felony. The State has offered to let him plead to a Class IV Felony. We are willing to do so.
>
> I think we addressed this matter about three weeks ago, and you said continue it for docket call and we set it for trial

> today. So I would like to renew my motion to allow him to plead to a Class IV Felony.
>
> I think it shows he didn't show up for a docket call about two years ago.

The prosecutor did not respond. The court again reviewed the history of the case, noting Brown's failure to appear at the omnibus hearing and docket call in October 2001. The court then stated:

> I don't have any control over the State dismissing charges but I've got control over plea agreements. And I have said it before and I will say it again. I am just not going to stand, you know, for plea agreements past a point of time that the defendant and counsel are given an opportunity, you know, to resolve the matter.
>
> So I guess the answer, then, is that the State saw fit to file two charges. We have gone through the procedures on them. We go to trial on two charges.

Defense counsel interposed an objection to the proceedings going forward on the ground that Brown would be denied "his right of due process and a fair trial," and the court noted the objection for the record.

The bench trial then began. The prosecution called four witnesses, none of whom were cross-examined by defense counsel. Several exhibits were received without objection, and one exhibit was received over a relevance objection by defense counsel. Defense counsel did not present any evidence. The court found Brown guilty on both counts. After sentencing, Brown perfected 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).

ASSIGNMENTS OF ERROR

Brown assigns, restated, (1) that the district court erred in refusing to accept his guilty plea to the single charge of possession of methamphetamine pursuant to the plea agreement and (2) that he received ineffective assistance of counsel at trial.

STANDARD OF REVIEW

[1] A trial court is given discretion as to whether to accept a guilty plea; this court will overturn that decision only where

there is an abuse of discretion. *State v. Johnson*, 242 Neb. 924, 497 N.W.2d 28 (1993); *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990).

[2] 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. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004); *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999).

ANALYSIS

Refusal to Accept Plea

[3,4] It is well established that a criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made. *State v. Johnson, supra*; *State v. Perez, supra*. Our cases recognize that a trial court has a large measure of discretion in deciding whether to accept a guilty plea. *State v. Leisy*, 207 Neb. 118, 295 N.W.2d 715 (1980); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

Although we wrote in *State v. Stewart*, 197 Neb. at 511, 250 N.W.2d at 859, that "such discretion is not unlimited," we have declined to adopt specific limitations imposed by other jurisdictions. For example, in *State v. Perez, supra*, we discussed *Griffin v. United States*, 405 F.2d 1378 (D.C. Cir. 1968), which held that a guilty plea as part of a plea agreement should not be rejected without a good reason. We declined to adopt this rule, noting that it "appear[ed] to conflict with the 'large measure of discretion' rule announced in *Leisy* and *Stewart*." *State v. Perez*, 235 Neb. at 801, 457 N.W.2d at 453. Similarly, although in *State v. Stewart, supra*, we acknowledged cases such as *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973), in which courts have attempted to define the scope of a judge's discretion to reject a guilty plea, we nevertheless specifically declined to do so.

Our previous cases have focused upon whether a trial court erred in rejecting a plea agreement for substantive reasons, such

as an inadequate factual basis or the defendant's dissatisfaction with his counsel. See, *State v. Johnson, supra*; *State v. Perez, supra.* On the other hand, this case presents the question of whether a trial court abuses its discretion by rejecting a plea agreement because it was submitted after the expiration of a judicially imposed deadline. Other courts addressing this issue have reached differing conclusions.

In jurisdictions which recognize a trial court's wide discretion to accept or reject plea agreements, strict enforcement of plea deadlines has generally been upheld. See, *U.S. v. Gamboa*, 166 F.3d 1327 (11th Cir. 1999) (rejecting guilty pleas of all coconspirators because one missed deadline by 40 minutes); *United States v. Ellis*, 547 F.2d 863 (5th Cir. 1977) (rejecting plea 1 day after deadline); *People v Grove*, 455 Mich. 439, 464, 566 N.W.2d 547, 558 (1997) ("rejection of a tardy plea is within the discretion of a trial court," where plea was presented 1 day before trial and over 1 month after plea cutoff date); *People v. Cobb*, 139 Cal. App. 3d 578, 188 Cal. Rptr. 712 (1983) (affirming rejection of plea submitted after deadline imposed by local practice rule). Courts taking this approach generally cite the need for enforceable efficiency in the trial court's management of its docket. See, *U.S. v. Gamboa, supra* (court-imposed time limits supported by need for judicial discretion in controlling scheduling of trial procedures and docket control and effective utilization of jurors and witnesses); *United States v. Ellis, supra* (strict adherence to guilty plea deadlines is justified as means of giving deadline integrity). The California Court of Appeals noted in *Cobb* that plea bargains are subject to reasonable time constraints and that court-imposed deadlines provide "a means of reducing the confusion, hardship and inconvenience inherent in calling calendars." 139 Cal. App. 3d at 581, 188 Cal. Rptr. at 713.

Other courts have determined that the rejection of a plea agreement solely because it was submitted after a deadline had passed constitutes an abuse of discretion. *U.S. v. Shepherd*, 102 F.3d 558 (D.C. Cir. 1996) (rejection of untimely plea agreement was abuse of discretion where record reflected plausible explanation for delay); *State v. Darelli*, 205 Ariz. 458, 72 P.3d 1277 (Ariz. App. 2003) (holding plea cutoff dates are impermissible without rule promulgated by Arizona Supreme Court); *State v. Hager*, 630

N.W.2d 828, 836 (Iowa 2001) (finding abuse of discretion where "court strictly adhered to the deadline and refused to consider the individual pressures and indecision faced by [the defendant]"); *State v. Sears*, 208 W. Va. 700, 705, 542 S.E.2d 863, 868 (2000) (abuse of discretion for trial court "to summarily refuse to consider the substantive terms of the [plea] agreement solely because of the timing of the presentation"). Courts rejecting the strict enforcement of court-imposed deadlines reason that the administrative benefits of efficiency must be balanced against fundamental principles that are impacted by the deadlines. For example, *State v. Hager*, 630 N.W.2d at 834, stated that "the pivotal dispute among the various courts centers on the balancing of the myriad of competing interests." The court noted that "[p]lea deadlines not only adversely impact prosecutorial discretion and individual interests, but strict adherence to deadlines impedes the very discretion of the court." *Id.* at 835-36. See, also, *U.S. v. Robertson*, 45 F.3d 1423 (10th Cir. 1995); *State v. Sears, supra.*

[5] Trial courts faced with the pressure of congested dockets and speedy trial requirements must have a degree of discretion in managing criminal case progression. The imposition of deadlines for completion of various pretrial procedures is a common case management tool, and thus the establishment and enforcement of deadlines for submission of plea agreements does not in itself constitute an abuse of judicial discretion. However, in view of the fact that " 'plea bargaining' is an essential component of the administration of justice," *Santobello v. New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), there may be circumstances in which strict enforcement of plea deadlines could constitute an abuse of discretion. In *People v. Jasper*, 17 P.3d 807 (Colo. 2001), the Supreme Court of Colorado fashioned a rule for the enforcement of plea agreement submission deadlines. The court held:

> [A] trial court may impose and enforce a plea cutoff deadline as part of its case management authority. In order to prevent arbitrary rejection of untimely pleas, however, a trial court must provide adequate notice to the parties of the plea cutoff deadline and must permit an exception to the deadline for good cause. The parties, not the court, bear the burden of establishing an exception to the plea cutoff deadline. Unless

> the parties specifically inform the court of facts constituting good cause, the parties waive any objection to the court's enforcement of the deadline.

17 P.3d at 809-10. We conclude that this rule serves the interest of efficient judicial administration in a manner which is consistent with due process of law, and we therefore adopt it. We expressly note, however, that adoption of this rule regarding plea agreement submission deadlines has no effect on our prior jurisprudence granting trial courts wide discretion in rejecting plea agreements for substantive reasons. See, *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

In applying our new rule to the instant case, we examine the record to determine (1) whether Brown had notice of the district court's policy of not accepting plea agreements after the date of the docket call and (2) whether there exists good cause that would justify an exception to the strict enforcement of the policy. The progression order entered and provided to Brown on the date of his arraignment established a filing deadline and hearing date for all pretrial motions, and it specifically stated that plea agreements would be taken up at the hearing in lieu of pretrial matters. The journal entry from the date of arraignment specifically notes that all plea negotiations were to cease at the time of the docket call. In urging the district court to accept a plea agreement more than 2 years after the scheduled hearing, Brown's counsel did not argue lack of notice. Rather, Brown acknowledges in his appellate brief that his counsel was familiar with the court's rule and that he had discussed the matter with Brown. We conclude that Brown had notice of the court's deadline for considering plea agreements.

The record further reflects that no good cause existed for the belated submission of the plea agreement. Brown failed to appear at the omnibus hearing on October 3, 2001, reportedly because he was incarcerated in another state. He did not appear again in this case until September 26, 2003, after he had been arrested in another state and extradited to Nebraska. The district court recited these facts as a part of its ruling rejecting the proposed plea agreements. Defense counsel candidly admitted the obvious fact that

Brown was at fault for not appearing at the originally scheduled omnibus hearing and docket call.

Although under our new rule, a missed plea deadline alone does not support the rejection of a plea agreement, it is within a court's discretion to reject an untimely plea agreement "if the defendant ignores the deadline by making no reasonable effort to reach a plea agreement prior to the deadline." *State v. Hager*, 630 N.W.2d 828, 837 (Iowa 2001). See, also, *People v. Jasper*, 17 P.3d 807, 816 (Colo. 2001) (determining that "mere renegotiation or a change of mind by the parties" would not ordinarily establish good cause for tardy plea). Because Brown absented himself from the state for approximately 2 years during the pendency of his case in the district court, he cannot establish good cause for his failure to submit a proposed plea agreement within the time period designated at the time of arraignment. Accordingly, we conclude that the district court did not abuse its discretion in rejecting the plea agreement which Brown proposed upon his return in 2003.

Assistance of Counsel

Brown's second assignment of error is that he received ineffective assistance of counsel at trial when his attorney failed to subject the State's case to meaningful adversarial testing. A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001).

[6,7] 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. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004); *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003). When considering whether a counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Faust, supra*; *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002). An appellate court will not

second-guess reasonable strategic decisions by counsel. *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000); *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). The presumption can be rebutted without an evidentiary hearing only when a decision by counsel cannot be justified as a result of a plausible trial strategy. *State v. Faust, supra.*

Brown argues that his trial counsel failed to cross-examine the State's witnesses or object to unspecified evidence adduced by the State. He also argues that the trial court failed to rule on his motion to suppress and that trial counsel made no objection, thus failing to preserve his right "to contest the search and seizure and any statements made pursuant thereto." Brief for appellant at 29-30. The record on direct appeal affords an insufficient basis upon which to evaluate these claims, and accordingly, we do not reach them.

CONCLUSION

We conclude that the district court did not abuse its discretion in rejecting Brown's plea bargain proposed approximately 2 years after the deadline established by the court. We do not reach Brown's claims that his trial counsel provided ineffective assistance because the record on direct appeal is insufficient for adequate review of these claims. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

DANNY J. TRIEWEILER, INDIVIDUALLY AND ON BEHALF OF VARSITY INVESTMENTS, INC., A NEBRASKA CORPORATION, APPELLEE, V. DON M. SEARS, APPELLANT.

DANNY J. TRIEWEILER, INDIVIDUALLY AND ON BEHALF OF VARSITY INVESTMENTS, INC., A NEBRASKA CORPORATION, APPELLEE, V. DAVID J. CAMPAGNA, APPELLANT.

689 N.W.2d 807

Filed December 17, 2004. Nos. S-02-134, S-02-135.

1. **Appeal and Error.** A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.
2. **Derivative Actions: Equity: Accounting.** A shareholder's derivative action which seeks an accounting and the return of money is an equitable action.

3. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
5. **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.
6. **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.
7. **Corporations: Actions: Parties.** As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders.
8. **Corporations: Derivative Actions: Parties.** The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.
9. ____: ____: ____. In legal effect, a stockholders' derivative suit is one by the corporation conducted by the stockholder as its representative. The stockholder is only a nominal plaintiff, the corporation being the real party in interest.
10. **Corporations: Actions: Parties: Proof.** If the shareholder properly establishes an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, rather than as a shareholder, such individual action may be maintained.
11. **Corporations: Actions: Parties.** It is only where the injury to the plaintiff's stock is peculiar to him or her alone, such as in an action based on a contract to which the shareholder is a party, or on a fraud affecting him or her directly, and does not fall alike upon other shareholders, that the shareholder may recover as an individual.
12. **Corporations: Accounting: Proof.** Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, when another person is in control of the books and has managed the business, that other person is in the position of a trustee and must make a proper accounting.
13. **Fraud: Courts: Equity: Proof: Presumptions.** While fraud cannot be presumed or inferred without proof in a court of equity any more than in a court of law, courts of equity are not restricted by the same rules as courts of law in the investigation of fraud and the proofs required to establish it.
14. **Principal and Agent: Proof.** The burden of proof is upon a party holding a confidential or fiduciary relation to establish the fairness, adequacy, and equity of a transaction with the party with whom he or she holds such relation.
15. **Pleadings: Proof.** A party will not be permitted to plead one cause of action and upon trial rely upon proof establishing another.
16. ____: ____. Proof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a cause substantially different from the case made in the pleadings.

17. **Derivative Actions: Pleadings: Damages.** Seeking individual damages in a petition alleging a derivative action is not fatal to that cause of action.
18. **Actions: Pleadings: Evidence.** The prayer of a petition is not a part of the allegations of fact constituting the cause of action; thus, where the facts alleged state a cause of action and are supported by the evidence, the court will grant proper relief, although it may not conform to the relief requested.
19. **Equity: Pleadings.** A prayer for general relief in an equity action is as broad as the pleadings, and the equitable powers of the court are sufficient to authorize any judgment to which a party is entitled under the pleadings and the evidence.
20. **Pleadings.** The prayer is no part of the pleading, tenders no issue, and neither adds to nor takes from the evidence required of either party.
21. **Derivative Actions: Pleadings: Equity.** A derivative action sounds in equity, and a court may rely on a general prayer for relief for the purpose of granting the relief to which the plaintiff is actually entitled.
22. **Corporations.** An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and is treated by the courts as a trustee.
23. ____. An officer or director must comply with the applicable fiduciary duties in his or her dealings with the corporation and its shareholders.
24. **Corporations: Liability: Damages.** A violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach.
25. **Corporations: Negligence: Liability.** Directors should have a general knowledge of the manner in which the corporate business is conducted, and, where the duty of knowing exists, ignorance because of neglect of duty on the part of a director creates the same liability as actual knowledge and failure to act on that knowledge.
26. **Corporations: Words and Phrases.** The degree of care required of a corporate director is the degree of care an ordinarily prudent person would exercise in a like position under similar circumstances. An ordinarily prudent person "in a like position" is an ordinarily prudent person who was the director of the particular corporation. The phrase "under similar circumstances" means that a court should take account of the director's responsibilities in the corporation, the information available at the time, and the special background knowledge or expertise the director has.
27. ____: ____. An outside director is one who is neither an officer nor an employee of the corporation.
28. **Corporations.** The degree of care for directors based on that which a prudent person in a like position under similar circumstances would give accommodates the various levels of director involvement in management; by depending on custom and usage, the standard protects the outside director from the expectation that he or she will give his or her undivided attention to corporate interests.
29. ____. While outside directors may not "close their eyes" to the conduct of corporate affairs, at least until they have reason to suspect impropriety, they may within reasonable limits rely on those who have primary responsibility for the corporate business. But lack of knowledge is not necessarily a defense, if it is the result of an abdication of directorial responsibility.
30. **Corporations: Trusts: Property.** The traditional remedy imposed by courts upon a finding of a misappropriation of a corporate opportunity is the impression of a constructive trust in favor of the corporation upon the property.

31. **Trusts: Property: Title: Unjust Enrichment: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.
32. **Trusts: Property.** Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust.
33. ____: ____. Where money is the asset upon which the constructive trust is based, it is necessary that the specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property.
34. **Trusts: Unjust Enrichment.** A constructive trust is imposed in order to prevent unjust enrichment, and in instances in which the law imposes a constructive trust, the doctrine of unjust enrichment generally governs the substantive rights of the parties.
35. **Unjust Enrichment: Restitution.** Unjust enrichment requires restitution, which measures the remedy by the gain obtained by the defendant, and seeks disgorgement of that gain.
36. **Damages: Liability.** Joint liability may render each liable party individually responsible for the entire obligation, regardless of what proportion of the plaintiff's damages was caused by each defendant.
37. **Negligence: Liability.** An act done by the joint agency or cooperation of several persons renders them jointly and severally liable.
38. ____: ____. All persons who knowingly aid or participate in committing a breach of trust will be held responsible for the resulting loss, and will be held accountable by personal judgment for the value of the property so converted.
39. **Corporations: Liability.** Directors and officers of a corporation are jointly as well as severally liable if they jointly participate in a breach of fiduciary duty or approve of, acquiesce in, or conceal a breach by a fellow officer or director.
40. **Equity.** Equity is not a rigid concept, and its principles are not applied in a vacuum, but instead, equity is determined on a case-by-case basis when justice and fairness so require.
41. ____. Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.
42. ____. Technicalities are not favorites of law or equity; courts relish them as instruments to prevent injustice, not to defeat justice.
43. ____. Equity looks through forms to substance; thus, a court of equity goes to the root of the matter and is not deterred by forms.
44. **Negligence: Liability.** Where the defendants have acted jointly to breach their fiduciary duties, the risk that any one defendant will be unable to satisfy his or her proportion of liability should be borne by the other wrongdoers, not the wronged party.
45. **Equity.** Equity will always strive to do complete justice.
46. **Corporations: Derivative Actions.** In a derivative proceeding, the plaintiff acts in a representative capacity for the corporation, and any recovery is obtained in the name of the corporation.
47. **Corporations: Derivative Actions: Debtors and Creditors.** In the case of a closely held corporation, a court in its discretion may permit an individual recovery to the

plaintiff in an action raising derivative claims, if it finds that to do so will not unfairly expose the corporation or defendants to a multiplicity of actions, materially prejudice the interests of creditors of the corporation, or interfere with a fair distribution of the recovery among all interested persons.

48. **Corporations: Negligence.** If a director of the corporation breaches his or her fiduciary duty to the corporation to usurp a corporate opportunity, the corporation is entitled to recover for that loss.
49. **Evidence.** When intentional destruction of evidence is established, the fact finder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction.
50. **Negligence: Damages.** A defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. The wrongdoer should bear the risk of uncertainty that his or her own conduct has created.
51. **Corporations.** A director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or dealing individually with third persons.
52. **Corporations: Property.** The fiduciary relation is so vital that directors are not only prohibited from making profit out of corporate contracts, and from dealing with the corporation except upon the most open and on the fairest terms, but the rule of accountability is so strict that they are not permitted to anticipate the corporation in the acquisition of property reasonably necessary for carrying out the corporate purposes or conducting the corporate business.
53. ____: ____. The doctrine of corporate opportunity prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence.
54. **Corporations: Damages: Proof.** Although officers or directors of a corporation are not necessarily precluded from entering into a separate business because it is in competition with the corporation, their fiduciary relationship to the corporation and its stockholders is such that if they do so they must prove that they did so in good faith and did not act in such a manner as to cause or contribute to the injury or damage of the corporation, or deprive it of business; if they fail in this proof, there has been a breach of that fiduciary trust or relationship.
55. **Corporations: Proof.** Where a corporate opportunity or self-dealing transaction is disclosed to the corporation, but the decision on it is made by self-interested directors, the burden is on those who benefit from the venture to prove that the decision was fair to the corporation.
56. **Corporations.** The test for whether an opportunity is corporate is whether the business is one of practical advantage to the corporation and fits into and furthers an established corporate policy.
57. **Corporations: Words and Phrases.** An opportunity is corporate whenever a fiduciary becomes involved in an activity intimately or closely associated with the existing or prospective activities of the corporation.
58. **Corporations.** When there is presented a business opportunity which the corporation is financially able to undertake and which, by its nature, falls into the line of the

corporation's business and is of practical advantage to it, or is an opportunity in which the corporation has an actual or expectant interest, a fiduciary is prohibited from permitting his or her self-interest to be brought into conflict with the corporation's interest, and may not take the opportunity for himself or herself.

59. ____. If a corporation's funds have been involved in financing an opportunity or its facilities or personnel have been used in developing the opportunity, the opportunity in justice should belong to the corporation.

60. ____. If a fiduciary uses corporate assets to develop a business opportunity, the fiduciary will be estopped from denying that it was a corporate opportunity, regardless of the corporation's ability to exploit it.

61. ____. The rule that it is immaterial who takes over a corporate opportunity where a corporation is insolvent or legally disabled from pursuing it applies only where the corporation is actually insolvent to such a degree that it cannot carry on business or the corporation is legally disqualified from embracing the opportunity. Financial inability, unless it amounts to insolvency to the point where the corporation is practically or actually defunct, is insufficient to warrant application of the rule.

62. ____. The financial inability of a corporation to take advantage of an opportunity because of lack of funds may not be relied upon by directors when their own lack of diligence was responsible for the corporation's momentary fiscal condition.

63. **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.

64. **Corporations: Courts: Fees.** Neb. Rev. Stat. § 21-2076(1) (Reissue 1997) does not authorize a court to order payment of fees by individual defendants.

65. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there.

66. **Corporations: Actions.** Neb. Rev. Stat. § 21-2076(3) (Reissue 1997) is directed at the conduct of litigation, not at the underlying wrongful conduct of the defendants.

Appeals from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed in part as modified, and in part vacated.

James B. Cavanagh, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellants.

Aimee J. Haley, of Fullenkamp, Doyle & Jobeun, and Amy Sherman Geren, of Geren Law Office, for appellee.

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

GERRARD, J.

NATURE OF CASE

Danny J. Trieweiler, the appellee, brought these corporate derivative actions in the district court on behalf of Varsity

Investments, Inc., a closely held corporation, against the other two shareholders of the corporation, David J. Campagna and Don M. Sears, the appellants. Generally, Trieweiler alleged that Campagna had breached a fiduciary duty by misappropriating money from the corporation, that Sears breached a fiduciary duty by failing to exercise reasonable care in the performance of his duties as a corporate director, and that both of the appellants had breached fiduciary duties by usurping a corporate opportunity. After a bench trial, the court found for Trieweiler on each of these claims and entered judgment accordingly. Although this appeal involves many issues, the fundamental questions presented are whether Trieweiler presented sufficient evidence to prove that the appellants breached their respective fiduciary duties to the corporation and, if so, whether the corporation's damages were proved with reasonable certainty.

FACTS

The following factual narrative is intended to provide the reader with the information necessary to understand our disposition of this appeal. Additional facts will be examined, in detail, in later sections of this opinion, as necessary for our analysis. The record in this case is extensive, containing thousands of pages of testimony and exhibits, and was difficult to review. We have conducted a comprehensive examination of the record, but a complete summary of all the evidence would be both impractical and unwieldy. Our election to not expressly mention each piece of relevant evidence should not be read to mean that we have not reviewed the record thoroughly, and carefully considered all the pertinent facts.

Because this case involves several business entities with similar names, we pause at the outset to explain, generally, how those entities are denominated. The first business at issue in this case is the "Varsity Sports Café," a bar, which opened in downtown Omaha in 1994. The Varsity Sports Café was owned and operated by "Varsity Investments" until 1997, when it was sold for an original purchase price of $200,000. The other business at issue in this case is the "Varsity West," also a bar, which opened in 1995. The Varsity West was owned and operated by "JVI, Inc.," or "Junior Varsity." Varsity West was sold later in 1995 for $186,000.

BUSINESS OPERATIONS

Trieweiler testified that he moved to Omaha in 1990 and worked at the Three Cheers bar as owner and manager. Trieweiler assisted with construction and remodeling projects at Three Cheers. Trieweiler was introduced to Campagna in 1993 by Campagna's cousin, because Campagna wanted to open a sports bar. The business plan was to start out with a sports bar, "get it going," and open up a string of sports bars.

Trieweiler testified that Sears, Campagna's father-in-law, was to handle the financing for the venture. Trieweiler was to be a 30-percent shareholder in the business, Campagna a 60-percent shareholder, and Sears a 10-percent shareholder. Trieweiler was to be responsible for handling the design work, carpentry, and tile work. Campagna was responsible for "putting the whole deal together" and "it was his idea." Sears had no day-to-day responsibilities in the opening or operation of the business.

Varsity Investments was formed to run the resulting venture, the Varsity Sports Café, in March 1994. According to Trieweiler, before the bar opened, he was to negotiate the lease and act as the general contractor. Trieweiler testified that he was actually involved in the labor related to construction and that he "did most of the construction." After the bar opened, Trieweiler was manager during the day. He handled the banking in the morning, balanced the cash register drawers, helped with cleaning and during lunch, then continued construction on the second level of the building later in the day. Trieweiler held the position of day manager between June and November.

At trial, Trieweiler described the process of balancing the cash register drawers. Every cash register contained a "Z-tape," which totaled out and broke down what had been rung into the register that day. Each morning, Trieweiler would take the Z-tape; count the cash, checks, and credit card payments; subtract the money that had been in the register initially; and see if it balanced out. The bartenders also handed in a sheet of any cash paid out, which amount Trieweiler included in the calculations. That process generated a "daily work sheet," which was attached to the Z-tape and kept in a filing cabinet on the premises. Trieweiler said that sometimes during the week the registers would have more credit

card payments than cash, but receipts were mostly cash, and the bar was essentially a cash-based business.

According to Trieweiler, Campagna's day-to-day duties after the bar opened were to work nights and weekends. But Trieweiler also testified that before the bar opened, Campagna wrote checks to himself for unknown reasons. Trieweiler said that he did not have access to the company checkbook, which was controlled by Campagna. However, Campagna testified that while Trieweiler was at the Varsity Sports Café, Trieweiler wrote most of the checks.

Financial Irregularities

According to Trieweiler, he and Campagna had agreed to receive $500 per week as salary once the bar opened; Trieweiler testified that his $500 salary did not change from the time the bar opened until it was fully staffed. Campagna testified that in 1994, he received $15,000 in salary through Varsity Investments' payroll service. Campagna apparently received $34,700 in salary in 1995, although his testimony on that subject was evasive and inconsistent, and it appears that his income may have been underreported in his tax filings for that year. Campagna received $36,250 in salary in 1996. Campagna testified that in 1997, he went "off payroll" and paid himself as it could be afforded, by writing himself a check. However, that income was not reflected in Campagna's tax records. Campagna claimed that his salary income from Varsity Investments in 1997 was $11,861.04.

Campagna also admitted at trial to taking an extra $10,000 from Varsity Investments in 1994 as a "bonus," although his trial testimony was not consistent with testimony given during his deposition, when he had said that the money was spent on business expenses. Pretrial interrogatories directed Campagna to identify money or assets received from Varsity Investments from 1993 to 1997, but the $10,000 "bonus" was not revealed in Campagna's answers to those interrogatories.

Varsity Investments never had a corporate credit card. Bank records indicate that Varsity Investments' funds were used to pay Campagna's personal credit cards, but Campagna testified that these payments were reimbursements for business expenses that Campagna had charged to his personal credit cards.

TRIEWEILER'S DEPARTURE

Trieweiler left his employment with the Varsity Sports Café on November 2, 1994. Trieweiler testified that he left on that date due to a number of concerns. He testified first that a $500 check for a beer distributor "bounced." Trieweiler was notified that he and his own company were being sued personally by a subcontractor. Furthermore, a final notice was posted for disconnection of the bar's electricity; Trieweiler said that he found two unopened utility bills in the office. Finally, a band that had played at the bar called and reported that the $1,200 check with which they had been paid had "bounced," but Trieweiler thought that band was to have played for door money and was not supposed to have been paid by the bar at all. Trieweiler found that the $1,200 "bounced" check was entered in the checkbook as payment to the Nebraska Department of Revenue.

Trieweiler testified that Campagna was responsible for paying the business' bills. Trieweiler confronted Campagna on November 2, 1994, with all of his concerns and then took a 2-week leave of absence. Trieweiler returned on November 15, and according to Trieweiler, Campagna told Trieweiler that he was being replaced as manager, the locks on the doors had been changed, and he was to be replaced on the board of directors. Trieweiler testified that he never received a share of corporate profits or any distribution as a shareholder and that he had not been paid for his shares of Varsity Investments. Campagna denied telling Trieweiler that his shares of Varsity Investments would not be honored. However, the Varsity Sports Café's liquor license renewal form for 1996, submitted by Campagna, stated that Trieweiler's shares had been transferred to Campagna.

BUSINESS RECORDS

Campagna was in charge of the books and records of Varsity Investments during 1995 to 1997. Trieweiler asked Campagna to allow Trieweiler to review the books and records of the business in January 1995. According to Trieweiler, Campagna replied, "We'll give it to you later." Trieweiler testified that he never received all the records. Trieweiler received incomplete check stubs, but never received daily report sheets, Z-tapes, invoices, or state tax returns.

Trieweiler testified that he notified Sears of his concerns about the business in February 1995, but never heard back from Sears. Sears acknowledged receiving a letter from Trieweiler, but did not recall the contents of the letter. Sears stated that when he invested in Varsity Investments, he had no expectation of profit; he simply wanted to provide Campagna with a business opportunity. Sears testified that during his tenure as an officer, director, and shareholder of Varsity Investments, he never attended a shareholders' meeting, reviewed any books or records, asked to review any books or records, or voted on any issues other than the removal of Trieweiler as a director. Sears was physically present at the Varsity Sports Café only once, at the opening. Sears stated that Campagna had told him that the Varsity Sports Café was having trouble covering expenses, but that Sears did not request a profit-and-loss statement, tax return, or any other financial documents.

Trieweiler stated that because he had been preparing the daily sales sheets and making the company's bank deposits, he knew that in October 1994, the business was generating enough profits to meet its obligations. However, Trieweiler testified that on days when he had not balanced the drawers, prepared the daily sales sheets, and made the bank deposits, he had no way of knowing whether the sales from the day were actually deposited in the bank. Trieweiler said that he requested records from that period, but they were unavailable. Trieweiler reported that in 1997, when asked about all of the business' missing records, Campagna said that he thought "the cleaning guy threw them away and that's my story and I'm sticking to it."

Campagna testified that records were maintained on computer and that hard copies were retained of daily sales sheets and Z-tapes. However, Campagna testified that the business stopped maintaining daily sales sheets in 1996 or 1997, because he "didn't want to get anybody in trouble with the IRS. There's a lot of people on daily cash that were paid cash." Campagna testified that the records that had been created and maintained by Varsity Investments during 1994 to 1996 were lost or destroyed in 1997.

Campagna admitted that Trieweiler had asked to review the company's financial records before Campagna stopped retaining those records and that Trieweiler had, before 1997, requested

the records that were lost or destroyed. Campagna admitted that the Varsity Investments' records that had been on computer were sold, with the computer, to the purchaser of the Varsity Sports Café and that a copy of those records had not been maintained, despite the fact that the records had already been requested by Trieweiler at the time. No daily sales worksheets were turned over to Trieweiler.

Trieweiler testified that he was eventually able to review "two or three different boxes" of Z-tapes that were turned over in May 1997. Trieweiler stated that the Z-tapes he received did not include all of the "grand total tapes," which tapes were a record of all the transactions entered into each register over an extended period of time. Trieweiler reported reviewing a box of bank statements and checks, although Trieweiler stated that some of the checks were missing. Additional records were obtained from the bank. Trieweiler testified that records had been obtained from liquor and beer distributors. Finally, Trieweiler stated that he had been able to review Campagna's and Sears' tax records, and Campagna's bank account records. Trieweiler was also able to obtain some records from the individual who purchased the Varsity Sports Café in 1997. Campagna verified the authenticity of those records.

Forensic Accounting Testimony

Trieweiler's key witness at trial was Rodney Anderson, a certified public accountant retained by Trieweiler to examine the financial records available to Trieweiler. The appellants' specific complaints with respect to the foundation for Anderson's testimony will be discussed in more detail below. In general, Anderson reviewed bank records for Varsity Investments and attempted to determine whether Varsity Investments' bank deposits included all of the income generated by operation of the business. Anderson testified that his task would have been easier had certain types of financial records been available to him, such as detailed general ledgers, a check register, a cash receipts listing, any kind of payroll information, employee expense reports, bank reconciliations, cash register receipts, invoices for expenses paid out of the drawers, and billing or expense information.

Anderson calculated that based solely on Varsity Investments' tax returns, the total losses for the business from 1994 to 1997

were $41,380. However, financial records recovered from the Varsity Investments' computer that was sold with the business led Anderson to conclude, when considered with other financial records, that Varsity Investments actually generated net sales for that period of $264,000. Because of the lack of information from a daily sales sheet, Anderson also calculated Varsity Investments' income by using the average monthly sales, and subtracting the cost of goods sold that had been reported on the tax returns; he calculated a total income for 1994 to 1997 of $331,000.

Anderson also conducted a depository analysis on Varsity Investments' bank records. Anderson identified the ordinary deposits, which would represent revenue from the business' daily sales, and concluded that the total sales for the business exceeded the total bank deposits by $243,232.35. Anderson examined bank records obtained from Campagna and his wife, compared those records to information about gifts and loans that was provided in response to Trieweiler's interrogatories, and also excluded identifiable sources of regular income. Anderson concluded that $117,915.88 of deposits made into the Campagnas' bank accounts in 1994 to 1997 were unexplained.

Varsity West

Trieweiler testified that in October 1994, Campagna found a location in southwest Omaha for a second bar. Trieweiler admitted that when asked about a new location, he might have said that the new location was not a good idea because of the bar's financial situation. Trieweiler explained that at that time, the bar's checks were "bouncing," payroll checks were "bouncing," bills were not getting paid, and the business was still paying off the construction loans on the first location. Trieweiler said that he had no further discussion with Campagna or Sears about the second location and that he did not learn about Varsity West until a liquor license application for Varsity West was submitted in 1995. Campagna conceded that after October 1994, Trieweiler was not informed of or consulted about the Varsity West development. Trieweiler admitted, with respect to Varsity West, that he had no access to any assets, between October 1994 and February 1995, that he could have invested in the new project.

The Varsity West location opened at the same location Trieweiler had discussed with Campagna. The Varsity West development was undertaken by a new corporation known as JVI, Inc., or Junior Varsity. However, the Bank of Nebraska loaned Varsity Investments, doing business as Varsity Sports Café, $75,000 for the purpose of opening the Varsity West location. The loan was requested by the appellants, entered into by the appellants on behalf of Varsity Investments, and was secured by the assets of Varsity Investments. But Campagna was to own 51 percent of Varsity West, Sears 10 percent, and Jeff Sears, Sears' son, 39 percent. The appellants personally guaranteed the loan, and the bank officer testified that the loan would not have been made had Sears not guaranteed it. Sears also gave Campagna a $30,000 loan for the Varsity West project, but was "[n]ot exactly" aware of what happened to that money.

A corporate resolution of Varsity Investments required a meeting and a vote of the shareholders to borrow money. Trieweiler testified that he was aware of no vote by Varsity Investments to incur any debt for use by Varsity West, no authorization to run Varsity West expenses through Varsity Investments, and no authorization to allow Varsity Investments to guarantee debt incurred by Varsity West. Trieweiler also testified that he had no knowledge of any loans made by Campagna to Varsity Investments.

After Varsity West was launched, Varsity Investments' payroll account was used to pay the employees of Varsity West. Insurance for Varsity West was obtained through Varsity Investments' insurance policy. Varsity West's credit card receipts were run through Varsity Investments' terminal. Campagna also conceded that during the operation of Varsity West, it engaged in joint advertising with the Varsity Sports Café and the advertising indicated a relationship between the businesses.

LITIGATION

After other litigation that is not relevant to this proceeding, Trieweiler filed derivative actions against the appellants in the district court, individually and on behalf of Varsity Investments, alleging two causes of action against each appellant. First, Trieweiler alleged the appellants had, in opening Varsity West, usurped a corporate opportunity belonging to Varsity Investments.

Second, Trieweiler alleged money and assets had been misappropriated from Varsity Investments in the operation of the Varsity Sports Café.

After trial, the district court entered judgment against the appellants. Many of the district court's conclusions of law and fact will be discussed in more specific detail as necessary for our analysis below. Generally, the court concluded that funds had been diverted from the Varsity Sports Café by Campagna and that determining the exact amount had been made impossible by Campagna's failure to retain records from the business. The court further determined that Sears had not fulfilled his duties as a corporate director and was jointly liable for Campagna's misappropriation. Based on Anderson's testimony, the court attributed $168,000 in losses from Varsity Investments to the appellants. The court also concluded that Varsity West was a corporate opportunity of Varsity Investments and that the two operations "were inextricably bound together in one enterprise." The court also noted that documents which would have made the exact nature of the corporate relationships clear had been destroyed.

The court ordered that 30 percent of the sales proceeds from Varsity West, or $26,725.25, should be awarded to Trieweiler. The court also awarded Trieweiler $16,000 in "unpaid wages," as a debt of Varsity Investments. Trieweiler was awarded 30 percent of the proceeds of the sale of the Varsity Sports Café, or $12,633.75. The court concluded that under the "exceptional circumstances" presented, Trieweiler should be permitted a direct recovery against the appellants for 30 percent of the money misappropriated from Varsity Investments, and the court ordered a payment of $50,400. Thus, the court entered a total judgment in favor of Trieweiler in the amount of $105,759. (The court's order sets forth the figure of $105,759 twice, which is logical because that is the sum of the court's underlying calculations of damages. However, the final disposition contained in the court's order sets forth a figure of $105,359, with no ready explanation for the difference of $400. We assume that $105,759 is the correct figure.) The court directed that Trieweiler's shares in the corporation be transferred to the appellants upon satisfaction of the judgment. Postjudgment, Trieweiler filed a timely motion for expenses, including attorney fees, pursuant to Neb. Rev. Stat. § 21-2076

(Reissue 1997). The court awarded costs and attorney fees, purportedly pursuant to § 21-2076(1) and (3), in the amount of $96,037.34.

ASSIGNMENTS OF ERROR

Although Campagna and Sears come before this court with distinct legal positions, and have filed separate briefs, those briefs present essentially indistinguishable arguments, and these cases have been consolidated for disposition by this court. Consequently, the assignments of error before this court do not distinguish between the appellants.

[1] Furthermore, the appellants' briefs assign 14 errors, many of which are very vague, such as assigning error "in the conclusions of law not supported by sufficient evidence." A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered. *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998). In this case, we consider the appellants' more specific assignments of error, as we have consolidated and restated them in light of the supporting arguments made in the appellants' briefs.

The appellants assign, consolidated, restated, and reordered, that the district court erred by (1) permitting Trieweiler to present evidence of "excess revenues" when he pled specific acts of misappropriation, (2) determining that Trieweiler could bring a derivative proceeding, (3) concluding Sears was jointly and severally liable, (4) awarding damages to Trieweiler (a) in his individual capacity and (b) for "unpaid wages," (5) finding Anderson's testimony to be reliable and the evidence of damages to be sufficient, (6) concluding that Varsity West was an usurped corporate opportunity of Varsity Investments, and (7) awarding attorney fees.

In addition, Trieweiler's brief contains two purported "assignments of errors" that contend the district court's award was insufficient. We do not consider these purported errors, as Trieweiler has failed to properly designate a cross-appeal pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 2001). See *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999).

STANDARD OF REVIEW

[2,3] A shareholder's derivative action which seeks an accounting and the return of money is an equitable action. In an appeal of

an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

[4,5] The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Reimer v. Surgical Servs. of the Great Plains*, 258 Neb. 671, 605 N.W.2d 777 (2000). 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. *Stukenholtz v. Brown*, 267 Neb. 986, 679 N.W.2d 222 (2004).

[6] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

ANALYSIS

[7-9] Before discussing the appellants' specific arguments, it is helpful to review the basic principles underlying a corporate derivative action of this kind. As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation. *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989). In legal effect, a stockholders' derivative suit is one by the corporation conducted by the stockholder as its representative. The stockholder is only a nominal plaintiff, the corporation being the real party in interest. *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944).

[10,11] However, there is a well-recognized exception to the general rule: If the shareholder properly establishes an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, rather than as a

shareholder, such individual action may be maintained. *Meyerson, supra.* It is only where the injury to the plaintiff's stock is peculiar to him or her alone, such as in an action based on a contract to which the shareholder is a party, or on a fraud affecting him or her directly, and does not fall alike upon other shareholders, that the shareholder may recover as an individual. *Id.*

[12-14] Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, when another person is in control of the books and has managed the business, that other person is in the position of a trustee and must make a proper accounting. *Woodward, supra.* While fraud cannot be presumed or inferred without proof in a court of equity any more than in a court of law, courts of equity are not restricted by the same rules as courts of law in the investigation of fraud and the proofs required to establish it. *Bauermeister v. McReynolds*, 254 Neb. 118, 575 N.W.2d 354 (1998) (supplemental opinion). The burden of proof is upon a party holding a confidential or fiduciary relation to establish the fairness, adequacy, and equity of a transaction with the party with whom he or she holds such relation. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

Scope of Pleadings

The appellants' first two assignments of error, although distinct, both involve examination of Trieweiler's operative petition against Campagna. The appellants first assign that the district court erred in permitting Trieweiler to present evidence of "excess revenues" when he pled specific acts of misappropriation. The appellants claim that Trieweiler pled specific acts of misappropriation from Varsity Investments by Campagna, but failed to prove those allegations, and instead only presented evidence of missing corporate revenue. The essence of the appellants' argument is that Trieweiler's evidence did not conform to, or support, the allegations made in his pleadings.

[15,16] The appellants correctly identify the controlling proposition of law, that a party will not be permitted to plead one cause of action and upon trial rely upon proof establishing another. *Abdullah v. Nebraska Dept. of Corr. Servs.*, 246 Neb. 109, 517 N.W.2d 108 (1994). Proof must correspond with the allegations in

the pleadings, and relief cannot be granted upon proof of a cause substantially different from the case made in the pleadings. *Id.*

However, the appellants' argument is premised upon a misrepresentation of Trieweiler's petition. In his operative amended petition, Trieweiler alleged that corporate funds

> were misappropriated and/or wasted by [Campagna] or by employees of the Corporation due to [Campagna's] mismanagement, and/or monies of the Corporation were excessively and unfairly paid, awarded or distributed, in an amount of at least $264,000, *including but not limited to the following respects and particulars*:
>
> . . . .
>
> . . . misappropriation of cash monies of the Corporation in an amount yet to be ascertained.

(Emphasis supplied.) The petition contained specific allegations of misappropriation totaling $110,556.93, but also identified several acts of misappropriation for amounts of money "yet to be ascertained." Because of that uncertainty, Trieweiler concluded in his operative petition that "[a]ccordingly, the Corporation has been damaged in the amount of profits, monies and other assets misappropriated, wasted and/or excessively and unfairly paid, awarded or distributed in a total amount yet to be ascertained and an accounting is necessary to ascertain said amount."

It is evident from even a casual reading of Trieweiler's petition that the evidence presented at trial of missing corporate revenues was relevant to prove Trieweiler's general allegations of misappropriation. In other words, the evidence presented at trial adequately conformed to the allegations in the pleadings, see *Abdullah, supra*, and the appellants' first assignment of error is without merit.

Second, the appellants assign that Trieweiler should not have been allowed to bring a derivative action. Their argument is that since Trieweiler sought damages to be awarded to him individually, instead of to the corporation, Trieweiler was not acting in a representative capacity for the corporation. See *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989). The appellants claim that "Trieweiler consistently pled and maintained that the purpose of these lawsuits was to obtain payment to himself . . . . He was not bringing an action seeking

recovery on behalf of the corporation." Brief for appellant Campagna at 18.

[17] However, the appellants have again misrepresented Trieweiler's operative petition, which concludes as follows:

> WHEREFORE, [Trieweiler], individually, and on behalf of Varsity Investments, Inc., prays for a judgment against [Campagna] in favor of Varsity Investments, Inc. in an amount of at least $264,000.00 for damages due to [Campagna's] breaches of fiduciary duty, mismanagement and/or misappropriation, or, alternatively, a judgment against [Campagna], in favor of . . . Trieweiler, for 30% of the damages to Varsity Investments, Inc.; for reasonable attorney's fees; the costs of this action and any other relief this Court deems is just and equitable under the circumstances.

Trieweiler's operative petition clearly seeks damages on behalf of the corporation, and individual damages are sought only in the alternative. Furthermore, as previously noted, there are circumstances in which individual damages may be appropriately awarded in connection with a derivative action. See *id.* See, generally, 13 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 6028 (perm. ed., rev. vol. 1995). We will discuss whether those circumstances were present in this case in more detail below. For purposes of resolving this issue, it is necessary only to note that seeking individual damages in a petition alleging a derivative action is not fatal to that cause of action. See, e.g., *Chambrella v. Rutledge*, 69 Haw. 271, 740 P.2d 1008 (1987). See, generally, 13 Fletcher, *supra*, § 6011 at 279 ("[w]hen a plaintiff pleads multiple theories of relief, the assertion of one theory does not necessarily imply or amount to waiver of any other theory").

[18-20] Under our former system of code pleading, the nature of an action is determined not by the prayer for relief but from the character of the facts alleged. *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984). (The petitions in these cases were filed prior to the effective date of the Nebraska Rules of Pleading in Civil Actions. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004).) The prayer of a petition is not a part of the allegations of fact constituting the cause of action; thus, where the facts alleged state a cause of action and are supported by the evidence, the

court will grant proper relief, although it may not conform to the relief requested. *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992). A prayer for general relief in an equity action is as broad as the pleadings, and the equitable powers of the court are sufficient to authorize any judgment to which a party is entitled under the pleadings and the evidence. *Sullivan v. General United Life Ins. Co.*, 209 Neb. 872, 312 N.W.2d 277 (1981). The prayer is not part of the pleading, tenders no issue, and neither adds to nor takes from the evidence required of either party. *Standard Reliance Ins. Co. v. Schoenthal*, 171 Neb. 490, 106 N.W.2d 704 (1960).

[21] Consequently, while the ad damnum clauses of Trieweiler's petitions sought individual damages, even had that request not been made in the alternative, Trieweiler's standing to maintain a derivative action would not have been undermined. A derivative action sounds in equity, and a court may rely on a general prayer for relief for the purpose of granting the relief to which the plaintiff is actually entitled. See *Chambrella, supra.*

In short, the appellants' second assignment of error is based on a misrepresentation of Trieweiler's petitions and would have been meritless regardless.

SEARS' JOINT LIABILITY

The next assignment of error we address is the appellants' contention that Sears should not have been found jointly and severally liable. We first consider the argument that Sears should not have been held jointly liable for Campagna's alleged misappropriations from Varsity Investments. The appellants argue that any liability found to result from Campagna's misappropriation should be borne by Campagna alone. The record does not support a finding that Sears participated in or intentionally abetted any of Campagna's alleged misappropriation. Consequently, the question is whether Sears' failure to supervise the affairs of Varsity Investments rose to the level of a breach of Sears' fiduciary duty toward the corporation and its stockholders. See, generally, *Department of Banking v. Colburn*, 188 Neb. 500, 198 N.W.2d 69 (1972).

[22-25] An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and is

treated by the courts as a trustee. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). An officer or director must comply with the applicable fiduciary duties in his or her dealings with the corporation and its shareholders. See *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979). Where a director has acted in complete good faith and breached no fiduciary duties, he or she is not liable for mere mistakes in judgment. See *id.* However, a violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach. See *id.* Directors should have a general knowledge of the manner in which the corporate business is conducted, and, where the duty of knowing exists, ignorance because of neglect of duty on the part of a director creates the same liability as actual knowledge and failure to act on that knowledge. *Id.* In addition, Neb. Rev. Stat. § 21-2095 (Reissue 1997) provides, in relevant part:

> (1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:
>
> (a) In good faith;
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.
>
> (2) In discharging his or her duties, a director shall be entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
> (a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
>
> . . . .
>
> (3) A director shall not be considered to be acting in good faith if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.
>
> (4) A director shall not be liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.

Admittedly, the evidence in this case does not indicate that Sears was informed about the affairs of Varsity Investments. By Sears' own admission, he did not review the books or records of the corporation, or ask to do so, and visited the Varsity Sports Café only once, when it opened.

However, the record also establishes that Trieweiler's letter to Sears, sent in February 1995, did not contain the allegations of substantial misappropriation that would later come to form the basis of this litigation. At that time, Trieweiler was aware that some of the corporation's bills had not been paid and that a check issued by Campagna had been entered improperly in the corporate checkbook. Trieweiler had, at that time, not been provided with desired access to the corporate records. Sears confirmed his awareness of the corporation's difficulty covering expenses, stating that he had been informed by Campagna. The record does not establish, however, that prior to this litigation, Sears was aware of any evidence of misappropriation or missing revenue.

[26] Of course, that conclusion begs the pertinent question: Did Sears breach a fiduciary duty by failing to monitor the corporation's affairs closely enough to make himself aware of any improprieties? Most state statutes now provide, as does Nebraska's, that the degree of care required of a director is the degree of care an ordinarily prudent person would exercise in a like position under similar circumstances. See, § 21-2095; 3A William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 1032 (perm. ed., rev. vol. 2002 & Cum. Supp. 2004). An ordinarily prudent person "in a like position" has been interpreted to mean an ordinarily prudent person who was the director of the particular corporation. 3A Fletcher, *supra*; 2 Model Business Corporation Act Annotated § 8.30(b) (3d ed. 2002). The phrase "under similar circumstances" has been interpreted to mean that a court should take account of the director's responsibilities in the corporation, the information available at the time, and the special background knowledge or expertise the director has. *Id.*

[27,28] An "outside director" is usually defined as one who is neither an officer nor an employee of the corporation. 3A Fletcher, *supra*, § 1035.20, citing *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639 (Iowa 1979). The degree of care

for directors based on that which a prudent person in a like position under similar circumstances would give has been said to accommodate the various levels of director involvement in management; by depending on custom and usage, the standard protects the outside director from the expectation that he or she will give his or her undivided attention to corporate interests. See, generally, 18B Am. Jur. 2d *Corporations* § 1710 (1985 & Cum. Supp. 2003), citing Michele Healy Ubelaker, *Director Liability Under the Business Judgment Rule: Fact or Fiction?*, 35 Sw. L.J. 775 (1981). See, generally, Donald E. Pease, *Outside Directors: Their Importance to the Corporation and Protection From Liability*, 12 Del. J. Corp. L. 25 (1987).

[29] While outside directors may not "close their eyes" to the conduct of corporate affairs, at least until they have reason to suspect impropriety, they may within reasonable limits rely on those who have primary responsibility for the corporate business. 3A Fletcher, *supra*, citing *Rowen, supra*. But lack of knowledge is not necessarily a defense, if it is the result of an abdication of directorial responsibility. See *Joy v. North*, 692 F.2d 880 (2d Cir. 1982). See, also, *F.D.I.C. v. Bierman*, 2 F.3d 1424 (7th Cir. 1993).

> In the last analysis, the question of whether a corporate director has become liable for losses to the corporation through neglect of duty is determined by the circumstances. If he [or she] has recklessly reposed confidence in an obviously untrustworthy employee, has refused or neglected cavalierly to perform his [or her] duty as a director, or has ignored either willfully or through inattention obvious danger signs of employee wrongdoing, the law will cast the burden of liability upon him [or her].
>
> [But] we know of no rule of law which requires a corporate director to assume, with no justification whatsoever, that all corporate employees are incipient law violators who, but for a tight checkrein, will give free vent to their unlawful propensities.

Graham, et al. vs. Allis-Chalmers Mfg. Co., et al., 41 Del. Ch. 78, 85-86, 188 A.2d 125, 130-31 (Del. Supr. 1963). The balancing of these factors must be on a case-by-case basis, depending upon the circumstances at the time of the challenged action or inaction. *Rowen, supra.*

As previously noted, Sears did not have day-to-day responsibilities in the management of the corporation. The record is less than conclusive with respect to whether Sears was an officer of the corporation, as the following colloquy from Sears' direct examination by Trieweiler's counsel demonstrates:

> [Trieweiler's counsel]. Were you an officer of Varsity Investments, Inc.?
>
> [Sears]. I believe I was. I'm really not sure.
>
> Q. Do you know what position you were — you held in Varsity Investments, Inc.?
>
> A. Not exactly without looking. Probably a vice president, I would guess. I don't know.
>
> Q. So you believe you would have been a vice president?
>
> A. It would be as good a guess as any.
>
> Q. Do you know what time frame you would have been a vice president of Varsity Investments, Inc.?
>
> A. From the formation of the corporation.
>
> Q. Until the present day?
>
> A. Yeah.

We conclude, based upon the record presented to us, that the district court did not err in concluding that Sears breached a fiduciary duty by failing to closely monitor Varsity Investments' affairs. Admittedly, Sears owned only 10 percent of the corporation and was not at all involved in the operation of the business, and his direct involvement had apparently not been contemplated by the other shareholders. It was clear to all concerned, from the outset, that Sears' primary role was to provide investment capital.

But it is not disputed that Sears, as a director of the corporation, had a fiduciary duty to the corporation and the other shareholders, and it is difficult to see how he could have fulfilled that duty by exercising no meaningful supervisory role whatsoever. A duty which required neither action nor attention to fulfill would not be a duty at all. In this case, Sears' inattention to corporate affairs was so profound that he could not even state, with certainty, whether or not he was an officer of the corporation. Even if Sears was an "outside director" and was not required to give Varsity Investments his undivided attention, the record here presents a textbook example of a director who "closed his eyes" to

the conduct of the corporation. See *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639 (Iowa 1979).

Furthermore, we can find no error in the district court's conclusion that Sears' breach of fiduciary duty was the proximate cause of financial losses by Varsity Investments. Sears was an experienced businessperson, having been operator, director, and officer of Sound Recorders, Inc., and director and president of American Gramophone Records. Had Sears devoted even a minimally appropriate degree of attention to corporate affairs, he might have observed that the corporation's finances were in disarray and that adequate records of corporate income were not being maintained. Furthermore, assuming for purposes of this analysis that Campagna misappropriated funds, Sears' proper execution of his fiduciary duties would have required him to determine whether Campagna had properly deposited or spent the corporation's unrecorded income. In other words, Sears' inattention to his fiduciary duties had a proximate causal connection with the mismanagement of and alleged misappropriation from Varsity Investments. The district court did not err in holding Sears to be jointly and severally liable for that mismanagement and misappropriation.

We next address the other aspect of Sears' joint liability—whether Sears was correctly found to be jointly and severally liable for damages from the diversion of the Varsity West opportunity. It is not disputed that the appellants acted together in pursuing the Varsity West project. The appellants have disputed that Varsity West was a corporate opportunity of Varsity Investments. For reasons that will be explained below, we reject the appellants' argument in that respect. For purposes of the current discussion, it suffices to state that Varsity West was an usurped corporate opportunity of Varsity Investments. Given that assumption, Sears argues that instead of being held jointly liable, the appellants should each have been held liable only for the proceeds that each of them actually received from the Varsity West sale.

The appellants simply argue a conclusion in that respect; they offer nothing in the way of legal analysis to advance their argument. But they have placed the issue before this court, and resolving it requires us to consider some of the fundamental principles of equitable relief.

[30,31] Sears' position is supported by the fact that the traditional remedy imposed by courts upon a finding of a misappropriation of a corporate opportunity is the impression of a constructive trust in favor of the corporation upon the property. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). See, generally, 3 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 861 (perm. ed., rev. vol. 2002 & Cum. Supp. 2004). A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *ProData Computer Servs. v. Ponec*, 256 Neb. 228, 590 N.W.2d 176 (1999). See, also, *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997). Regardless of the nature of the property upon which the constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *Manker, supra*; *Ponec, supra*.

[32,33] Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust. *Ponec, supra*. However, where money is the asset upon which the constructive trust is based, it is necessary that the specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property. *Ponec, supra*; *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998).

[34,35] Consequently, the concept of joint liability is, to some extent, inconsistent with the concept of a constructive trust. A constructive trust is imposed in order to prevent unjust enrichment, and in instances in which the law imposes a constructive trust, the doctrine of unjust enrichment generally governs the substantive rights of the parties. See *Barnes v. Eastern & Western Lbr.*

Co., 205 Or. 553, 287 P.2d 929 (1955). Unjust enrichment requires restitution, see *Ahrens v. Dye*, 208 Neb. 129, 302 N.W.2d 682 (1981), which measures the remedy by the gain obtained by the defendant, and seeks disgorgement of that gain. See, *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142 (Iowa 2001); *Burch & Cracchiolo, P.A. v. Pugliani*, 144 Ariz. 281, 697 P.2d 674 (1985) (en banc). In other words, when damages are based upon unjust enrichment, a defendant is liable only to the extent of the enrichment. See *Natl. City Bank, Norwalk v. Stang*, 84 Ohio App. 3d 764, 618 N.E.2d 241 (1992).

[36] Joint liability, however, may render each liable party individually responsible for the entire obligation, regardless of what proportion of the plaintiff's damages was caused by each defendant. See, e.g., *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). In that instance, damages are measured by the plaintiff's loss and seek to provide compensation for that loss. See *Unisys Corp., supra*. Thus, for instance, an action for unjust enrichment differs at common law from tortious conversion primarily on the basis that all the defendants may be held jointly liable in tort, while only those who have benefited are liable, and then only to the extent thereof, in an action for unjust enrichment. *Myzel v. Fields*, 386 F.2d 718 (8th Cir. 1967). This supports a conclusion that joint and several liability is inappropriate in relation to the equitable remedy of a constructive trust. See *A. T. Kearney, Inc. v. INCA International*, 132 Ill. App. 3d 655, 477 N.E.2d 1326, 87 Ill. Dec. 798 (1985). See, also, *Barnes, supra*.

[37,38] The countervailing principle, however, is the general rule that an act done by the joint agency or cooperation of several persons renders them jointly and severally liable. See *English v. Bruin Engineering, Inc.*, 201 Neb. 791, 272 N.W.2d 753 (1978). All persons who knowingly aid or participate in committing a breach of trust will be held responsible for the resulting loss, and will be held accountable by personal judgment for the value of the property so converted. *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975).

[39] Based on that general principle, it has been held that directors and officers of a corporation are jointly as well as severally liable if they jointly participate in a breach of fiduciary duty, or approve of, acquiesce in, or conceal a breach by a fellow officer

or director. See, generally, 3 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 1002 (perm. ed., rev. vol. 2002 & Cum. Supp. 2004). See, e.g., *Radol v. Thomas*, 772 F.2d 244 (6th Cir. 1985); *Lawson v. Baltimore Paint and Chemical Corporation*, 347 F. Supp. 967 (D. Md. 1972); *Resolution Trust Corp. v. Block*, 924 S.W.2d 354 (Tenn. 1996); *Christner v Anderson, Nietzke*, 433 Mich. 1, 444 N.W.2d 779 (1989); *Chelsea Industries, Inc. v. Gaffney*, 389 Mass. 1, 449 N.E.2d 320 (1983); *Seaboard Industries, Inc. v. Monaco*, 442 Pa. 256, 276 A.2d 305 (1971); *Knox Glass Botl. Co. v. Underwood*, 228 Miss. 699, 89 So. 2d 799 (1956).

In this case, however, the appellants acted jointly to breach their fiduciary duties by diverting a corporate opportunity from Varsity Investments. That opportunity has been liquidated, and the proceeds divided among the participants, including the appellants. Diversion of a corporate opportunity is generally remedied by the imposition of a constructive trust, the theory of which is inconsistent with joint liability, yet joint liability is indicated by the appellants' cooperation to breach their fiduciary duties.

[40,41] We conclude that despite the tension between joint liability and the theory of unjust enrichment, the district court did not err in holding the appellants jointly and severally liable in this case. Equity is not a rigid concept, and its principles are not applied in a vacuum, but instead, equity is determined on a case-by-case basis when justice and fairness so require. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). Where relief may be granted, although no precedent may be found, the court will so proceed. *State ex rel. Stenberg v. Moore*, 253 Neb. 535, 571 N.W.2d 317 (1997).

[42-45] We see little reason to distinguish between the diversion of a corporate opportunity and any other jointly executed breach of fiduciary duty in determining whether defendants are jointly liable for damages resulting from the breach. There would be no sound basis in logic or public policy for concluding that defendants are not jointly liable for diverting a corporate opportunity, yet jointly

liable for theft or mismanagement. Such a distinction, while conceivable, would be based in a technical understanding of equitable relief. But technicalities are not favorites of law or equity; courts relish them as instruments to prevent injustice, not to defeat justice. *Miller v. School Dist. No. 69*, 208 Neb. 290, 303 N.W.2d 483 (1981). Equity looks through forms to substance; thus, a court of equity goes to the root of the matter and is not deterred by forms. *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999); *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991). Where the defendants have acted jointly to breach their fiduciary duties, the risk that any one defendant will be unable to satisfy his or her proportion of liability should be borne by the other wrongdoers, not the wronged party. Equity will always strive to do complete justice. *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956). The controlling objective is to make the plaintiff whole. Cf., *Capital Investors v. Executors of Morrison's Estate*, 800 F.2d 424 (4th Cir. 1986); *Seaboard Industries, Inc. v. Monaco*, 442 Pa. 256, 276 A.2d 305 (1971); *Barnes v. Eastern & Western Lbr. Co.*, 205 Or. 553, 287 P.2d 929 (1955).

The district court did not err in holding the appellants to be jointly and severally liable, with respect to either misappropriation from Varsity Investments or usurping the corporate opportunity of Varsity West. The appellants' third assignment of error is without merit.

TRIEWEILER'S DAMAGES

As previously noted, the court entered a total judgment in favor of Trieweiler, in an individual capacity, in the amount of $105,759. The appellants claim that if damages were to be awarded, the court erred in awarding those damages individually to Trieweiler, as opposed to Varsity Investments, the interests of which Trieweiler represents in this derivative proceeding. We note that Trieweiler's brief does not appear to take issue with this assignment of error, at least with respect to the "forced distribution" of the corporation's recovery from the appellants. Nonetheless, in the absence of an express concession by Trieweiler, we must explain our reasoning with respect to this assignment of error.

[46] The appellants correctly state that in a derivative proceeding, the plaintiff acts in a representative capacity for the corporation, and any recovery is obtained in the name of the corporation.

See *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989). See, generally, 13 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 6028 (perm. ed., rev. vol. 1995). It is only where the injury to the plaintiff's stock is peculiar to him or her alone, such as in an action based on a contract to which the shareholder is a party, or on a fraud affecting him or her directly, and does not fall alike upon other shareholders, that the shareholder may recover as an individual. *Meyerson, supra.*

The court, before entering judgment, recognized these general principles. The court stated that "[a]n award in favor of Varsity Investments, Inc. and against . . . Campagna for misappropriation and . . . Sears for breach of fiduciary duty, jointly and severally, in the amount of $168,000.00 would be proper." But the court went on to state:

> However, under the circumstances, due to the efforts that . . . Trieweiler had to go to take [sic] to establish these claims and because he is the only shareholder not involved in the wrongdoing shown by the evidence in these actions, an award of $105,759.00 in favor of . . . Trieweiler should be entered. This award ought to be paid directly to and/or collected for the benefit of . . . Trieweiler without regard to the interests of the two remaining shareholders . . . and without regard to the claims of any other persons or entities. This sum includes [Trieweiler's] claim as a 30% shareholder to the Varsity Sports assets misappropriated by Campagna of $168,000.00; and to his $16,000.00 individual claim at Varsity Sports; and to his interest in the proceeds of the two sales — $12,633.75 and $26,725.25

This court has, in the past, recognized that an action raising a derivative claim may, in the case of a closely held corporation, be treated as a direct action for purposes of recovering damages. See *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983). In *Anderson*, we concluded that the trial court had not erred in permitting a minority shareholder a direct recovery from the majority shareholder whom the court found to have misappropriated funds from the corporation. See *id.*

But in *Anderson*, we did not completely set forth our reasons for that conclusion, or establish any criteria for determining when,

in a case involving a closely held corporation, a direct recovery might be within the court's discretion. The American Law Institute (ALI), however, has promulgated a rule for such circumstances that we find to be persuasive:

> In the case of a closely held corporation . . . the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested parties.

2 American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.01(d) at 17 (1994).

The ALI rule was, when proposed, a consolidation of decisions generally holding that the special case of a closely held corporation justifies an exception to the general rule that only a derivative action may be used to seek redress of corporate injuries. See *id.* The basis for this reasoning is that a closely held corporation may be treated, in effect, as an incorporated partnership, and a significant difference in legal treatment is unwarranted, as the concept of a corporate injury that is distinct from any injury to the shareholders approaches the fictional in the case of a firm with only a handful of shareholders. *Id.*

[47] Since its promulgation by the ALI, § 7.01(d) has been adopted by a number of courts. See, e.g., *Mynatt v. Collis*, 274 Kan. 850, 57 P.3d 513 (2002); *Aurora Credit Services v. Liberty West*, 970 P.2d 1273 (Utah 1998); *Barth v. Barth*, 659 N.E.2d 559 (Ind. 1995); *Derouen v. Murray*, 604 So. 2d 1086 (Miss. 1992); *Schumacher v. Schumacher*, 469 N.W.2d 793 (N.D. 1991). Likewise, we conclude that these principles are helpful to our analysis of the instant case. We hold that in the case of a closely held corporation, a court in its discretion may permit an individual recovery to the plaintiff in an action raising derivative claims, if it finds that to do so will not unfairly expose the corporation or defendants to a multiplicity of actions, materially prejudice the interests of creditors of the corporation, or interfere with a fair distribution of the recovery among all interested persons.

Applying those principles to the instant case, we conclude, on our de novo review, that those criteria are met in this case and that the district court did not err in permitting Trieweiler an individual recovery against the appellants. There is no indication in the record that permitting Trieweiler a direct recovery will lead to a multiplicity of actions or interfere with a fair distribution of any recovery from the appellants. Nor does the record suggest that there are creditors of the corporation whose interests will be prejudiced by Trieweiler's recovery, as the debts evidenced in the record were paid from the proceeds of the sales of the Varsity Sports Café and Varsity West. Consequently, the court acted within its discretion in permitting Trieweiler an individual recovery.

The appellants are, however, correct in arguing that the court erred in awarding Trieweiler $16,000 for "unpaid wages." Trieweiler's operative petitions do not seek recovery for any unpaid wages. Evidence was presented as to the value of services Trieweiler rendered to the corporation during construction and startup, but that evidence was not intended to support a claim for unpaid wages, as the following colloquy demonstrates:

> [Trieweiler's counsel]. Did you — did you keep track of the value of the services that you provided during the construction and start-up of the Varsity Sports Cafe on 302 South 11th Street?
>
> [Trieweiler]. Yes, I did.
>
> [Trieweiler's counsel]. And what did you determine the value of those services to be?
>
> [Appellants' counsel]. Objection, no foundation, irrelevant.
>
> THE COURT. Is there a suit for lost wages or the value of work performed?
>
> [Appellants' counsel]. I think it goes to consideration for the stock.
>
> THE COURT. Okay.

As previously noted, a party will not be permitted to plead one cause of action and upon trial rely upon proof establishing another. *Abdullah v. Nebraska Dept. of Corr. Servs.*, 246 Neb. 109, 517 N.W.2d 108 (1994). Proof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a cause substantially different from the case made in the

pleadings. *Id.* Based upon these principles, we conclude that the court erred in awarding Trieweiler damages for unpaid wages. The court's judgment will be modified to remove that award.

EVIDENCE OF DAMAGES

The appellants present several overlapping arguments with respect to Trieweiler's evidence of damages. Much of this argumentation rests on the appellants' contention that the testimony of Trieweiler's expert witness, Anderson, was without sufficient foundation, and that issue will form the core of this section of our analysis. First, however, we will dispose of some of the appellants' other contentions.

The appellants first argue that Trieweiler's case should have failed because he failed to present sufficient evidence of lost profits. The appellants argue that since Trieweiler failed to present evidence of net profits, there was not enough evidence to support an award of damages. See, e.g., *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003); *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001); *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996); *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991). In a related argument, the appellants contend that Trieweiler was required to present evidence of the corporate tax liability that would have been incurred had the corporation actually received the assets that the court found had been misappropriated.

These arguments, however, are premised on a misunderstanding of the basis of Trieweiler's lawsuit. Trieweiler brought a derivative action on behalf of the corporation, and the corporation's recovery from the appellants is not based on lost or prospective profits. See *Pribil, supra* (explaining distinction between present and prospective damages). In *Home Pride Foods, supra*, for instance, the plaintiff sought to recover for revenues that it allegedly *would* have earned had the defendant not acquired the plaintiff's secret customer list. Compare, also, *World Radio Labs., supra*; *Katskee, supra*. In this case, however, the plaintiff sought to recover for revenues that actually *were* earned, but allegedly misappropriated; the corporation is entitled to recover assets that were misappropriated from it because of the appellants' breaches

of their respective fiduciary duties. In other words, the plaintiff's recovery is measured by the value of the assets that were misappropriated. Evidence of the value of the misappropriated assets was all that Trieweiler was required to present to support his claim for damages.

[48] The appellants also argue that in assessing damages for the diversion of the Varsity West corporate opportunity, the court erred in failing to consider that Jeff Sears received 39 percent of the net proceeds of the Varsity West sale and that "[n]either Trieweiler nor Varsity [Investments] had any claim against the proceeds received by Jeff Sears." Brief for appellant Sears at 27. This assertion is pointedly incorrect. The corporate opportunity doctrine rests on the assumption that a business opportunity may "belong" to a corporation. If a director of the corporation breaches his or her fiduciary duty to the corporation to usurp that opportunity, the corporation is entitled to recover for that loss. See, generally, *Electronic Development Co. v. Robson*, 148 Neb. 526, 28 N.W.2d 130 (1947). The fact that the proceeds from the usurpation may have ended up in the hands of an innocent party does not defeat the corporation's right to recover from those whose breaches of fiduciary duty occasioned the loss.

Stated more simply, the fact that a director stole valuable assets from a corporation and gave those assets to a presumably innocent third party does not change the fact that the assets properly belonged to the corporation in the first place and that the corporation should be compensated for the theft by the wrongdoer. A gratuitous transfer of unlawfully obtained property does not defeat the victim's right to recover its losses. Consequently, Varsity Investments may recover the value of any corporate opportunity that was diverted from it, regardless of who else may have profited. See *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003) (director ordered to pay "expenses" of new corporation, such as salary to wife and sponsorship of son's racing team, that would not have been incurred had director not usurped corporate opportunity from former corporation).

Underlying most of the appellants' argument on damages, however, is the appellants' contention that Anderson's expert testimony lacked foundation and should not have been relied upon by the district court. It is unclear whether the appellants'

contention is directed at the admissibility of Anderson's testimony, the weight it should have been given, or both. We assume that the appellants are arguing that the testimony should have been neither admitted nor found credible.

The appellants' arguments are again undermined by their failure to distinguish the circumstances of the instant case from cases involving lost profits or other types of prospective damages. See *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). We have held in those cases that the trier of fact "is to award such damages only where the evidence shows that the *future* earnings . . . for which recovery is sought are 'reasonably certain' to occur." (Emphasis supplied.) *Id.* at 228, 665 N.W.2d at 573. This is not such a case.

Furthermore, the appellants appear to assume that Trieweiler bore the entire burden of proof in this proceeding. However, as previously stated, an officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and is treated by the courts as a trustee. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). Although the burden of proof is ordinarily upon the party seeking an accounting to sustain the accounting, when another person is in control of the books and has managed the business, that other person is in the position of a trustee and must make a proper accounting. *Id.* Here, the evidence establishes that Campagna had control of the books of the corporation and managed the business and that Sears had a duty to examine Campagna's conduct; it was the appellants' burden to account for the corporation's revenues and the disposition of its assets. See, *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983); *Howell v. Poff*, 122 Neb. 793, 241 N.W. 548 (1932).

The appellants failed in that burden. The primary purpose of Anderson's testimony was to establish that the records retained by Varsity Investments were incomplete. The district court found Anderson's testimony persuasive on that point and stated:

> A presumption that the missing, lost or destroyed records contained information helpful to [Trieweiler] and damaging to each of the [appell]ants, arises by virtue of the failure of [the appellants] to maintain complete books and records of the Corporation, including daily sales sheets, when on notice

> of the claims involved in these actions; and by virtue of the failure of [the appellants] to make and keep books and records of the Corporation during its operation of the Varsity Sports Café.

[49] The district court's reasoning is supported by the rule of spoliation, or intentional destruction of evidence. See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). When intentional destruction of evidence is established, the fact finder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction. *Id.*, citing *State v. Langlet*, 283 N.W.2d 330 (Iowa 1979). The instant case does not present a clear case of spoliation, since the record does not clearly establish that Varsity Investments kept financial records that Campagna later *intentionally* destroyed, although there is some evidence in the record to suggest that. But the adverse inference drawn from the destruction of evidence is predicated on bad conduct. *Davlin, supra*, citing *U.S. v. Wise*, 221 F.3d 140 (5th Cir. 2000). Intentional destruction is said to indicate fraud and a desire to suppress the truth. See *Davlin, supra*, citing *Jackson v. State*, 791 So. 2d 830 (Miss. 2001).

Here, the record does not clearly establish intentional *destruction* of financial records. But it does establish an intentional breach of a fiduciary duty to maintain such records, which also may be indicative of fraud and a desire to suppress the truth, particularly when, as the district court noted, adequate financial records were not maintained despite notice of Trieweiler's claims against the appellants. " 'Such seemingly careless concern for records at a time when they were being requested . . . would clearly support the inference that the information contained therein would be harmful to the defendants.' " *Yoffe v. United States*, 153 F.2d 570, 574 (1st Cir. 1946).

It is with these presumptions in mind that we turn to the gravamen of the appellants' complaint: Anderson's testimony did not establish that Campagna misappropriated money, or what amounts of money were missing. As the district court stated, "[a]t this juncture, no one, other than Campagna can ever know, or ascertain with precision, the extent to which funds were diverted from this business." That appears to be exactly the point upon which the appellants are relying.

Nonetheless, we conclude that Anderson's testimony and his attempt to reconstruct Varsity Investments' finances from fragmentary records are sufficiently reliable to establish that the appellants have failed to account for revenue that was earned by the corporation. In particular, Anderson's comparison of Varsity Investments' tax returns with the (accidentally) available computer records showed net sales for which no accounting was made. Anderson compared daily sales calculations with regular bank deposits and concluded that sales significantly exceeded deposits; no other accounting was made of that revenue. As the court noted, and our statement of facts reflects, Campagna failed to explain either much of this revenue or deposits into his personal bank accounts, and the court found the explanations he did offer to be contradictory and unpersuasive. See *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992) (on de novo review, appellate court may consider that trial court heard and saw witnesses and found one version of facts more credible than another).

The appellants' complaints about specific items that they claim Anderson should have considered disregard this simple fact: It was the *appellants*' burden to account for corporate revenues, and Anderson's testimony was not required to establish to the penny how much money was earned and where it ended up—rather, once Anderson established with reasonable certainty that the corporation's records were incomplete, it was the appellants' burden to make a proper accounting to the shareholders.

Furthermore, while the appellants complain about Anderson's testimony, they offered no expert testimony of their own to explain their view of the evidence or to provide an alternative means of evaluating the record. While the appellants find fault with detailed aspects of Anderson's testimony, they did not present any expert testimony of their own to support their assertion that Anderson's methodology was unreliable. Anderson's testimony, whatever its faults, was the only instrument made available to the district court or to this court to assist us in navigating through and making sense of thousands of pages of testimony and evidence.

[50] Anderson conceded that his analysis would have been more complete and precise had certain types of financial records been available to him. But this imprecision was necessitated by the wrongful conduct of the appellants.

> "[A] defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. . . . The wrongdoer should bear the risk of uncertainty that his [or her] own conduct has created."

Lakota Girl Scout C., Inc. v. Havey Fund-Rais. Man., Inc., 519 F.2d 634, 643 (8th Cir. 1975), quoting *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970). See, also, *C&B Sales & Service, Inc. v. McDonald*, 177 F.3d 384 (5th Cir. 1999); *Marquis Theatre Corp. v. Condado Mini Cinema*, 846 F.2d 86 (1st Cir. 1988), citing *Knightsbridge Marketing v. Promociones Y Proyectos*, 728 F.2d 572 (1st Cir. 1984); *Wolf v. Rand*, 258 A.D.2d 401, 685 N.Y.S.2d 708 (1999). In addressing a similar situation, the *Wolf* court found

> no basis to disturb the court's methodology for establishing the diverted profits . . . . Since the breach of fiduciary duty was proved, the court may be accorded significant leeway in ascertaining a fair approximation of the loss . . . as contrasted with the more precise, compensatory, standard of a contract or tort case . . . so long as the court's methodology and findings are supported by inferences within the range of permissibility . . . which is the case herein. After all, "[w]hen a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated."

(Citations omitted.) 258 A.D.2d at 402-03, 685 N.Y.S.2d at 710, quoting *Whitney v. Citibank, N.A.*, 782 F.2d 1106 (2d Cir. 1986).

Anderson's testimony established that Varsity Investments' revenue had been underreported and that the disposition of that income was not reflected in Varsity Investments' financial records. The appellants contend that Anderson did not consider other factors that "could effect [sic] profitability of the bar operation such as competition, casinos, employee theft, labor costs, costs of goods sold, rent and other factors." Brief for appellant Sears at 31. In fact, Anderson did consider many of these factors, as his calculations included overhead expenses as reported on Varsity Investments'

tax returns. There is also some irony in charging Anderson with overlooking the possibility of "employee theft," given the basis of these proceedings.

But beyond that, once Anderson established that corporate revenues were missing, it was the appellants' burden to account for that income, not Trieweiler's, and certainly not Anderson's. In other words, while Trieweiler presented evidence, through Anderson, to approximate corporate revenues, the burden of approximating costs, and accounting for profits, belonged to the appellants. See *C&B Sales & Service, Inc., supra.* See, also, *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 677 N.E.2d 159 (1997) (wrongdoer responsible for asserting and proving defense of tax deductions). Absent such evidence, we cannot say the district court erred in finding Anderson's calculations of Varsity Investments' lost revenues to be credible and persuasive. As the district court stated, "[f]rom the evidence adduced, one could only conclude that substantial funds were siphoned off from the business, and not reported in any medium . . . ."

We conclude that the appellants' arguments with respect to evidence of damages are without merit. Trieweiler presented credible evidence to establish that corporate revenues were unreported and missing. The appellants had the burden to account for those revenues. They failed to meet that burden, particularly given that their breaches of fiduciary duty deprived Trieweiler, Anderson, and the court of the financial records that should have been available. Although Anderson's reconstruction of Varsity Investments' finances was admittedly imprecise, that imprecision was occasioned by the appellants, and it is they who should bear its risk. The district court did not err in presuming that the financial records the appellants should have been able to produce, but did not, would have contained information unfavorable to the appellants' position in this case.

Consequently, although the record does not allow calculation of Varsity Investments' losses to the penny, the law does not require such specificity. See *C&B Sales & Service, Inc. v. McDonald*, 177 F.3d 384 (5th Cir. 1999). Anderson's testimony provided an approximation of Varsity Investments' damages that

was reasonable given the circumstances. See *id.* The appellants' assignment of error to the contrary is without merit.

CORPORATE OPPORTUNITY

The appellants claim that Varsity West was not a corporate opportunity of Varsity Investments. First, the appellants argue that they acted in good faith and did not harm Varsity Investments. Second, the appellants argue that Varsity Investments was not financially able to pursue the Varsity West venture. We address each argument in turn.

[51,52] The general rule is that a director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or dealing individually with third persons. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003); *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983). The fiduciary relation is so vital that directors are not only prohibited from making profit out of corporate contracts, and from dealing with the corporation except upon the most open and on the fairest terms, but the rule of accountability is so strict that they are not permitted to anticipate the corporation in the acquisition of property reasonably necessary for carrying out the corporate purposes or conducting the corporate business. *Bellino, supra.*

[53-55] Consequently, the doctrine of corporate opportunity prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence. 3 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 861.10 (perm. ed., rev. vol. 2002 & Cum. Supp. 2004). Although officers or directors of a corporation are not necessarily precluded from entering into a separate business because it is in competition with the corporation, their fiduciary relationship to the corporation and its stockholders is such that if they do so they must prove that they did so in good faith and did not act in such a manner as to cause or contribute to the injury or damage of the corporation, or deprive it of business; if they fail in this proof, there has been a breach of that fiduciary trust or relationship. *Id.* See *Clemons Mobile Homes, supra.* Therefore, where a corporate

opportunity or self-dealing transaction is disclosed to the corporation, but the decision on it is made by self-interested directors, the burden is on those who benefit from the venture to prove that the decision was fair to the corporation. *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 677 N.E.2d 159 (1997).

[56-58] The appellants argue that Varsity West was not a corporate opportunity of Varsity Investments, because they acted in good faith and did not injure Varsity Investments. However, these arguments are inconsistent with Nebraska law. The test for whether an opportunity is corporate is whether the business is one of practical advantage to the corporation and fits into and furthers an established corporate policy. *Bellino, supra*; *Clemons Mobile Homes, supra*. Stated another way, this test characterizes an opportunity as corporate whenever a fiduciary becomes involved in an activity intimately or closely associated with the existing or prospective activities of the corporation. If this test is met, usurping that opportunity was necessarily harmful to the corporation. When there is presented a business opportunity which the corporation is financially able to undertake and which, by its nature, falls into the line of the corporation's business and is of practical advantage to it, or is an opportunity in which the corporation has an actual or expectant interest, a fiduciary is prohibited from permitting his or her self-interest to be brought into conflict with the corporation's interest, and may not take the opportunity for himself or herself. 3 Fletcher, *supra*, § 861.20.

The appellants offer no argument, nor would the record support a credible argument, that Varsity West did not fall into Varsity Investments' line of business, or would not have been of practical advantage to the corporation and fit into and furthered established corporate policy. In fact, as found by the district court, the record shows that Varsity West was, as a practical matter, almost indistinguishable from Varsity Investments. The two businesses advertised jointly. Insurance, payroll services, and credit card processing for Varsity West were handled through Varsity Investments' existing operations. Business loan proceeds were cross-collateralized and shared between the two businesses, and Varsity West revenues were used to pay Varsity Investments' debts. As found by the district court,

> [t]he two bars were in fact one business enterprise. To recognize a distinction between them, simply because a second corporation was subsequently formed whose title matched existing lease and license applications, would deny the reality of this operation.
>
> . . . They were inextricably bound in one enterprise. No new capital was invested in Varsity West. The concept of the two bars was identical, indeed they were advertised as the same venture. The business that was actually conducted at Varsity West could not have taken place without the oversight and sponsorship of Varsity Sports.

[59] Given the involvement of Varsity Investments in the operation and development of Varsity West, it is difficult to conclude that Varsity West was not a corporate opportunity of Varsity Investments. " 'Obviously, if the corporation['s] funds have been involved in financing the opportunity or its facilities or personnel have been used in developing the opportunity, the opportunity in justice should belong to the corporation.' " *Banks v. Bryant*, 497 So. 2d 460, 465 (Ala. 1986). See, also, *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 677 N.E.2d 159 (1997); *Ault v. Soutter*, 167 A.D.2d 38, 570 N.Y.S.2d 280 (1991); *Billman v. State Deposit Corp.*, 86 Md. App. 1, 585 A.2d 238 (1991); *Paulman v. Kritzer*, 74 Ill. App. 2d 284, 219 N.E.2d 541 (1966), *affirmed* 38 Ill. 2d 101, 230 N.E.2d 262 (1967). See, generally, 3 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 861.10 (perm. ed., rev. vol. 2002 & Cum. Supp. 2004).

[60] The intertwining of corporate affairs also undermines the appellants' claim that Varsity Investments was financially unable to pursue the Varsity West development. If a fiduciary uses corporate assets to develop a business opportunity, the fiduciary will be estopped from denying that it was a corporate opportunity, regardless of the corporation's ability to exploit it. 3 Fletcher, *supra*. See, e.g., *Paulman, supra*. In short, it is difficult to believe that Varsity Investments was financially unable to develop Varsity West when, as a practical matter, Varsity Investments *did* develop Varsity West.

[61] Furthermore, while there is authority for the contention that it is immaterial who takes over a corporate opportunity

where a corporation is insolvent or legally disabled from pursuing it, the record in this case does not support the application of that authority.

> The rule thus contended for, so far as we have been able to find, applies only in case the corporation is actually insolvent to such a degree that it cannot carry on business or the corporation is legally disqualified from embracing the opportunity. Financial inability, unless it amounts to insolvency to the point where the corporation is practically or actually defunct, is insufficient to warrant application of the rule. We do not find, from our search, any authority for applying the rule to technical insolvency such as inability to pay current bills when due or where mere inability to secure credit prevails as appears in this case.

Electronic Development Co. v. Robson, 148 Neb. 526, 539, 28 N.W.2d 130, 138 (1947). Accord *Nicholson v. Evans*, 642 P.2d 727 (Utah 1982). Corporate financial difficulty short of actual insolvency as defined above is inadequate by itself to exonerate a fiduciary who appropriates an opportunity. *Id.* While the record in this case shows financial difficulties for Varsity Investments, the evidence falls far short of actual insolvency.

[62] Finally, it is difficult to accept the appellants' claims of financial inability when it is not at all clear what the financial condition of the corporation would have been had a proper accounting been made of Varsity Investments' revenues. "The [financial] inability of the corporation to take advantage of the opportunity because of lack of funds may not be relied upon by directors when their own lack of diligence was responsible for the corporation's momentary fiscal condition." *Daloisio v. Peninsula Land Co.*, 43 N.J. Super. 79, 93, 127 A.2d 885, 892 (1956). See, generally, 3 Fletcher, *supra*. Given the circumstances discussed in previous sections of this opinion, we cannot accept the appellants' complaints about the financial condition of the corporation, since that condition was itself the result of the appellants' breaches of fiduciary duties. See *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983).

For the foregoing reasons, we conclude that Varsity West was a corporate opportunity of Varsity Investments that was wrongfully

usurped by the appellants. The appellants' assignment of error to the contrary is without merit.

ATTORNEY FEES

[63] Finally, the appellants argue that the district court erred in ordering them to pay 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. *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004). The only bases upon which Trieweiler sought attorney fees, and the only bases upon which fees were granted, were found in § 21-2076, which provides:

> On termination of the derivative proceeding the court may:
>
> (1) Order the corporation to pay the plaintiff's reasonable expenses, including attorney's fees, incurred in the proceeding if the court finds that the proceeding has resulted in a substantial benefit to the corporation;
>
> . . . .
>
> (3) Order a party to pay an opposing party's reasonable expenses, including attorney's fees, incurred because of the filing of a pleading, motion, or other paper, if the court finds that the pleading, motion, or other paper was not well-grounded in fact, after reasonable inquiry, or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The court found that both of these provisions applied in the instant case. However, the district court erred in reaching those conclusions.

[64,65] With respect to § 21-2076(1), we first note that because Trieweiler was awarded an individual recovery, there is no evidence to suggest that this action resulted in the "substantial benefit to the corporation" contemplated by the statute. But, even assuming that the proceeding has resulted in a substantial benefit to the corporation, the section simply does not authorize the court to order payment of fees by the appellants. Rather, it

states explicitly that fees may be recovered from the corporation. It is not within the province of the courts to read a meaning into a statute that is not there. *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003). The district court erred in concluding that § 21-2076(1) authorized it to order the appellants to pay attorney fees.

[66] Section 21-2076(3), on the other hand, permits the court to order a party to pay an opposing party's fees. However, the record does not support a finding that Trieweiler incurred fees and expenses "because of the filing of a pleading, motion, or other paper." Section 21-2076(3) is directed at the conduct of litigation, not at the underlying wrongful conduct of the defendants, and the court failed to justify a conclusion that the appellants' legal strategies in defending this lawsuit were not well grounded in fact or warranted by existing law, and were interposed for an improper purpose.

Therefore, we vacate the order of the district court ordering the appellants to pay attorney fees.

CONCLUSION

The district court judgment finding liability on the part of the appellants, and awarding an individual recovery to Trieweiler, is supported by the record and is generally affirmed. However, the court erred in awarding $16,000 to Trieweiler for unpaid wages, and the court's judgment is modified to the limited extent necessary to remove that award. The court's order awarding attorney fees was in error and is vacated. We pause to note, however, that we recognize the difficulties presented by this case, having confronted some of them ourselves, and although we have concluded that the district court erred in some respects, we take this opportunity to commend the court for its evident consideration and overall diligence in presiding over this complex matter.

AFFIRMED IN PART AS MODIFIED,
AND IN PART VACATED.

JOHN BUDLER AND LINDA BUDLER, COPERSONAL REPRESENTATIVES OF THE ESTATE OF ANDREW BUDLER, DECEASED, APPELLEES, V. GENERAL MOTORS CORPORATION, APPELLANT.

689 N.W.2d 847

Filed December 17, 2004. No. S-04-096.

Certified Question From the U.S. Court of Appeals for the Eighth Circuit. Judgment entered.

Frank Nizio, of McGuire Woods, L.L.P., Eileen Penner and Kristina S. Bennard, of Mayer, Brown, Rowe & Maw, L.L.P., and Jay L. Welch, Kevin J. Dostal, and Ralph A. Froehlich, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellant.

William H. Pickett and David T. Greis, of William H. Pickett, P.C., and Norman M. Krivosha and Catherine A. Damico, of Kutak Rock, L.L.P., for appellees.

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

WRIGHT, J.

NATURE OF CASE

The U.S. Court of Appeals for the Eighth Circuit has certified the following question to this court: "Is the ten-year statute of repose for products liability actions in Neb. Rev. Stat. § 25-224(2) (1995), tolled by a person's status as a minor, pursuant to Neb. Rev. Stat. § 25-213?" We accepted the certification request.

FACTS

In accordance with Neb. Rev. Stat. § 24-221 (Reissue 1995), the following facts were provided in the certification request from the Eighth Circuit. Andrew Budler was born on October 3, 1979. On April 3, 1998, he was injured as a result of a rollover of the 1991 Pontiac Grand Prix in which he was a passenger. Andrew's parents, John Budler and Linda Budler (the Budlers), were appointed to act as his coconservators and, upon his death on October 10, 2002, as his copersonal representatives.

The 1991 Pontiac Grand Prix was first sold by General Motors Corporation (GMC) on June 24, 1991. On April 2, 2002, the

Budlers filed a two-count complaint against GMC, alleging a strict liability claim and a product liability claim. GMC moved to dismiss the suit based upon the 10-year statute of repose found in Neb. Rev. Stat. § 25-224(2) (Reissue 1995). (We note that § 25-224 was amended in 2001; however, the certification request from the Eighth Circuit refers specifically to § 25-224 (Reissue 1995).) The Budlers claimed that § 25-224(2) was tolled by Neb. Rev. Stat. § 25-213 (Reissue 1995), which provides that a minor "shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed." In essence, they argued that since Andrew was a minor at the time of the accident, he would have 4 years from the date he reached the age of majority to commence an action against GMC.

The U.S. District Court for the District of Nebraska concluded in *Budler v. General Motors Corp.*, 252 F. Supp. 2d 874 (D. Neb. 2003), that Andrew's infancy tolled the statute of repose in § 25-224(2). The federal district court opined that the policy reasons for allowing the suit to proceed were as strong as those in previous Nebraska cases, particularly since Andrew's injuries occurred within 10 years after the vehicle was first sold.

GMC appealed, arguing that the cases relied upon by the federal district court were inapposite and that § 25-213 did not apply given the explicit qualifying language in § 25-224(2) that "[n]otwithstanding subsection (1) of this section or any other statutory provision to the contrary," a product liability action must be commenced within 10 years after the date when the product was first sold or leased for use or consumption.

The Eighth Circuit found no controlling precedent in the decisions of this court regarding the certified question and, because the answer to the question may be determinative of GMC's appeal, certified the question to us.

ANALYSIS

We begin our analysis by setting forth the applicable sections of Nebraska law. Section 25-213 states in relevant part:

> Except as provided in sections 76-288 to 76-298, if a person entitled to bring any action mentioned in this chapter . . . is, at the time the cause of action accrued, within the age of twenty years . . . every such person shall be entitled to

> bring such action within the respective times limited by this chapter after such disability is removed.

For purposes of § 25-213, the phrase "within the age of twenty years" means until a person turns 21 years of age. See, *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000); *Lawson v. Ford Motor Co.*, 225 Neb. 725, 408 N.W.2d 256 (1987).

Section 25-224 provided:

> (1) All product liability actions . . . shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.
>
> (2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.
>
> . . . .
>
> (4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date.

This court has considered the effect of § 25-213 on statutes of limitation in several cases, but we have not specifically addressed the issue presented here. In *Sacchi v. Blodig*, 215 Neb. 817, 341 N.W.2d 326 (1983), we examined whether the legal disability of insanity tolled the statute of limitations found in the professional negligence statute, Neb. Rev. Stat. § 25-222 (Reissue 1995). We also considered whether § 25-222 was a statute of unconditional repose "so that any cause of action based on professional negligence is absolutely barred at the expiration of 10 years from the rendition of or failure to render the service which is the basis of the action." *Sacchi v. Blodig*, 215 Neb. at 819, 341 N.W.2d at 329. Section 25-222 provides in relevant part: "[I]n no event may any action be commenced to recover damages for professional negligence . . . more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action."

We noted that there had been no amendments to § 25-213 (Reissue 1979) which excluded professional negligence and that "[b]y omitting professional negligence from those excluded situations mentioned in § 25-213, the Legislature has dictated that the time limits for commencing an action based on malpractice shall not apply to persons under legal disability." *Sacchi v. Blodig*, 215 Neb. at 823, 341 N.W.2d at 330.

In *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984), we were asked by the U.S. Court of Appeals for the Eighth Circuit to determine whether the 2-year statute of limitations in § 25-224(4) (Reissue 1979) was tolled by § 25-213 (Reissue 1979). Amy Macku, a minor, had been injured on August 23, 1977, when she drank liquid drain cleaner manufactured by Drackett Products Company. Her mother filed a complaint in federal district court on May 13, 1981, seeking damages for Amy's injuries.

We held that § 25-213 tolled the time limit of § 25-224(4) for prosecution of an infant's cause of action. *Macku v. Drackett Products Co., supra.*

> Existence for a century has made preservation of an infant's cause of action an integral part of Nebraska's policy and law not casually overlooked or discarded. There must be more than silence in the legislation before we can infer an intent in § 25-224(4) to extinguish preservation of an infant's cause of action protected by § 25-213. To fashion an abolitionary intent from the verbal void of § 25-224(4) would be truly creative. However, creation is a subject for *Genesis* and not for the Nebraska Reports.

Macku v. Drackett Products Co., 216 Neb. at 181, 343 N.W.2d at 61. Although we held that the limitations found in §§ 25-222 and 25-224(4) were tolled by § 25-213, we noted that the language of § 25-224(2) differed from § 25-224(4) in that it contained the phrase "[n]otwithstanding . . . any other statutory provision to the contrary."

In contrast, in *Stuart v. American Cyanamid Co.*, 158 F.3d 622 (2d Cir. 1998), *cert. denied* 526 U.S. 1065, 119 S. Ct. 1456, 143 L. Ed. 2d 543 (1999), the U.S. Court of Appeals for the Second Circuit construed Nebraska law and held that § 25-224(2) (Reissue 1995) was not tolled by § 25-213 (Reissue 1995). Brian Stuart had

received a polio vaccination in early 1979, when he was 3 months old. Within 30 days, he became permanently paralyzed. Doctors told his mother in May 1979 that the condition was caused by a vaccine-induced polio infection. His mother filed an action against the maker of the vaccine in 1990.

The Second Circuit stated that a statute of limitations generally establishes the time period within which lawsuits may be commenced after a cause of action has accrued and that, as such, it is

> an affirmative defense, affecting the remedy, but not the existence of the underlying right. [Citation omitted.] In contrast, a statute of repose extinguishes the cause of action, the right, after a fixed period of time, usually measured from the delivery of the product or completion of work, regardless of when the cause of action accrued.

Stuart v. American Cyanamid Co., 158 F.3d at 627. In concluding that the statute of repose is not tolled during a plaintiff's infancy, the court stated:

> The statute of repose (which was adopted well after the infancy tolling provision was enacted) bars *all* product liability actions commenced more than ten years after the product's sale "[n]otwithstanding . . . [any] other statutory provision to the contrary . . . ." [Citation omitted.] In light of the unambiguous language of the statute, it is clear that the Nebraska [L]egislature did not intend to toll the statute of repose during a claimant's infancy.

Id. at 628-29. See, also, *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991) (§ 25-224(2) can properly be characterized as statute of repose which prescribes limitations on actions).

The fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998). Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Woodhouse Ford v. Laflan, ante* p. 722, 687 N.W.2d 672 (2004). 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. *In re*

Guardianship & Conservatorship of Woltemath, ante p. 33, 680 N.W.2d 142 (2004). In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. See, *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002); *Hoiengs v. County of Adams, supra.*

Guided by these principles of statutory interpretation, we examine § 25-224(2) and (4) because a comparison of these subsections is determinative of the question presented. Nebraska law has recognized the need to preserve a cause of action belonging to one under legal disability, e.g., an infant, since 1867. See *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984). In *Macku*, we found nothing in the language of § 25-224(4) (Reissue 1979) indicating that its 2-year limitation was given significance greater than or effect different from any other statute of limitations mentioned in chapter 25 of the Nebraska Revised Statutes. In concluding that § 25-213 (Reissue 1979) tolled the time limit of § 25-224(4), we could not infer an intent to extinguish the preservation of an infant's cause of action without such specific language in § 25-224(4).

However, there is language in § 25-224(2) (Reissue 1995) that expresses the Legislature's intent to override the tolling provision of § 25-213 (Reissue 1995). As noted in *Hatfield v. Bishop Clarkson Memorial Hosp.*, 701 F.2d 1266, 1272 n.5 (8th Cir. 1983) (Lay, Chief Judge, dissenting), the "explicit override of other provisions in subsection (2) and the absence of such an override in subsection (4) is a strong indication that the [L]egislature" did not intend that the two subsections would have the same result.

It is evident that § 25-224(2) and (4) are distinguishable. As in the professional negligence statute, § 25-222, the Legislature did not include a specific override in § 25-224(4). However, the Legislature has specifically overridden the infancy tolling provision of § 25-213 by stating that § 25-224(2) applies notwithstanding any other statutory provision to the contrary. Since we are required to give effect to all parts of a statute, see *In re Guardianship & Conservatorship of Woltemath, supra*, we

conclude that the 10-year limitation in § 25-224(2) is not tolled by the provisions of § 25-213.

CONCLUSION

Our answer to the certified question is that Neb. Rev. Stat. § 25-224(2) (Reissue 1995) is not tolled by a person's status as a minor pursuant to Neb. Rev. Stat. § 25-213 (Reissue 1995).

In accordance with Neb. Rev. Stat. § 24-225 (Reissue 1995), this opinion stating the law governing the certified question shall be sent by the clerk under the seal of the Nebraska Supreme Court to the U.S. Court of Appeals for the Eighth Circuit and to the parties.

JUDGMENT ENTERED.

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